

Direct Examination



Chapter Four



Staff Sergeant Karla Campbell-Starling, court reporter with the trial judiciary's Fourth Judicial Circuit, discusses the intricacies of the job with Sergeant Whitney Farrow, a paralegal beginning his training as a court reporter, during a recess. This photo was taken at the courthouse at Fort Bliss, Texas.

Specialist Two Gilbert E. Kaschmeier, a court reporter for the Judge Advocate Section, US Army Garrison, Regional Camp Zama (Japan), demonstrates a "Stenomask." With this device, he can record every word and describe every gesture during the proceedings of a board or court-martial, as rapidly as 420 words per minute. In April 1958, when this photograph was taken, the steno mask was the latest technology for court reporters, and it is still in use today.

CHAPTER 4—DIRECT EXAMINATION

I. SKILL OVERVIEW:

- A. **Goals:** This chapter develops counsel’s ability to conduct a clear and memorable direct examination. We will focus on both substance and style, as both are important in presenting a meaningful case, whether you represent the government or the accused.
- B. **Training Overview:** This chapter contains two distinct training segments, Sections III and IV below: Section III focuses on the substance of the direct exam—how to structure and organize the examination so that panel members understand the testimony and remember it; Section IV focuses on the techniques—voice inflection, movement about the courtroom, pacing—that make the direct examination more focused, engaging, and memorable.

II. THE LAW:

A. The Order of Your Case in Chief:

- 1. “The Military Judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence.” MRE 611(a).
- 2. “Leading questions should not be used on direct examination of a witness. Leading questions are permitted on cross-examination.” MRE 611(c).

B. Witness Competency:

- 1. “[e]very person is competent to be a witness unless these rules provide otherwise...” MRE 601.
- 2. “A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” MRE 602.

C. Witness Testimony:

- 1. “Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence and (b) the fact is of consequence in determining the action.” MRE 401.
- 2. “(a) Relevant evidence is admissible unless any of the following provides otherwise: (1) the United States Constitution as it applies to members of the Armed Forces; (2) a federal statute applicable to trial by courts martial; (3) these rules; or (4) this manual.” MRE 402(a).

CHAPTER 4—DIRECT EXAMINATION

3. “(b) Irrelevant evidence is not admissible.” MRE 402(b).

III. STRUCTURE AND ORGANIZATION OF A DIRECT EXAMINATION:

- A. **The Substance of Direct Examination:** The goal of direct examination is to elicit the witness’s testimony in a clear and logical progression so that the trier of fact will understand, believe, and remember what was said. A useful way to think about direct examination is to consider each one a story; and every story has a beginning, a middle, and an end. And just as every story has a purpose—a moral or a lesson—every witness has a purpose. Crafting and conducting a successful direct examination is a discipline which can be mastered through the application of a few basic principles coupled with practice in court. The principles discussed below provide the structure on which to build a sound direct examination.
 1. **The Beginning:** Introduce the witness. This may sound like an obvious point, but you would be surprised how often attorneys call a witness, ask his or her name, and then launch immediately into questions about the case. To the extent possible, you should humanize every witness by placing the witness in context with a few introductory questions. For key substantive witnesses, such as the victim in an assault case or an important eye witness, you can elicit testimony about what town the witness lives in, what they do for a living, whether they have a family, and other biographical information, provided it is not overly intrusive. For technical or chain of custody witnesses, you should at least establish what the witness does, how long he or she has been doing it, what the witness’s role is at the lab or police department, and why this role is important. Only after you establish some basic introductory facts should you move on to elicit the substance of the witness’s testimony.
 2. **The Middle:** Once introductory matters are dispensed with, you will move on to elicit the testimony about the case in a logical manner using proper questions. Keep the following practice points in mind:
 - a. **Have a Plan:** Have some sort of written plan for each witness to keep you focused on that witness’s purpose. While you might not write out each question to be asked during direct examination, you should at least have an outline or bullet points handy to make sure you hit the key points or the elements of the offense.
 - b. **Primacy and Recency:** Because people remember best what they hear first and what they hear last, strive throughout the trial—in opening statement, in closing argument, and in direct examination—to start strong and end strong.

CHAPTER 4—DIRECT EXAMINATION

- c. **Start with a Bang:** Consider starting direct examination with a headline introducing the most critical part of the witness's testimony, then going back over it in greater detail when you get to the chronological block of the direct examination. "Mrs. Jones, did you witness Sergeant Spinney stab Mr. Barnes with a knife at the Tabernacle Tavern last June 14?"
- d. **End with a Bang:** Consider saving one or more of your most powerful visual exhibits until the end of your direct examination. These techniques allow you to start with a bang and end with a bang, as well as to emphasize and repeat cogent points of the witness's testimony.
- e. **Use Non-leading, Open-ended Questions:** Single-fact, non-leading questions enhance clarity, brevity, and pace. The goal is to allow *the witness* to tell the story.
 - i. Non-leading questions are those that do not suggest the answer;
 - ii. Non-leading questions commonly begin with a question word: who, what, when, where, how, or why; and
 - iii. Yes or no questions are not necessarily leading and thus are permissible on direct examination provided they do not suggest the answer.
- f. **Organize Logically:** Determine the key points of the direct examination that support your theory. Organize those points in a logical order. Often, this results in a chronological presentation of the events.
- g. **Focus on the Theory:** Cover only those facts which advance the theory of your case and support your planned closing argument. The witness's testimony should establish or corroborate essential facts, refute or contradict facts offered by your opponent, and sponsor demonstrative evidence that makes your case more persuasive.
- h. **Keep it Simple:** Use simple, plain English in your questions. Have your witnesses answer with simple, plain English. Have the witnesses explain all but the most common military acronyms. Have the witness explain all technical terms. Such simplifications will help you communicate to the panel.

CHAPTER 4—DIRECT EXAMINATION

- i. **Use Headlining for Transitions:** When switching from one topic to another, use a headline to alert the witness and the panel that you are doing so. “I would like to ask you some questions about January 4, 2017. Was that a work day for you?” “I’d like to ask you some questions about your treatment at the hospital, OK?” These headlines make the direct examination much easier to follow and, thus, easier to remember.

- j. **Use Looping:** As you go through the questioning on direct examination, particularly testimony on the crux of the matter—the assault in a case involving violence or the physical penetration in a sexual assault case—loop words from the previous question into the next question to orient the witness and the panel and keep the narrative flow moving:

Q: What did you see in his hand?

A: I saw a knife.

Q: And when you saw the knife, what was he doing with it?

A: He was holding it out in front of him and coming at me.

Q: As he came at you with the knife out in front of him, what was he saying?

- k. **Volunteer Weaknesses:** You should disclose *significant* weaknesses during direct examination. This will minimize their impact by giving you the chance to present the weaknesses in your own way. Consider, for example, asking questions about significant weaknesses in the middle of the examination rather than at the beginning or the end.

- l. **Use Exhibits to Highlight Facts:** To make direct examination more stimulating, you should emphasize key points with visual aids wherever possible. This may be done using the overhead projector, computer graphics, or by using demonstrative and real evidence from the case. Consider introducing exhibits at the end of the witness’s testimony. This technique serves two purposes:
 - i. It avoids interrupting the flow of narrative to introduce an exhibit during direct examination; and
 - ii. It allows you to repeat and emphasize important facts; you get to have the witness *state* the testimony and then *show* the testimony.

CHAPTER 4—DIRECT EXAMINATION

3. The End:

- a. **Exhibits:** As mentioned above, after eliciting testimony about the critical events, you should consider taking a moment to go back and introduce exhibits that have been alluded to during the examination. This allows you to re-emphasize key aspects of the testimony.
- b. **Canned Exit:** Once you are completely finished with questioning, you should have a planned exit line that ends on a positive note. “*Thank you. Those are my only questions*” or “*I have nothing further*” are standard.

IV. STYLISTIC CONSIDERATIONS IN DIRECT EXAMINATION:

- A. **Proper Questioning Technique:** The advocate’s role during direct examination is to help the witness tell the story using carefully framed single-fact, non-leading questions in a logical structure. As discussed in Chapter 3, *Opening Statements*, stylistic considerations—voice inflection, purposeful movement, and attention to the testimony—further enhance the effectiveness of a well-structured direct examination.
- B. **Voice Inflection:** How you vary your tone of voice and inflection is a critical part of effective communication. Monotone is boring. Sing-song is annoying. Yelling is intimidating and can be painful. Haste is distracting. All these things may prevent your audience from understanding the evidence you are trying to present. Worse yet, they might cause the factfinder to zone out and stop listening entirely. So think carefully about how you speak in court. Consider the impact of inflection on the meaning of the following statement:

I *never* said I’d give you money.

versus

I never said I’d give you *money*

versus

I never said I’d give *you* money.

The first version denies ever making the statement. The second version acknowledges a statement was made but that the promised “gift” was something *other* than money, while the third focuses on whom the money was to be given to. Clearly, inflection can dramatically change the meaning of a sentence. When conducting questions for direct examination, consider proper voice inflection in every question and avoid being monotonous, sing-songy, too hasty, or too loud.

CHAPTER 4—DIRECT EXAMINATION

- C. **Use Pace to Emphasize:** Pace involves controlling the speed of the examination. Your pace should never be rushed; take your time with each area of questioning. Slow down when you begin to ask questions about the critical aspects of the examination. Have the witness describe significant events in slow motion, relating as much fine detail as possible.
- D. **Body Language and Movement:**
1. **Bearing:** Military bearing is especially critical in a court-martial.
 2. **Position:** During direct examination, the members' focus should be on the witness. So your position in the courtroom should not interfere with the members' line of sight of the witness. This forces the witness to look at the panel members and also ensures that the members can hear the witness. Place the podium or lectern at the far end of the panel box.
 3. **Movement:** Counsel's movement in a courtroom should be thoughtful. Some military judges allow free movement around the courtroom while others make counsel remain at the podium. Whatever the rule, you should use your body language to convey control and confidence in the courtroom. Do not move around the courtroom for the sake of movement but rather to emphasize a point, provide transition, or to retrieve and display evidence. Controlled, concise use of movement should replace unproductive and distracting pacing.
 4. **Eye Contact** engages the witness, the panel, and the military judge.
 5. **Verbal Tics:** Many counsel develop distracting verbal habits in direct examination, such as saying "and," "uh," and "ok" after each answer or before each new question. Focus on eliminating these verbal tics. Become comfortable with silence. Don't feel you need to fill in open "air-space." Silence may be used to underscore or highlight the next question you ask.
 6. **Physical Tics:** Body language can convey confidence in court or it can become a distraction. The factfinder should be focused on the evidence as you elicit it, not on distracting physical tics. Some of the most common of these are
 - a. pen clicking;
 - b. paper shuffling;
 - c. crossing of arms;
 - d. pacing back and forth;
 - e. swaying; and

CHAPTER 4—DIRECT EXAMINATION

- f. hands in pockets.

Like verbal tics, these should be eliminated. If you ever have a chance to review a videotape of yourself in court, you should do so. This can be very helpful in recognizing and eliminating any distracting physical habits.

- E. **Listen to the Answers:** It is common for counsel, particularly on direct examination, to fail to listen to the witness's answers. This is probably because we usually have prepared our witnesses and we think we know what the answer to each question will be. But there is no surer way to look foolish in court than to unwittingly ask a question that the witness already answered or to fail to follow up on an unanticipated answer. Witnesses frequently give surprise answers, and you have to listen for them carefully so you can deal with them immediately.

Another good reason to listen actively is that, if you do not seem interested in the witness's answer—because you are busy studying your notes or writing something down—the factfinder will also lose interest in what the witness has to say.

To remedy this common pitfall, focus actively on every single one of the witness's answers and wait until the witness has answered completely before moving on. Active listening also increases eye contact, which will reassure a hesitant witness while engaging the fact finder.

REFERENCES

Mauet, Thomas A., *Trial Techniques and Trials, Ninth Edition* (2013), pp. 109-96.

McElhaney, James W., *McElhaney's Trial Notebook, Fourth Edition* (2005), pp. 397-429.

Packel, Leonard, Dolores B. Spina, *Trial Advocacy: A Systematic Approach*, (1984), pp. 17-40.

Rumsey, D. Lake, Editor, *Master Advocates' Handbook*, (1986), pp. 73-103.

CHAPTER 4—DIRECT EXAMINATION

DRILLS

I. GOALS OF THE DRILLS:

- A. The drills for this chapter are divided into two parts. The first part, Section A: Organization and Substance, contains drills to develop counsel's substantive skills in organizing and conducting a complete, easy to follow, and memorable direct examination. The first two drills in Section A (#1 and #2) are designed for trial counsel. The second two (#3 and #4) are for defense counsel.
- B. The second part, Section B: Style and Control, focuses on developing an engaging and professional style in conducting direct examination. Section B therefore focuses on such stylistic matters as voice intonation, looping, headlining, movement around the courtroom, body language, and verbal tics.

II. SUBSTANCE AND STYLE:

- A. **Organization and Substance Drills:** The following four drills are based on four different fact scenarios: a bad check case, *U.S. v. Minderbender*, a physical assault case, *U.S. v. Jones*, both included along with exhibits in the chapter appendix, as well as the two sexual assault cases contained in the appendix to the manual, *U.S. v. Mallick*, and *U.S. v. Anderson*. Drills #1 and #2 are for trial counsel. Drills #3 and #4 are for defense counsel.
 - 1. **Drill #1 - U.S. v. Minderbender (Bad Check Case):** This drill should take 1½ -2 hours to complete.
 - a. **Roles:** Four people are needed:
 - i. Trial Counsel;
 - ii. Defense Counsel (to make objections);
 - iii. Witness: the cashier at the Post Exchange; and
 - iv. Military Judge played by supervisor.
 - b. **Instruction:** The supervisor should prepare and deliver a 30-minute instruction reviewing the basic principles of direct examination in this chapter, with an emphasis on guiding the witness in giving a compelling and coherent account of the facts.

CHAPTER 4—DIRECT EXAMINATION

- c. **Preparation:** Counsel should review *U.S. v. Minderbender*, the bad check case in the appendix to this chapter. Counsel should get 30 minutes to prepare a direct examination of the Post Exchange (PX) cashier who cashed Minderbender's check. The classroom should be set up as a courtroom with two counsel tables, a witness chair, and a bench for the judge.
 - d. **Practical Exercise:** Trial counsel should conduct a direct examination of the cashier establishing the elements of the offense. Defense counsel should make all valid objections, and the military judge should make legally correct rulings.
 - e. **Critique:** The supervisor should base the critique on the organization and coherence of the examination:
 - i. Did counsel introduce and humanize the witness?
 - ii. Did the examination have a logical structure—a beginning, middle, and an end?
 - iii. Did counsel use non-leading, open-ended questions?
 - iv. Did counsel elicit testimony in line with the theme and theory?
 - v. Did counsel use simple language?
 - vi. Did the witness use simple language?
 - vii. Did counsel use headlining? Looping?
 - viii. Did counsel properly lay a foundation for one or more exhibits to highlight testimony?
2. **Drill #2 *U.S. v. Jones* (Physical Assault Case):** This drill should take 1½ -2 hours to complete.
- a. **Roles:** Four people are needed:
 - i. Trial Counsel;
 - ii. Defense Counsel (to make objections);
 - iii. Witness: Victim PVT Smith; and

CHAPTER 4—DIRECT EXAMINATION

- iv. Military Judge played by supervisor.
 - b. **Instruction:** The supervisor should prepare and deliver a 30-minute instruction reviewing the basic principles of direct examination in Chapter 4, with an emphasis on guiding the witness in giving a compelling and coherent account of the facts.
 - c. **Preparation:** Counsel should review *U.S. v. Jones*, the assault case in the appendix to this chapter. Counsel should get 30 minutes to prepare a direct examination of the victim, PVT Smith. The classroom should be set up as a courtroom with two counsel tables, a witness chair, and a bench for the judge.
 - d. **Practical Exercise:** Trial counsel should conduct a direct examination of the witness establishing the elements of the offense. Defense counsel should make all valid objections, and the military judge should make legally correct rulings.
 - e. **Critique:** The supervisor should base the critique on the organization and coherence of the examination. (See critique criteria in Direct Examination Drill #1).
3. **Drill #3 *U.S. v. Anderson* (Adult Victim Sexual Assault):** This drill should take 1½ -2 hours to complete.
- a. **Roles:** Four people are needed:
 - i. Defense Counsel;
 - ii. Trial Counsel (to make objections);
 - iii. Witness: Mr. Robert Martinez; and
 - iv. Military Judge played by supervisor.
 - b. **Instruction:** The supervisor should prepare and deliver a 30-minute instruction reviewing the basic principles of direct examination, with an emphasis on guiding the witness in giving a compelling and coherent account of the facts.
 - c. **Preparation:** Counsel should review *U.S. v. Anderson*, the adult victim sexual assault case in the Appendix to this manual. Counsel should get 30 minutes to prepare a direct examination of the friend of the accused, Mr. Robert Martinez. The classroom should be set up as a courtroom with two counsel tables, a witness chair, and a bench for the judge.

CHAPTER 4—DIRECT EXAMINATION

- d. **Practical Exercise:** Defense counsel should conduct a direct examination of the witness establishing the defense’s theory. Trial counsel should make all valid objections, and the military judge should make legally correct rulings.
 - e. **Critique:** The supervisor should base the critique on the organization and coherence of the examination. (*See* critique criteria in Direct Examination Drill #1.)
4. **Drill #4 *U.S. v. Mallick (Child Sexual Assault Case)*:** This drill should take 1½ -2 hours to complete.
- a. **Roles:** Four people are needed:
 - i. Defense Counsel;
 - ii. Trial Counsel (to make objections);
 - iii. Witness: Ms. Amelia Mallick, wife of the accused; and
 - iv. Military Judge played by supervisor.
 - b. **Instruction:** The supervisor should prepare and deliver a 30-minute instruction reviewing the basic principles of direct examination, with an emphasis on guiding the witness in giving a compelling and coherent account of the facts.
 - c. **Preparation:** Counsel should review *U.S. v. Mallick*, the child sexual assault case in the Appendix to this manual. Counsel should get 30 minutes to prepare a direct examination of the wife of the accused, Amelia Mallick. The classroom should be set up as a courtroom with two counsel tables, a witness chair, and a bench for the military judge.
 - d. **Practical Exercise:** Defense counsel should conduct a direct examination of the witness establishing the elements of the offense. Trial counsel should make all valid objections, and the military judge should make legally correct rulings.
 - e. **Critique:** The supervisor should base the critique on the organization and coherence of the examination. (*See* critique criteria in Direct Examination Drill #1).

B. Style and Control Drills:

CHAPTER 4—DIRECT EXAMINATION

1. **Purpose of These Drills:** The following five drills are designed to enhance trial and defense counsel’s ability to
 - a. Use single-fact, non-leading questions;
 - b. Strategically incorporate looping and headlining to build coherent testimony; and
 - c. Properly use inflection, body language, and purposeful movement to highlight aspects of the direct examination.

2. **How to Conduct These Drills:**
 - a. **Preparation:** Practice these drills on your own in front of the mirror or with a spouse, a friend, or a colleague. You may also record them on your cell phone to play back later.
 - b. **Role Play:** In order to maximize this exercise, be prepared to step out of your comfort zone – expand any self-imposed limitations to your trial advocacy skills to obtain the full benefit of these drills. Listen and learn from other counsel to see how you may be able to fold in strategies to enhance your presentations.
 - c. **Execution:** Supervisors should demonstrate what they expect from counsel. Show them what “right” looks like. After your demonstration, select counsel to do the entire drill if time allows, or have counsel collectively perform the drill, randomly selecting counsel to perform a part of the exercise. Consider allowing more junior counsel to perform first to ensure they are afforded the time to conduct the full exercise.

3. **Drill #5—Voice Inflection:** Choose a short phrase from those listed below. Have counsel stand and repeat the sentence each time emphasizing a different word. Very quickly counsel will see how the meaning of the sentence can change. Alternatively, select a lyric from a popular song asking counsel to place an inflection on a different word. Discuss with counsel how not only inflection but also pace and facial expressions can emphasize critical aspects of the direct examination.
 - a. This is a really stupid idea.
 - b. I never said I’d give you money.
 - c. Show me the money.
 - d. I feel your pain.

CHAPTER 4—DIRECT EXAMINATION

- e. You never said “NO.”
 - f. What did you see?
 - g. After the accused staggered across the street, where did he go?
 - h. You never saw him leave the bank?
4. **Drill #6—Body Language and Movement:** Direct counsel to select a case from their current caseload or one of the cases from the *Appendix* in this manual. Counsel should then conduct a mock direct examination of one of the witnesses that will likely testify. Substance is not critical, however, this exercise also allows counsel to become more familiar with the facts of the case.

Ask counsel to move about the courtroom during the exercise with purpose – obtaining and presenting a piece of evidence, as an example. When counsel begin to move around the courtroom for no specific purpose, have the participants call this to counsel’s attention. Alternatively, if counsel is pacing or demonstrating other distracting movements, place two pieces of paper on the floor and require counsel to remain on the paper. This forces counsel’s energy into the face, voice, and arms. The goal here is to minimize distracting movements while enhancing purposeful movement. Counsel need to appear comfortable and natural both while standing behind the podium and away from the podium, to the extent the military judge allows you to use the courtroom freely.

5. **Drill #7—Form of the Question:** (Level 1)
- a. **Single-Fact, Non-leading:** Each counsel conducts a direct examination of another counsel about an object or event of their choosing. The goal is to use open-ended, non-leading questions to develop the facts. Write on the board or provide a handout with the classic list of who, what, where, when, why, and how as a reminder.
 - b. **Technique:** The supervisor should first demonstrate what he or she expects counsel to do. Sample topic areas could include what counsel had for breakfast, lunch or dinner, past weekend activities, their uniform, a favorite restaurant, the contents of a briefcase or the briefcase itself. The possibilities are endless. Enhance the teaching value by requiring counsel to stand and examine a witness seated in a witness chair.

CHAPTER 4—DIRECT EXAMINATION

- c. **Example:**
 - Did** you eat breakfast?
 - Where** did you eat breakfast?
 - What** time did you eat?
 - Whom did** you eat with?
 - What** did you eat?
 - How** was the food?
 - What** did you have to drink?
 - Why** did you choose Shoney's to eat?
 - How** much did you spend?
 - What** time did you leave?
 - d. **Example:**

Do you own a car? Continue as above.
 - e. **Example:**

What is your favorite restaurant? Continue as above.
 - f. Ensure that each counsel conducts a simple direct examination. Have other counsel, including yourself, object and rule if counsel's question is leading, compound, or otherwise improper.
 - g. Counsel should do this more than once. Run each counsel through on a different subject. This will help develop muscle memory and will further emphasize the need to break an event into its component pieces. This drill develops an absolutely critical skill in conducting an effective direct examination through the persuasive retelling of a story. Use this drill from time to time as an icebreaker or warm-up drill before future exercises.
6. **Drill #8—Listening and Looping:** (Level 2)
- a. **What Is Looping?** Most counsel are familiar with the technique generally referred to as "looping." Remind counsel looping involves incorporating the part of the answer intended to be reinforced from one question into the next question. Looping may be used to emphasize important parts of the direct examination. But do not use looping for the entire direct examination; it gets distracting.

CHAPTER 4—DIRECT EXAMINATION

i. **Example:**

Q: What color is your car?

A: Red.

Q: What is the model of your red car?

A: It's a Porsche 911.

Q: Where did you drive your red Porsche 911?

ii. **Example:**

Q: What did the accused do when you asked to buy cocaine?

A: He reached into his pocket and pulled out a baggy.

Q: After you asked for the cocaine and he pulled out the baggy, what did he say?

Q: He said the baggy would cost me \$100.00.

Q: When he pulled out the baggy and said it would cost \$100.00, what did you do?

A: I gave him the money.

Q: After he said it would cost \$100.00 and you gave him the money, what did he do?

A: He gave me the baggy of cocaine.

Q: After you gave him the money and he gave you the cocaine, what did you do?

A: I pulled out my badge and arrested him.

7. **Drill #9—Building Blocks (Inflection, Form and Looping):**

- a. **Putting it all together:** For this drill, the supervisor plays the witness and judge. This drill involves more than one counsel. All counsel should be seated in front of you. You will give them minimal facts below to begin their questioning. Each counsel will ask one non-leading, single-fact question. Emphasize the use of looping the previous answer into the next question.
- b. You will point to counsel who is to ask the next question. The question must build on the previous question, that is, develop the facts in a logical order. This places the emphasis on listening skills.

CHAPTER 4—DIRECT EXAMINATION

As the judge, if counsel ask a leading, compound, or otherwise objectionable question, or backslide to an area already covered, simply say “sustained,” explain to counsel the objectionable segment of the question, and move to a new counsel. The exercise should be kept moving. Give counsel time to formulate questions but don’t linger. Just point to another counsel or establish eye contact. This keeps the drill moving and reinforces eye contact with the witness, an essential component of direct examination. Choose counsel randomly.

Option A

Facts Given to Counsel: I am standing on the front steps of the 1st Brigade Headquarters Building with a folder in my hands. It is 1200 hours.

Facts for Supervisor: I am carrying a classified file to the Brigade Commander with whom I have an appointment at 1230. It is a bright, sunny day. I am by myself but others are standing nearby. A man approaches with a knife in his hand. He lunges at me and stabs my right arm. I do not know the man. He is 6’2” tall, Caucasian, mustache, scar on right cheek. He says, “You prying bastard!” After I fall to the ground he takes the folder and runs away. I crawl into the Brigade Headquarters and am helped by those standing around. The file contained an investigation into the improper release of classified information by staff members in the S-2 Shop. Two staffers had been identified for disciplinary action.

Note: Counsel should explore your job, purpose, contents of file, approach of man, identification of man and knife.

Option B

Facts Given to Counsel: I am standing at an ATM and I hear footsteps behind me.

Facts for Supervisor: I hear footsteps behind me and before I can turn around I am grabbed from behind. The person wraps her right arm around my neck. I see a wisp of long blond hair for an instant as I struggle for air. The voice of a female demands my ATM access number. I give it. I am then backed up and taken around a corner. I notice Nike sneakers and see a reflection in the ATM glass. The person is a female wearing jeans and red shirt. I see her raise her arm and notice a long blunt object in her hand and then I see blackness. I am 5’10” tall, weigh 170 pounds. When grabbed from behind I remained upright - the person was apparently as tall or taller than me. I later discovered \$500.00 missing from my account, and my wallet was also taken.

Note: Counsel should explore physical descriptions, clothing, statements, weapons and money taken.

CHAPTER 4—DIRECT EXAMINATION

Option C

Facts Given to Counsel: I am driving in my car and have just stopped at an intersection.

Facts for Supervisor: I am sexually assaulted in my car. I am driving in my blue Ford Taurus with my son in the back seat. It is 1800 hours and I just picked my boy up from daycare. I stop near an alley at a traffic light at First and Main Streets, just outside the barracks. A brown van pulls up beside me. No one else is around. Two men immediately jump out, and order me out of the car. I open the door and they drag me out. I know one of the men. He is a fellow Soldier in my brigade. They then drag me out and the other man sexually assaults me in the alley. Both men get into the van and drive away.

Note: Counsel should explore the description of the van, the men, and anything said.

REFERENCES

Thomas A. Mauet, *Trial Techniques & Trials*, (Ninth Ed, 2013).

James W. McElhaney, *McElhaney's Trial Notebook* (4th Ed. 2006).

Steven Lubet, *Modern Trial Advocacy*, Chapter 4 (Fifth Ed, NITA).

CHAPTER 4—DIRECT EXAMINATION

APPENDIX TO CHAPTER 4—DIRECT EXAMINATION

Fact Scenario #1: Bad Check Case, <i>U.S. v. Minderbender</i>	p. 19
Sample Solution Direct Examination, <i>U.S. v. Minderbender</i>	p. 21
Fact Scenario #2: Assault Case, <i>U.S. v. Jones</i>	p. 24
Sample Solution Direct Examination, <i>U.S. v. Jones</i>.....	p. 26

CHAPTER 4—DIRECT EXAMINATION

SCENARIO #1: BAD CHECK CASE – *U.S. v. MINDERBENDER*

The purpose of this drill is to enhance direct examination skills. Counsel will conduct a mock direct examination of Mrs. Jane Smith, a Post Exchange (PX) cashier, based on the scenario provided. Pay special attention to organizing the examination, form of the questions, and verbal/non-verbal communication techniques. An exhibit of a bad check is attached. After the exercise, a sample solution will be provided.

The accused's name is LT Milo L. Minderbender, USA. He is assigned to Company A, 178th Infantry, Fort Knight. LT Minderbender has a checking account with Nations Bank; he also has a cocaine habit. During the end of January, 2017, LT Minderbender depleted his checking account to support his cocaine use. On 24 January, 2017, LT Minderbender cashed check # 2910 for \$250.00 at the Fort Knight PX. The maximum amount that can be cashed per customer is \$400.00 per day. He wrote the check prior to arriving at the PX. The check was undated. When he cashed the check, LT Minderbender presented his Armed Forces identification card as identification to Mrs. Jane Smith, a PX cashier. Mrs. Smith reviewed the check for completeness and verified the signature on the check. Mrs. Smith wrote the ID# on the check. She then accepted the check, counted out \$250.00 and gave it to the accused. Mrs. Smith stamped the back of the check, indicating the check was presented to the Fort Knight PX for cash. Later that day, Mrs. Smith gave the check to her supervisor, Mrs. Taylor, for deposit. Mrs. Smith has worked as a cashier for 15 years. Although she cannot remember the accused cashing the check, she can verify the process she uses to cash checks.

The PX sent LT Minderbender notice that his check was returned for insufficient funds. LT Minderbender did not redeem the dishonored check. The check is undated.

CHAPTER 4—DIRECT EXAMINATION

BAD CHECK

LT MILO L. MINDERBENDER 21-54-9876 MID# 555 22910
22 HELLER DR. (804) 867-5300 FSA 20-22/1942
SCAGWAY, USA 99603

PAY TO THE ORDER OF Milo L. Minderbender \$ 250.00
Two hundred fifty dollars DOLLARS

NationsBank 75 Years of Military Banking
NationsBank of Texas, N.A.
Fort Sam Houston Banking Center Pl.
PO Box 8000 San Antonio Tx 78229

FOR Cash
| : 12345654 1969 - 221 - | - 122 - | - 00 || :

RETURNED FOR INSUFFICIENT FUNDS

ENDORSE HERE

Milo L. Minderbender

Fort Knight, USA

Each for patron's safe and return from NationsBank on front and Agent's "Agent's Document" on back. If not printed, Do Not Cash.

CHAPTER 4—DIRECT EXAMINATION

SAMPLE SOLUTION—DIRECT EXAMINATION IN BAD CHECK CASE

- Q: Are you Mrs. Jane Smith?
- Q: Where do you work, Mrs. Smith?
- Q: How long have you worked at the PX?
- Q: What is your job title?
- Q: What are your duties?
- Q: Have you received training to qualify you in your duties? Please describe.

CHECK CASHING PROCEDURES

- Q: Mrs. Smith, I am going to ask you questions about PX check cashing procedures. Are you familiar with those procedures?
- Q: How is it that you are familiar with the procedures?
- Q: When presented a check for cash, what information do you look for on the check?
- Q: Does the cashier make marks on the check?
- Q: What marks are made?
- Q: Why are these marks made?
- Q: Are you required, as part of your job, to make these annotations on the check?

IDENTIFICATION

- Q: Is it required that the person presenting the check show some form of identification?
- Q: Why must identification be presented?
- Q: What happens if the person does not present an identification card?
- Q: In your 15 years of experience as a cashier, have you ever cashed a check without some form of identification being presented?

CASH OR THING OF VALUE

- Q: Once proper identification is presented with the check, what does the cashier provide in return?

CHAPTER 4—DIRECT EXAMINATION

- Q: Is it indicated on the check whether the cashier provides cash or merchandise?
- Q: How is this annotation made?
- Q: Why is this annotation made?
- Q: How is cash presented to the customer?
- Q: Why is the cash counted twice before giving it to the customer?
- Q: Once the customer leaves, what do you do with the check?

QUESTIONED BAD CHECK

- Q: Mrs. Smith, I am handing you what has previously been marked as Prosecution Exhibit 1 for ID (hand the witness the attached bad check). Do you recognize this?
- Q: What is Prosecution Exhibit 1 for ID?
- Q: How do you recognize this check?
- Q: Are there any markings on the check indicating it was cashed at the PX?
- Q: Who made those markings?
- Q: How do you know you made those markings?
- Q: When were those markings made?
- Q: Were you required to make those markings as part of your job? (Offer PE for ID as evidence.)
- Q: Looking at the front of the check, what does the mark: “MID# 55512” indicate?
- Q: How did you get that number?
- Q: Whose initials are next to that number?
- Q: Why did you place your initials there?
- Q: Did the signature on the ID card match the signature on the check?
- Q: And whose signature is on the check?
- Q: You also indicated you placed the mark on the back of the check. How did you do that?
- Q: When was this mark made?
- Q: What does this mark indicate?

CHAPTER 4—DIRECT EXAMINATION

Q: How much cash did you give the customer?

Q: After you provided the customer \$250.00, what did you do with the check?

Thank you, Mrs. Smith. I have no further questions.

CHAPTER 4—DIRECT EXAMINATION

SCENARIO #2: ASSAULT CASE – *U.S. v. JONES*

The purpose of this drill is to enhance direct examination skills. Counsel will conduct a mock direct and cross examination of Private Smith, an assault victim, based on the scenario provided. Emphasize the organization of the examination, form of the questions, and verbal/non-verbal communication techniques. A diagram of the crime scene is attached. Upon completion of the exercise, a sample solution will be provided.

The victim's name is John A. Smith, a 19-year-old Private. The accused's name is Private Jones. Both are assigned to Company A, 178th Infantry. Both live on the same floor in Barracks number 1234. The accused lives in room 101. Smith lives in room 110. On Friday, 1 February 2017, between 1800 and 2100, Soldiers in the barracks, including Smith, were drinking and listening to music. Smith drank about eight beers and appeared drunk. The accused was in his room watching television. At approximately 2100, Smith went to the accused's room and knocked on the door. The accused opened the door, and Smith came in. Smith was loud and obnoxious, and the accused, realizing Smith had been drinking, asked him to leave. Smith refused. The accused asked him two or three additional times, but Smith insisted on staying and watching television. According to Smith, the following transpired:

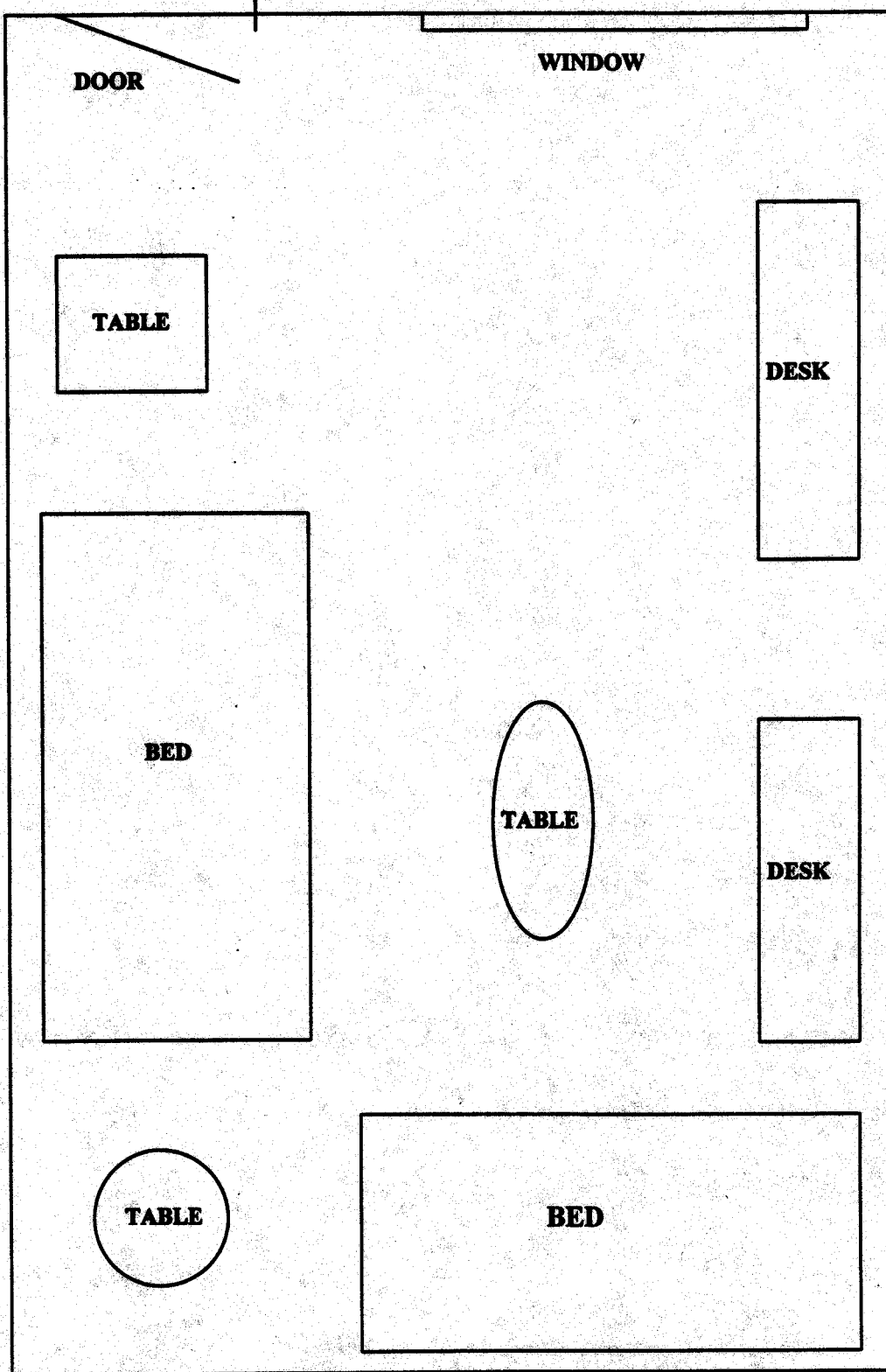
The accused told him that he would throw him out if he did not leave. Smith again refused to leave, asking the accused why he did not want to let him stay in the room. The accused then picked something up, stood up, and came at him. The accused struck Smith on the head with something sharp. Smith fell to the floor. Smith got up and opened the door, but was struck again on the back of the head, and fell on the floor in the hall. That is all he remembers.

The accused stated the following: Smith came to the room, was drunk and obnoxious. After a few minutes, he asked Smith to leave, but Smith refused, saying he wanted to stay and watch television. Smith told the accused that if he tried to make him leave he would "kick his ass." Smith then stood up started walking towards the accused. The accused picked up a crescent wrench from his desk. Smith kept coming, so he hit Smith on the head with the wrench. Smith fell to the floor. The accused then opened the door and told him again to get out. Smith started to stand up. Fearing Smith would attack, Jones hit Smith again on the back of the head. Smith fell again. The accused pushed Smith out into the hall and closed the door.

Smith was found in the hall by several other soldiers who heard yelling. He was bleeding, and had several deep cuts on his head. He was taken to the emergency room, where his wounds were stitched and treated. He had one large cut on the front of his head, and another on the back of his head. His BAC was .14 one hour after the incident.

CHAPTER 4—DIRECT EXAMINATION

ROOM 101, BARRACKS 1234



CHAPTER 4—DIRECT EXAMINATION

SAMPLE SOLUTION—DIRECT EXAMINATION IN ASSAULT CASE

INTRODUCE THE WITNESS

- Q: Are you Private Smith, assigned to Company A, 178th Infantry?
- Q: How old are you?
- Q: How long have you been in the Army?
- Q: What is your military specialty?
- Q: How long have you been assigned to Company A?
- Q: Where do you live?
- Q: How long have you lived there?

SET THE SCENE

- Q: Private Smith, I'm going to ask you questions about the evening of 1 February 2017. Where were you after work on that day?
- Q: What were you doing?
- Q: Were you drinking alcohol that evening?
- Q: How many beers did you drink that evening?
- Q: Were you drunk?
- Q: Did you visit the accused that evening?
- Q: Where did you visit him?
- Q: What time was it when you visited him in his room?

DESCRIBE THE ASSAULT

- Q: What happened when you went to his room?
- Q: What was the accused doing?
- Q: Was he standing or sitting?
- Q: What was he sitting on?

CHAPTER 4—DIRECT EXAMINATION

- Q: What was he wearing?
- Q: What did the accused say?
- Q: Did you leave when the accused asked you to leave? Why not?
- Q: Did he change his mind?
- Q: What did you tell him?
- Q: What happened when you didn't leave the accused's room?
- Q: What did the accused do when he got up?
- Q: Describe the object he picked up.
- Q: How was the accused holding the sharp object?
- Q: How did he appear?
- Q: What did the accused do after he picked up the object?
- Q: How did the accused move toward you?
- Q: As he aggressively moved toward you, what did you do?
- Q: What happened next?
- Q: How did he hit you?
- Q: Was the object he used hard or soft?
- Q: Where did he hit you?
- Q: How hard did he hit you?
- Q: Describe how it felt when the accused hit you.
- Q: Did you try to block his blow?
- Q: After he hit you, what did you do?
- Q: Did you try to stand up?
- Q: As you were standing up, what happened?
- Q: Where did the accused hit you the second time?
- Q: What did he hit you with?

CHAPTER 4—DIRECT EXAMINATION

- Q: How hard did he hit you?
- Q: Were you able to protect yourself from the blow? Why not?
- Q: Did the accused say anything? What?
- Q: What did you do after the accused hit you the second time?
- Q: At any time during this incident did you hit the accused?
- Q: At any time during this incident did you push the accused?
- Q: At any time during this incident did you raise your hand to strike the accused?

DEMONSTRATE THE INCIDENT

- Q: [Ask permission from the military judge to have the witness leave the witness box and conduct a demonstration of the assault.] Private Smith, please stand up and step out from the witness box. With me standing where you were in the room, show the court what the accused did after he stood up. [Counsel should describe the demonstration for the record and ask the witness to return to the witness box when complete.]

CRIME SCENE DIAGRAM

- Q: Private Smith, please direct your attention to the diagram on the easel to your left, which has been marked as PE 8 for ID. Do you recognize this diagram?
- Q: What is it?
- Q: How do you recognize it?
- Q: Is this diagram a fair and accurate representation of the accused's room, Room 101?
- Q: [Request permission to have the witness approach the diagram.] Private Smith, using the red marker, please place an "S" where you were standing when the accused hit you. [State for the record that the witness did as directed.]
- Q: Now using the same red marker, place a "J" where the accused was standing when he hit you. [State for the record that the witness did as directed. Counsel should offer the diagram into evidence.]

DESCRIBE INJURIES

- Q: What happened after you were hit in the head the second time?
- Q: What happened once you were in the hall?
- Q: What is the last thing you remember?

CHAPTER 4—DIRECT EXAMINATION

- Q: After regaining consciousness, what happened?
- Q: Did you have any injuries? Please describe them.
- Q: Did you receive any medical attention?
- Q: How were your injuries treated?

CONCLUSION

- Q: Private Smith, why did you go to Private Jones's barracks room on the evening of 1 February 2017?
- Q: Did you ever want to fight him?

Thank you, Private Smith. Nothing further, your honor.