

Instructions for Using a “Three Column Format” Outline

A. Introduction

The Three Column Format (TCF) is simply one of many direct examination formats available to trial attorneys. The TCF should be kept in a trial notebook behind the tab of the witness’ name.

The advantage of using the TCF over other formats is the TCF forces the user, well before trial, to: (1) review the case facts; (2) assess the value or effectiveness of each potential key question; and (3) anticipate form and evidentiary objections.

At trial, the TCF allows the user to: (1) listen to the witness; (2) have a more effective conversational style with the witness; (3) quickly adjust to unanticipated facts/events/testimony ; (4) not be phased by opposing counsel’s objections; (5) be prepared to cite the correct rule(s) of evidence that permits the question; (5) quickly rephrase the question if necessary; and (6) remember to ask all key questions.

In summary, the advantage of the TCF is it, at trial, serves as a quick memory jogger for the user, but allows the user to listen and adjust to the testimony of the witness.

The disadvantage of the TCF is it is not intuitive and may, in fact be counter-intuitive. It is unlike any other outline in that the successful use of the TCF at trial depends on the memory and pre-trial preparation of the user. It takes the user some time to become comfortable with the TCF. Accordingly, the only way a user learns how to use the TCF successfully is to use it early and often.

The frustrations of coaching students to use the TCF will be well worth the benefits of watching the student excel to his/or her full potential during direct examinations if you stick with it and the student uses it.

B. The Substance of Each Column

The TCF should be used only after the team has prepared the theme, theory and closing arguments. This non *sequitur* and very “backwards” approach allows the TCF user to better evaluate the utility of each question. In other words, this “backward” approach allows the user to think about what facts/evidence is necessary to support the closing argument and to ask only those questions designed to elicit such facts/evidence. All other questions that ask for facts/evidence that will not be used in the closing argument are not useful, and in certain circumstances dangerous because such useless questions will: (1) detract or confuse the fact finder [or scoring judges] from the case theme/theory; (2) allow a sharp witness to throw off the attorney; and (3) force the attorney or team to change their case trial strategy.

The following are suggestions for using each of the columns in the TCF. For illustration, the colored highlights in the text correspond with the same colored highlight in the sample TCF that immediately follows the text.

i. Topic

The substance of each column is self-explanatory. Under the **Topic** column, there should always be three sections: (1) a **Background** section at the very beginning; (2) a **Conclusion** section next to the end; and (3) a **Re-Direct** section at the very end. For an effective direct examination, particularly in a mock trial competition, in addition to the “Background, “Conclusion” and “Re-Direct” sections, there should be **no more than four additional sections under the Topics column**. If there are more than four **additional**

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sections (in addition to the Background, Conclusion, and Re-Direct), then the direct examination will not be focused. The lack of focus will cause the fact-finder [scoring judges] to likewise lose focus or interest in the direct-examination. Moreover, in a competition, allowing the student more than four **additional sections** will cause the team to go over the allotted competition time.

The **Background** should brief for all witnesses, especially lay witnesses. It is analogous to introducing a friend to others at a party. In other words, it should tell the fact-finder [scoring judges] just the pertinent information about the person to allow the fact-finder to understand: (1) who the person is; and (2) why the person knows what s/he is talking about. The how, when, and where the person learned about what s/he is talking about comes later and in the **additional sections**. With expert witnesses, the attorney is essentially doing the same thing, but in a bit more formal manner as dictated by the requirements of Rules of Evidence 702 and 703. There is nothing strategic or substantive about the Background topic, it is merely an introduction.

The **additional sections** between the **Background** and **Conclusion**, are the substance of the direct examination. The **additional sections** should be chosen to mimic the closing argument and written in the same chronology or sequence of the closing argument. Doing so allows the fact-finder to follow and better remember both the direct-examination and closing argument. The **additional sections** should not be more than seven words long because it is suppose to be a memory jogger to remind the attorney of what questions will follow. Additionally, the **additional sections** should serve as “subject markers” and the attorney should announce each “subject maker” as s/he arrives at the “subject marker,” *e.g.*, if the topic of “Corporation Two Goal in Developing Contracts” arises, the attorney should say to the witness, “now Mr. Smith, let’s talk about your corporation’s goal in entering into the contract in dispute.” This “subject marker” allows the fact-finder to better follow transitions, understand and retain the testimony.

The **Conclusion**, is NOT a summary of the questions just asked in the direct-examination as a closing argument would be a summary of the facts/evidence presented at trail. Rather, the **Conclusion** is merely a topic that must be asked at the very end of the direct-examination for dramatic effect and to help the fact-finder retain the most important part of the witness’s testimony. This is true because people retain best what they learn last. Much like the team should first prepare the closing argument before using the TCF to prepare for the direct-examination, the **Conclusion** in the TCF should be the first thing written before the user writes **additional sections**.

The **Re-Direct** is the section the user will use to, as the name implies, re-direct the witness after opposing counsel cross-examines the witness. The Re-Direct should be followed by no more than three **question topics**. The **question topics** are the key points of the witnesses’ testimony that are essential for closing arguments. If in cross-examination, the opposing counsel does not touch on any of the **question topics**, there is no need to do a re-direct. If opposing counsel succeeds in raising some doubt about one or more of the **question topics** a re-direct is necessary. Under the **question topics** there should be some blank spaces for the attorney to write questions as s/he listens to the cross-examination. Then, the attorney can use some or all of the questions to conduct the re-direct. To the degree the Court permits, it is advisable for the attorney, during a re-direct, to go back to the **Conclusion** questions to conclude the re-direct.

Topic	Questions	Evidentiary
Background	-- Name -- position -- role -- length	-- Leading: <u>Foundational</u>

	<ul style="list-style-type: none"> -- Position with prior company (VP of Sales, Western Region) <li style="padding-left: 20px;">-- Define “region” -- “In your current position with Corporation Two, do you make any decisions with respect to termination of contracts with franchisees?” 	
<p>Corporation Two Goal in Developing Contracts</p>	<ul style="list-style-type: none"> -- Uniformity <ul style="list-style-type: none"> -- Why -- How (<i>Element 1 Duties</i>) <input type="checkbox"/> -- Quality Assurance <ul style="list-style-type: none"> -- Definition <ul style="list-style-type: none"> ■ Not discretionary (<u>Amaco</u> standard) <li style="padding-left: 20px;">-- Why <li style="padding-left: 20px;">-- Necessity <ul style="list-style-type: none"> -- (to ensure compliance) -- (to promote brand name) -- Reliability <ul style="list-style-type: none"> -- Otherwise tarnishes Corporation Two’s concept [Damage set up] -- What documents of Corporation One show damages (audit report) -- “Why is predictability of franchisee performance important to Corporation Two?” 	<ul style="list-style-type: none"> -- Improper Opinion: FRE 701, <u>Lay Opinion</u> ([a] <u>Rationally based</u> (on position); [c] <u>not based on scientific, technical, or other specialized knowledge</u>) -- FRE 401,2,3: Relevant to show the basis of breach, central issue to the case. Probative value not substantially outweighed by prejudice, if any. -- <i>Id.</i>
<p>Dealing with Mr. Smith, Corporation One</p>	<ul style="list-style-type: none"> -- <i>Id.</i> Mr. Smith (representative, sole office of Corporation One) -- Exhibit 1 (contract signature block) 	<p>(Exhibit 1) -- foundational</p>

	<ul style="list-style-type: none"> -- Meeting (11 July 2008 @ Chicago_ -- purpose (franchisee national conference) -- Mr. Smith there -- Spoke to Mr. Smith <ul style="list-style-type: none"> -- witnesses <ul style="list-style-type: none"> -- (Mr. Doe) -- (Mrs. Smith) -- Where were Doe and Smith (3 feet away in conversation) -- Mr. Smith said @ breach <ul style="list-style-type: none"> -- Received notice of default -- Ignored it (b/c 4 prior default letters) <ul style="list-style-type: none"> ■ Admits (<i>Element 2 Breach</i>) <input type="checkbox"/> 	<p>-- Hearsay: FRE 801(d)(2)(A) <u>Party-Opponent Admission (own capacity)</u></p>
<p>Conclusion</p>	<ul style="list-style-type: none"> -- Damages to Corporation Two breach (<i>Element 3 Damages</i>) <input type="checkbox"/> <ul style="list-style-type: none"> -- as a result of Mr. Smith's admission <ul style="list-style-type: none"> -- brand name -- good will -- quantifiable <li style="padding-left: 100px;">-- \$534,998.64 (audit report) <li style="padding-left: 100px;">-- revenue report 	<p>-- Speculation – Laid Foundation, knowledge, access, read audit report, not based on guess.</p>
<p>Re-Direct --</p>	<p>-- Standardization</p> <p>-- Predictability of Performance not negotiable</p> <p>--Contract Clause Clear</p>	

ii. Questions

The **Questions** column lists the questions to be asked. There are three categories of questions: (1) **essential questions**; (2) **important questions**; and (3) **non-essential questions**.

The key to using the **Questions** column is to NOT write out any of the questions except for the **essential questions** that relate to an element in the jury instructions. There should be no more than 5 **essential questions** in the TCF, otherwise, the utility of the TCF is defeated and the fact-finder will not be able to understand the direct-examination. All **non-essential questions** should be mere memory joggers, see the light blue highlights below for a sample of **non-essential questions**. The **non-essential questions** are like filler questions that help bind or gives substance to the **essential questions** and **important questions**. Finally, certain questions will be more important than non-essential but not important enough to be “essential,” these **important questions** should be written in bold to tell the attorney that these questions should be asked unless it becomes unnecessary because the witness addressed them in other responses. Unlike **essential questions**, **important questions** are not required to be asked by the attorney.

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Background	-- Name -- position -- role -- length -- Position with prior company (VP of Sales, Western Region) -- Define “region” -- “In your current position with Corporation Two, do you make any decisions with respect to termination of contracts with franchisees?”	-- Leading: <u>Foundational</u>
Corporation Two Goal in Developing Contracts	-- Uniformity -- Why -- How (Element 1 Duties) <input type="checkbox"/> -- Quality Assurance -- Definition ■ Not discretionary (<u>Amaco</u> standard) -- Why -- Necessity -- (to ensure compliance)	-- Improper Opinion: FRE 701 , <u>Lay Opinion (a) Rationally based (on position); [c] not based on scientific, technical, or other specialized knowledge]</u> -- FRE 401,2,3: Relevant to show the basis of breach, central issue to the case.

	<p>-- (to promote brand name)</p> <p>-- Reliability -- Otherwise tarnishes Corporation Two's concept [Damage set up] -- What documents of Corporation One show damages (audit report)</p> <p>-- "Why is predictability of franchisee performance important to Corporation Two?"</p>	<p>Probative value not substantially outweighed by prejudice, if any.</p> <p>-- <i>Id.</i></p>
<p>Dealing with Mr. Smith, Corporation One</p>	<p>-- <i>Id.</i> Mr. Smith (representative, sole office of Corporation One) -- Exhibit 1 (contract signature block)</p> <p>-- Meeting (11 July 2008 @ Chicago_ -- purpose (franchisee national conference) -- Mr. Smith there -- Spoke to Mr. Smith -- witnesses -- (Mr. Doe) -- (Mrs. Smith)</p> <p>-- Where were Doe and Smith (3 feet away in conversation)</p> <p>-- Mr. Smith said @ breach -- Received notice of default -- Ignored it (b/c 4 prior default letters) ■ Admits (<i>Element 2 Breach</i>) □</p>	<p>(Exhibit 1) -- foundational</p> <p>-- Hearsay: FRE 801(d)(2)(A) Party-Opponent Admission (own capacity)</p>
<p>Conclusion</p>	<p>-- Damages to Corporation Two breach (<i>Element 3 Damages</i>) □ -- as a result of Mr. Smith's admission -- brand name -- good will -- quantifiable</p> <p>-- \$534,998.64 (audit report)</p>	<p>-- Speculation – Laid Foundation, knowledge, access, read audit report, not based on guess.</p>

	-- revenue report	
Re-Direct --	-- Standardization -- Predictability of Performance not negotiable --Contract Clause Clear	

iii. Evidentiary

The use of the **Evidentiary** column is what sets good trial attorney apart from bad trial attorneys. In competition, the effective use of the **Evidentiary** column is the key to making the students perform as if they have are actual experienced attorneys. In other words, if you want your team to win, you must make them use the **Evidentiary** column.

The **Evidentiary** column allows the attorney to expertly respond to form and substantive objections. Moreover, the **Evidentiary** column allows the attorney to not get flustered by opposing counsel’s form or substantive objections.

The user does not need to fill in an **evidentiary response** to any questions to which s/he does not anticipate any objections. Obviously, for questions that could draw an objection, an **evidentiary response** should be written. **Evidentiary responses** are specific and include the Rules of Evidence number if applicable. This allows the attorney to cite the Rules of Evidence number in a response.

While some form objections require specific detailed answers encapsulated in an **evidentiary response**, most form objections can be anticipated in a **general response**. These **general responses** can be shorter and serve as a mere memory jogger for the attorney.

The use of the **Evidentiary** column will allow the user to eliminate questions to which there are no evidentiary exceptions or rephrase questions that are permissible if stated in a specific way.

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<p>Dealing with Mr. Smith, Corporation One</p>	<ul style="list-style-type: none"> -- <i>Id.</i> Mr. Smith (representative, sole office of Corporation One) -- Exhibit 1 (contract signature block) 	<p>(Exhibit 1) -- foundational</p>

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Re-Direct --	<ul style="list-style-type: none"> -- Standardization -- Predictability of Performance not negotiable --Contract Clause Clear 	

End.