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A **Direct** Path To **Winning**

Tips for conducting an effective direct examination.

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SOME LAWYERS DREAM of conducting a blistering cross examination. Others of delivering a compelling, emotionally charged closing argument. But few lawyers dream of planning, preparing and conducting a direct examination. In fact, direct examination may be the most underestimated part of trial.

It may also be the most important, because the truth is many, if not most, cases are won or lost on direct examination. It is during direct examination that the parties present their affirmative cases, that the witnesses provide their versions of the events and that the judge and jury first hear from the witnesses. While other parts of the trial may be more dramatic, none matters more than direct examination. This article offers 11 tips for conducting it effectively.

Choose Witnesses Carefully

More than one lawyer has told of how well his case was going until his witnesses opened their mouths. It is only a slight exaggeration to say there are no bad cases, just bad witnesses. Indeed, very few cases are better than the witnesses who make them, no matter how compelling the story, no matter how persuasive the documentary evidence and no matter how extensive counsel's preparation.

There are of course cases in which counsel will have no choice but to call a particular witness, no matter his or her baggage. It is difficult to try a product liability case without presenting testimony from the plaintiff, no matter how nervous; it is just as difficult to defend a securities fraud litigation without presenting testimony from the individuals accused of fraud, no matter how arrogant; and it is almost impossible to try a patent case without presenting testimony from the inventor, no matter how quirky. In other cases, however, one of counsel's principal tasks in preparing for trial is to identify the witnesses who can present the case most effectively.

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Choosing whom to call and for what purposes is often a difficult task. Although most witnesses can be prepared to testify effectively, the risks of calling a witness can nevertheless outweigh the benefits. None is perfect, and many have the vulnerabilities mentioned above and others as well. There is no substitute for engaging in a mock examination of each potential witness. How effectively does each communicate the client's side of the case? How well does he or she handle the likely cross? The decision whether to call a particular witness must be based on an evaluation of the individual's relationship to the case, i.e., the centrality of the witness' role in the story being told, and on an objective assessment of the strengths and weaknesses revealed by a mock examination.

Prepare Them for Success

Juries tend to side with the parties they like and have a hard time believing the testimony of witnesses they dislike or to whom they cannot relate. In a trial setting, however, even likeable people can be paralyzed by fear, honest people can appear to be lying when they state their name, and knowledgeable people can come across as arrogant. A direct examination that maximizes a witness' strengths and minimizes his or her weaknesses rarely, if ever, occurs spontaneously. Setting the stage for success in the courtroom requires preparation.

There is no single method for preparing a witness to testify. Provided it can be done without imparting to the individual information she does not already possess, it is usually advisable to ensure that the witness understands the big picture, and how she fits into it. That usually entails multiple meetings with the witness, discussion of the topics the examination will address, a review of her prior testimony and consideration of documents relevant to her testimony. Developing an effective direct examination is a collaborative, iterative process, and the objective is to find the best way for the witness truthfully to communicate what she knows as simply and persuasively as possible.

Trial lawyers differ on whether a detailed "script" of the examination that includes both questions and expected answers is desirable. Inexperienced trial counsel can get so preoccupied with their outlines that they do not listen carefully enough to the witness' answers, missing opportunities to clarify or

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correct. Experienced ones will often reduce to bullet points the testimony that must be elicited from the witness and make sure each point is checked off. Suffice it to say that, by the time she is expected to take the stand, the witness should be familiar with the questions that may be asked, whether or not they have been "scripted" in detail, and with the exhibits that may be used. Nothing that occurs during a direct examination (or cross examination, for that matter) should come as a surprise to the witness or the examining attorney.

All witnesses have strengths and weaknesses. The most effective direct examinations play to the witness' strengths and minimize (or at least accommodate) weaknesses. If the witness is a chemistry professor who has spent decades teaching in a classroom, it may make sense to structure the examination so that it resembles a classroom discussion by asking for permission to have the witness come off the stand and present testimony using flip charts or other demonstratives. By contrast, if the witness is a reserved bookkeeper who rarely interacts with people, it may make sense to orient the examination around the documents with which the witness is most comfortable.

Introduction and Accreditation

More than 2,300 years ago, Aristotle referred to one of the primary means of persuasion as "ethos," appeal based on the character of the speaker. Not only is ethos important in any jury trial, it is critical that it be established early. Jurors form strong opinions early, and those opinions can be difficult to shake. Thus, an effective direct examination begins by introducing and accrediting the witness.

From the start of direct, the witness' relationship to the case should become apparent, and the trier of fact should have a general sense of what she will testify to and why her testimony should be credited. One way to do that is by asking, immediately after the witness identifies himself or herself to the jury, "Why are you here today?" The answer to that question, e.g., "I witnessed the accident that I understand is at issue," "I signed the contract" or "I am the inventor of the patented technology," will make clear why the witness' testimony matters and should be listened to.

Questions about the witness' background and personal history permit the trier of fact to connect with the witness and add to her credibility. But witness accreditation is about more than merely humanizing the witness. It is about giving the trier of fact a reason to credit her. With an expert witness, that can be done by eliciting testimony concerning areas of expertise or accomplishments, such as professional awards or distinctions. With lay witnesses, it can be done by emphasizing what makes the witness' testimony special, e.g., her presence at the site of the accident, her role in the negotiations that led to the contract being signed and so on.

Organize to Facilitate Learning

To persuade, direct testimony must be understood. As the German poet Goethe put it, "everyone hears only what he understands." Thus, the most effective direct testimony is organized to promote learning. Jurors are generally most alert at the beginning of an examination. And what comes at the end can be enduring because it is the last thing jurors hear. Beginning strong increases the probability that an examination will be understood and remembered.

Few lawyers dream of **planning**, **preparing** and **conducting** a **direct examination**. It may be the most **underestimated** part of trial. It may also be the most important, because the truth is many, if not most, cases are **won or lost** on direct examination.

Direct examinations are most effective where they employ the principles of good storytelling. For instance, most stories are best understood when presented chronologically. Action testimony is most effective when presented without interruption. And specifics are more interesting than generalities.

Control Without Leading

Leading questions are generally not allowed on direct examination. But even if they were, leading questions are rarely the most effective means of conducting an effective direct examination.

Leading questions put the examiner front and center. The aim on direct examination, however, is to spotlight the witness. Juries tend to identify with and believe (or disbelieve) witnesses, rather than counsel. For that reason, the most effective examinations are those in which the jury hears the story directly from the witness.

Besides, leading questions are not the only means of control on direct. Counsel can control the examination by guiding the witness from one topic to another, asking open-ended questions that require a narrative answer and following up with more focused questions, if necessary, to elicit omitted detail. If and when the witness' account omits useful detail, counsel can follow up to elicit that information.

Anticipate the Witness' Need for Help

No matter how well trial counsel selects and prepares her witnesses, there will be glitches, and some will be significant.

In all of the prep sessions, the project manager, her key witness, will remember clearly that he began construction on the job in the fall of 2009. But when counsel asks him about that at the beginning of his direct, he is flustered in front of the jury and cannot remember.

An unprepared lawyer will ask, "Was it in the fall of 2009?" That will likely establish the necessary fact, but at the cost of creating the impression that the witness is there to say what counsel wants him to say. Prepared counsel will have annotated her witness outline and have ready access to the exhibits in the case. She will seamlessly place before the witness the document that refreshes his recollection. The jury gets the testimony about when construction began from the witness, and counsel has shown both the jury and her nervous witness that she is completely in control of things, even when they do not go according to plan.

In many cases, virtually everything to which a witness will testify is rooted in documents or other exhibits. Prepared counsel will have annotated witness outlines with references to those exhibits. When the inevitable failure of recollection (or, worse yet, incorrect recollection) occurs, counsel will then be prepared to immediately produce before the witness the exhibit that will set him straight, rather than being one of those lawyers who ends up fumbling awkwardly for an exhibit in front of the jury, only to end up uttering the least-kept promise of unprepared trial lawyers: "I'll come back to that later."

Anticipate Objections

Annotations to a witness outline should include more than just references to exhibits. With respect to any part of that witness' testimony that could draw a reasonable objection, the outline should equip counsel to respond to the objection.

If there will be testimony about a third party's statement that is admissible through the witness as a present sense impression or excited utterance, the outline will prepare trial counsel to identify the specific hearsay exception relied on, to list its prerequisites, and to cite the best case supporting admissibility. Prepared lawyers will bring the outline to the sidebar and soundly defeat the objection in a way that instills confidence in the judge that counsel knows what he is doing.

Preparing for objections in this way will reveal that some responses to anticipated objections are more involved or nuanced, and a complete understanding of why trial counsel is right requires a more considered analysis than a sidebar permits. Those issues become candidates for a motion in limine, so the trial judge can devote to them the attention they deserve before trial. A middle ground between an in limine motion and springing the issue on the judge for the first time at sidebar is alerting the judge to the looming issue the day before eliciting the testimony.

Anticipate the Cross

Every case has two sides. One way or the other, at some point during trial, both sides will come out. An effective direct examination, like a good theory of the case, takes account of all of the expected evidence, not just the evidence favorable to counsel's case. In fact, the surest way to undermine an effective direct examination is to ignore an adversary's theory and evidence.

In one high-profile case, for example, an expert isolated seven allegedly misleading statements from a lengthy patent prosecution. The expert's testimony sounded pretty good until it became clear on cross examination that the expert's account omitted important context, which could have been included in a more careful direct examination.

By contrast, anticipating the cross (and structuring the direct in view of it) can not only blunt its force, but can also enhance credibility and thus strengthen counsel's case. This time-tested principle was highlighted by Aristotle in his treatise "On Rhetoric." Revealing that a witness has a criminal record, for example, draws the sting of the point when mentioned on cross, as does disclosing that a witness had a limited view of an accident or participated in some but not all of the contract negotiations. Overstatement can lose cases.

Use Visual Aids and Physical Exhibits

The most effective direct examinations involve more than the spoken word. They involve photographs of the scene of the case, computer re-creations of an accident, drawing on a chalkboard, visual aids, summary charts and physical exhibits and other such demonstrative evidence.

This is an age of visual learning. It has been estimated that retention of information is six times greater when that information is conveyed by visual and oral means than when the information is conveyed by the spoken word alone.[1] Pictures, flow charts, diagrams and other visual aids can not only enhance the trier of fact's interest in the testimony, but also effectively explain, emphasize and summarize what words alone cannot.

A common example to illustrate this principle is a patent case in which a patent-holder plaintiff seeks to defeat a claim of obviousness by showing, among other things, that it took the inventor a long time to solve the problem disclosed in the patent. Counsel can underscore the plaintiff's point by having the witness walk the jury through enlargements of selected pages from the notebook used by the inventor during her research. Physical exhibits might also be employed to recreate in real-world detail the experimentation ultimately culminating in the invention.

Finally, the lengthy road to innovation can be depicted in a demonstrative exhibit listing chronologically all the events, including failed experiments, that predated the disputed invention. That same demonstrative will come in handy when it comes time to sum up.

Notably, however, visual aids are not effective when they upstage the witness, or when they become a distraction. In an effective examination, visual aids are used to complement and enhance, rather than supplant, the substance of the witness' testimony. Demonstrative exhibits are often most effective when introduced after the witness has completed his description of events. That preserves the flow and impact of the story, while at the same time reinforcing visually what the trier of fact heard previously.

And whenever they are introduced, the jury needs time to examine and absorb them. It is best not to elicit critical testimony moments after distracting the jury's attention with a complex visual aid.

Use Redirect Sparingly

Redirect examination is not an opportunity to repeat the direct examination. Nor is it about underscoring what may have gone poorly on cross. The purpose of redirect is to put the cross in context, clarify testimony that might not have been clear on cross examination and/or explain or further develop a point brought up by opposing counsel. The most effective redirect examinations are brief and to the point, usually touching on just a few propositions.

The most effective redirects are those that exploit over-reaching and unfairness in the cross, such as the following example:

Q: Counsel showed an e-mail you wrote on March 15, 2001. Do you recall that?

A: Yes.

Q: Specifically, counsel pointed you to the first line in the document where you said "clinical studies conducted to date indicate no statistically significant improvement in efficacy." How do you reconcile that statement with the testimony you provided on direct examination, when you noted that clinical studies did establish efficacy?

A: Well, several studies establishing efficacy were conducted after I wrote the e-mail.

This redirect not only clarified a point made during cross, but did so in a way that undermined the credibility of the cross examination.

Use Depositions Selectively

Despite all of the time, money or effort put into depositions, they are best used sparingly at trial. They are, in a word, deadly.

The trier of fact usually has little patience for long clips of deposition testimony, most of which is unfocused and less interesting than live testimony. Yet it is sometimes necessary to use deposition designations affirmatively at trial, such as where important witnesses are unavailable to testify or are outside the parties' control and the court's subpoena power. There can also be good strategic reasons to use deposition testimony in lieu of live testimony, such as avoiding or limiting cross examination.

The key is to carefully select the excerpts used at trial. They should generally be brief and to the point, but they cannot be presented without context. Some introductory testimony is usually a good idea.

Jury research shows that, if counsel chooses to use deposition testimony, it should "consider using videotapes of adverse witnesses, especially those who appear nervous, hesitant, or argumentative, since the videotape tends to show these negative characteristics effectively. Depositions of favorable witnesses are usually more effectively presented in court by reading the deposition."[2]

1. U.S. Dept. of Labor, Presenting Effective Presentations with Visual Aids, available at http://www.osha.gov/doc/outreachtraining/htmlfiles/traintec.html.

2. Thomas A. Mauet, "Trial Techniques" 163 (Aspen, 2007) (7th ed.).