International Association of Defense Counsel

Trial Academy

Direct Talk About Direct Examinations

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Direct examinations of friendly or at least neutral witnesses are far from the most glamorous part of trial. The performing lawyer is the star of the show when giving opening statements and closing arguments, and when cross examining hostile witnesses. These activities tend to dominate the lawyer's thinking, and along with trial briefs and jury instructions they tend to take up the bulk of the time and angst during final trial preparation. In direct examinations, however, the attention of the courtroom should be focused primarily on the witness. Direct examinations can be an afterthought: ask the witness's name and address, then keep saying "What happened next?"

Indeed, in this writer's opinion, it *is* relatively easy to do a direct examination, if one is satisfied with mediocrity. Excellence, however, requires work and careful thought, in direct examinations as in everything else. This article will suggest some ideas directed toward achieving excellence in direct examinations.

I. CASTING YOUR WITNESSES

A number of metaphors can be used for the role of the trial lawyer, including general, ship's captain and surgeon. My own favorite depicts the trial lawyer as the director of a movie, in which he or she also plays a part and adapted the script from another medium (i.e., reality). An important part of this director's role is the selection of the cast. Obviously the trial lawyer is limited to some degree by the facts: if there was only one eyewitness to an important fact, that person will be your witness no matter how inarticulate or unappealing. Often, however, the trial lawyer *can* control which "actors" tell the story, and when casting is possible it is extremely important to do it well.

Suppose, for example, that you are defending a manufacturer in a major product liability case. The facts about the development, testing and marketing of the product extend over a period of years, and no one person knows them all. Indeed, it may be that no one currently with the company knows much about any of them. This is not an obstacle to telling your story. It is, indeed, a creative opportunity.

What do you do? You interview the most knowledgeable people in the company concerning this product. You are, in essence, auditioning them as possible spokespeople, gauging their intelligence, ability to articulate, toughness, and human warmth. You measure them against the image you think would be best in this role for this particular case, whether you are looking for a grandmother, or a Biblical prophet, or a German engineer, or whatever suits the need. You make the best selection available, which obviously has to be someone with sufficient credentials and experience to be credible in the role. Then you prepare them intensely, going over all of the documents, teaching them the product history and training them in the themes of the case and how to handle both direct and cross examination.

Similar casting discretion exists in the retention of expert witnesses, and in the selection of which fact witness to use when several are available. Sometimes you will be stuck with Jean Claude van Damme, but wherever possible, arrange it so you're working with de Niro.

II. PREPARING YOUR WITNESSES

The process of preparing a witness is critical to the success of a direct examination. This is not only because of the substance of what the witness learns during witness preparation. It is also because the process builds your relationship with the

witness, and the relationship of the witness to the trial lawyer is fundamental to the success of the witness's performance. The jury will perceive, consciously or unconsciously, whether the witness is nervous, whether the witness is uncomfortable, whether the witness likes or dislikes the lawyers asking the questions, and many other unspoken cues that will affect whether the jurors listen to and believe the witness. The witness should like and trust you as the trial lawyer. That relationship is usually built during the preparation process.

You will typically want your significant witnesses to understand a lot about the case. What are your themes? Why are these witnesses being called, and where do they fit into the overall story you are presenting? What will the jurors already have heard, and what will they hear later?

It is important to give your witnesses a detailed and physical feel for what the process will be like, to minimize nerve-wracking surprises at the time of trial. If possible, show the witnesses the courtroom in advance and do a "dry run" of the process of parking, finding the courtroom, walking to the stand, taking the oath, using the trial presentation technology and so forth. The more the witness is familiar with the process by the time of trial, the more confident and controlled the witness is likely to appear. Make sure your significant witnesses get lots of sleep, don't have to rush, and save the alcohol indulgence for the end of trial. (This last advice is even more important for trial lawyers.)

Different trial lawyers have different philosophies on the extent they rehearse their witnesses during trial preparation. Some practice every question and answer repeatedly, while some never rehearse for fear of sounding, well, rehearsed. The best

course is probably to adjust your style based on the needs of the individual witness. A sharp, confident witness may need little actual rehearsal, although all witnesses need preparation. A witness who is inexperienced and feeling very insecure about the idea of testifying may benefit by a detailed rehearsal of both direct and anticipated cross examination. As with so many things, the trial lawyer must make these judgments instinctively and on the fly.

Be sure, during your preparation session, to ask the witnesses if they have any questions for you and if anything is bothering them about the idea of testifying.. Sometimes witnesses agonize over fears that would never occur to lawyers, like whether their lawyer will be allowed in the courtroom or whether they will go to jail if something goes wrong in their testimony. These phantoms can be easily dispelled, but you need to ask in order to find out what they are.

Finally, remember that a relationship goes two ways. Be sensitive to your own emotions concerning your witnesses. You should feel concern for them and you should like them. If you do, your direct examinations will be more effective.

III. TELLING YOUR STORY

You have cast the best witnesses possible, and you have prepared them well. It is now time to conduct your direct examinations. What do you do?

Always remember that you are telling a story. You must be clear, and you will be helped immeasurably if you entertain. Today's juries have short attention spans, and are used to the remarkably abbreviated trials that they see on television. You mustn't bore them, and nothing is more boring than an examination that wanders along without any seeming relevance to the case. The jurors should never be in doubt about what point you

are trying to make. Once you've outlined your direct examination, read it over from the perspective of a juror and ask yourself if it is always clear what you are driving at.

Clarity and direction are foiled if your adversary can interrupt or even truncate your examination with successful objections. Novice trial lawyers need to master the rules of evidence so they instinctively avoid the traps they contain. In particular, the concept of foundation often eludes and frustrates the rookie. It is mainly a matter of common sense. Witnesses are generally supposed to testify only to matters where they have direct knowledge or expert opinion, and so courts require that before they testify to certain facts or opinions, there must be foundation laid to show that they have the requisite ability to observe or opine.

If your adversary makes a successful objection for lack of foundation, you must be flexible enough to leave your outline and lay the foundation. This might consist of a series of questions about ability to observe, like "Where were you standing in relation to the accident?" or "Was anything blocking your view?" Or it might consist of a series of questions directed to shoring up an expert's qualifications, like "Have you covered this very issue in the classes you have taught?" or "How did you personally verify the numbers you used in making this calculation?" If you can't think of anything else, ask the witness to answer yes or no to whether he knows what you want him to testify about, and then ask how he knows. Better yet, plan your examinations so you lay the necessary foundation for all testimony without any objections being made.

It is often said that you should never ask a question on cross examination to which you don't know what the answer will be. Like most such rules, this one contains much truth but is subject to exceptions. Indeed, in the author's view, the rule would be better

phrased if it read, never ask a question on cross examination unless you are prepared for whatever answer you get. As a former partner of the author's also pointed out, the rule really holds more true for direct examination than cross examination. If a hostile witness gives an unfortunate answer, you can attack the testimony through impeachment or argument. If the unfortunate answer comes from your own witness, whose credibility you are working so hard to establish, you may be stuck with it. Thus it is a very risky thing, nearly always to be avoided, to ask your own witness during direct examination a question that just came into your head and is outside the scope of your preparation of the witness. If it is allowed in your jurisdiction (and sometimes it isn't), you can cover this point with your witness during a break in the testimony. Otherwise, it is probably best to leave it alone.

The best direct examinations are conversations in which both the lawyer and the witness are interested participants. When you are engaged in such a conversation, you don't slavishly follow a written outline. You look at the person to whom you are speaking, and you react to what she is saying with your facial expression and your tone of voice. You listen to the person, and you allow what she says and how she says it to affect your next question. She does the same for you. Such spirited conversations are fun to listen to, and a listener may actually resent someone who rudely interrupts the exchange, for example an opposing attorney making objections. It is the learned technique of the trial lawyer that enables you to conduct this type of interesting and entertaining conversation in the context of a carefully outlined direct examination, in which you know at all times where you are going and you are constantly steering the discussion accordingly without seeming to do so.

IV. INOCULATING AGAINST CROSS EXAMINATION

The clearest and most convincing direct examination can be destroyed by an effective cross examination. Indeed, sometimes the damage is worse when the witness has been particularly effective on direct, because the contrast in the witness's demeanor can be so stark. Thus no direct examination can be considered successful unless the witness has been properly inoculated against cross examination.

It can be helpful to speak frankly with your witness about the importance of demeanor. A witness who appears earnest and confident can do remarkably well on cross examination even while making seemingly harmful admissions, while a witness who appears guilty, evasive or scared can do poorly in the eyes of the jury even if nothing of particular importance is elicited by the cross examiner. It can be especially damaging if a witness who follows all your suggestions on direct examination—look the questioner in the eye, be confident and forthright, don't evade—suddenly forgets them all and starts sweating and shifting his eyes like Raskolnikov before the cross examiner asks a question. Gentle, practical advice during witness preparation can help the witness stay calm and keep a consistent demeanor.

To prepare your witness for cross, of course, you will need to give considerable thought to the questions your adversary is likely to ask. This will be a helpful exercise in all aspects of your trial preparation. While you might want to minimize rehearsal of the direct with some witnesses, to avoid having the witness look coached, a detailed rehearsal of cross examination is even more important. If your witness tells you when all is over that your practice cross was harder on the witness than the real one, you will know you have done your job.

V. CONCLUSION

The last words are the most important, and apply not only to direct examination but to all phases of trial. No matter what disaster may befall, no one should ever see you sweat. You project the demeanor you wish, you act in total control, and afterward you warmly tell your witness how well everything went. Unless, of course, your witness is the person with settlement authority, in which case your professional obligations may compel a bit more candor.