This Week's Feature
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Top 10 Things to Know About Persuasive Direct Examinations

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Direct examination is art, not science. There are few rules ("no leading" and "first-hand knowledge") and even these are rarely absolute. But direct examination is probably the most important part of most cases, because it is your chance to tell your client's story to the judge or jury. And in addition to being important, direct examinations are hard—very hard. That is because we can only tell stories in court that are true (no matter how much sometimes we wish the truth was different) and because their format – Question and Answer—is not a common or even intuitive way to tell a good story.

The ideas that follow come from several sources—mostly experience and study—and not much of it is strictly original, but applying these ideas should help you become a better trial lawyer, no matter what kind of cases you handle.

1. Why Direct Exams Are So Important, and So Hard

First, a short story I heard a long time ago. It seems there was a young lawyer on his way to court, struggling to balance a stack of case books and treatises in his arms as he worked his way up the courthouse steps. An older lawyer saw him and observed, "Son, you need a witness." The moral of that story is, of course, that often we cannot win a case with law books; we win by putting on evidence that compels the trier of fact to accept the rightness of our client's cause—its side of the story. Even in a document-intensive case, we need witnesses to tell our client's story. It may be our client's story, but it's our job as lawyers to put the evidence together in a way that persuades the court or jury that our side deserves to win. In trial, we do that mostly through direct examination.

Direct examinations are important because they are the only way to tell our client's story and thereby persuade the trier of fact of the rightness of our client's position. We can craft tightly worded affidavits to support or overcome a summary judgment motion, but those are tossed out once the case gets into the courtroom. We can make great opening statements and closing arguments, but judges tell the juries that those are "not evidence" and most don't even let jurors take notes during opening or closing. Direct exam is where our client's side of the story comes out.

Direct examinations are hard, because they are not natural ways of telling stories. Most stories are told in a narrative. But direct examination requires that we tell a story using a dialog. Plato and Socrates were good at this, but most of us have to work at it pretty hard. We have to ask the questions that will allow the witness to tell our client's story. So the challenge is figuring out how to tell a good story in an artificial Q and A structure.

Okay, direct examinations are hard and they are important. So how do we do them well?

2. Tell a Good Story

We all remember good stories. Greek myths and plays. Aesop's fables. Shakespearean plays. Grimm's fairy tales. Old Testament stories. New Testament parables. John Grisham novels. These stories stay with us. We remember them. They are good stories because they ring true; they tell us something about the human condition, something that rings true to us.

A good story will resonate with your audience, whether judge or jury. It is hard in a commercial case to craft and tell a good story, but it is just as critical in a commercial case, as it is in a tort case. A good story has to be believable, make sense and fit the audience's preexisting attitudes and beliefs. It has to fit in with what your audience intuitively believes. It may be true, but if it does not fit (or overcome) your audience's pre-existing beliefs, it won't be either remembered or accepted as truth, and it won't persuade, which is what trial advocacy is all about.

3. Make Your Witness's Story Fit Your Case Theme

We all know that every case needs a theme—words that will stick with the trier of fact and provide a framework for the story that you are telling. It might be about risks, or consequences, or personal responsibility or getting what someone deserves, or about not being blamed for something your client did not do, but there has to be a theme.

So, when planning a direct examination, know why you are calling the witness and how she fits into the case theme. If she does not, don't call the witness. Be prepared to be flexible and drop witnesses based on how the trial is going.

4. Prepare by Creating a Summary of What the Witness Is Supposed to Say and Build from That

Organize for effect—probably chronological but consider other alternatives. Most stories are told in the order in which the events happened. That makes it easier to follow and remember. It also allows lawyers who get lost in their examination outlines to ask the bail-out question, "What happened next?"

Instead of writing out questions, write out a short summary of each witness's testimony—hopefully just a paragraph or two. Use "story-boards" like a movie director. Plan out each "scene" in your case presentation, with a very short version of what the witness is saying in each scene. Again, you are telling a story. Instead of writing out *questions*, write out the *answers* you want to hear (consistent with the truth, of course). You should be able to think of and ask questions that will elicit the answers you want.

Keep your examination focused on the good stuff. Cull out the irrelevant. Ask yourself why you need the witness to say what the question demands as an answer. If you are not going to remind the judge or jury about what the witness said in your closing argument, or use the testimony to set up more important testimony, then you probably can dump that part of your examination.

Dealing with weaknesses or problems: conventional wisdom is to bring them out during direct examination. That is fine, and usually the right decision, but don't let dealing with weaknesses or bad facts disrupt your flow or become a distraction. If your witness has a problem that requires a lot of explanation during direct examination, consider a different witness.

5. Start Strong

Most people—even lawyers—don't walk up to a stranger at a party or meeting and say, "state your name." So why do we do this in trials? Instead, tell the jury or judge at the beginning who the witness is, why he is on the stand, and what he has to say. I like to start an examination with something like, "Would you please tell the jury your name [or, who you are] and why you are here?" The witness can answer, "My name is John Smith. I am the vice president of manufacturing for Acme Widget Corporation, and I negotiated the contract the plaintiff says we breached." The judge or jury knows right away who the witness is and why it should pay attention.

Establish the factors of credibility early and reinforce them often. Establish that the witness knows what he is talking about ("I was there….") and that he knows what he is talking about. Make sure that his story stands up to scrutiny, makes sense and feels right. Make sure the judge or jury has plenty of opportunity, as early in the examination as possible, to get these messages.

6. Make the Story Immediate—Use Present Tense as Much as Possible to Put the Court and Jury at the Scene

Jim McElhaney wrote a great article about this in a recent *ABA Magazine*. Use the present tense as much as possible to help put the trier of fact in your client's situation, the better to understand what happened from his point of view. A judge or jury who sees the facts from your client's point of view is more likely to accept your side's story and rule in your favor.

Put your doctor in the operating room and ask him who *is* present; what *is* happening; what he *is* seeing; what *is* he doing to try to save the patient. Put the CEO in the board meeting and ask the witness what she *is* saying, and why, and how the the person on the other side of the negotiation *is* reacting. Put the driver in the car and ask her what she *is* seeing, and what she *is* doing to try to avoid the collision. Not "what happened," but "what is happening."

Making it immediate makes it more likely that the jury will put itself in the "scene." That builds rapport with the jury and helps it connect with—and be persuaded by—your story.

7. A Few Thoughts on Language and Technique

Use real words, not lawyer speak, and English/Germanic words, not Latin derivatives. Use "ask," not "request"; "before," not "prior to"; "after, not "subsequent to." You get the idea. Pretend you are not in a courtroom trying to sound like a lawyer, but rather a real person having a conversation with another real person. The jurors will like you and your witness better if you talk like they do.

Ask the sort of questions you would ask someone if you just met them at a convention or party. Keep the questions short so the judge or jury can focus on the witness, not on you. Your witness, not you, is the key to the jury accepting the truth and rightness of your client's story, so give the witness the chance to tell his story in his words, not just agreeing with yours.

Don't lead your witness on direct—at least not on anything important—not just because it will draw an objection, but because it tells the judge or jury that your witness is not credible, in that he doesn't know what he's talking about and needs you to speak for him. Credible, knowledgeable and reliable witnesses don't need someone else to tell their story for them.

Stand where the judge or jury can see and hear everything. This sounds too basic to mention, but you'd be surprised how many experienced trial lawyers manage to stand where the judge or jury can't see the witness or an important exhibit.

Get the witness moving around, if possible, especially if he's going to be on the stand for a long time. Try to use some sort of blow-up, chart, photograph, or just about anything that will give you an excuse to bring your witness off the stand to talk to the court or jury from a different perspective. This helps re-set the scene every now and then, and can help emphasize a part of the witness's testimony that is delivered from the new location. It might also wake the judge or jurors.

8. Using Visuals and Other Aids to Reinforce the Audience's Absorption and Retention

People have different learning styles and many retain more of what they see than what they hear. We are all used to multi-media presentations that incorporate words, sound and visual images to keep the audience's attention. Jurors and even judges today are used to getting information from multiple screens,

with audio, video and text, all at the same time. CLE presenters and college professors use PowerPoint presentations, hopefully with sound and motion. At a minimum, jurors and even trial judges expect this.

Preparation and smoothness are vital. Nothing will kill your skillful presentation of key documents during a critical part of a direct examination faster than technology that doesn't work. Be uber-prepared. Rehearse again and again so you know exactly how to make things happen when and how you want them to. Have a backup that can be brought online in a matter of seconds if something happens to your primary. Nobody jumps out of an airplane without a backup parachute.

Consider mixing your media between high and low tech. A judge once smiled when my opponent responded to my PowerPoint presentation with a "paper point" presentation, which consisted of copies of key documents (highlighted of course). In trial, blow up key documents on old-fashioned boards. You (or, better, your witness) can highlight them or write on them, and when you are done with them, you can leave them lying around in the jury's view until the other side notices and makes you put them away.

Make sure your documents are legible. If it's hard to read, it won't be remembered. If your opponent produces bad copies in discovery, don't wait until a few weeks before trial to figure that out and request better ones.

9. End on a High Note

Have some good question (to which there can be no legitimate objection) that will elicit a good answer, something you want the trier of fact to remember, and then STOP. Be alert during your direct examination, and don't be afraid to skip to that high-note finish earlier in your examination if you sense the judge/jury has had enough.

10. Experts—Special Issues

How to start an expert's direct examination. In my mind, start the expert's examination the same as you do with a fact witness; by establishing who he is and why he is on the stand, and what he brings to the courtroom. ("My name is Erik Linhart, Ph.D.; I am an economist, and I have been asked to give the court and jury my opinion as to why the plaintiff went out of business.")

Qualifications. Don't belabor them, but do enough to establish that the expert really is an expert. Consider calling an expert that is really an expert in the subject matter, not just a professional witness, although that can require a lot of care and effort teaching the expert how to testify. Never accept the other side's offer to stipulate as to the expert's qualifications; that takes away your chance to build up your witness's credibility with the trier of fact.

Start with the opinions, then back up with how the witness got there, or vice versa. Different lawyers have different ideas about this. Some like to have the expert describe what he did, what he reviewed, and then what conclusions were drawn and why. Some like to start with a statement of the opinions and then have the witness explain how she reached the opinion. I have done it both ways and can't say that one way works better than the other.

One hybrid approach I like is to start with the "who I am and why am I here" at the beginning, and have the expert say the opinion right up front: "I am Dr. Linhart, and I am here to explain why I believe that the plaintiff went out of business because of the bad business decisions it made, not because of anything the defendant did." Then launch into an explanation of what the expert did to reach the opinion he reached. The benefit of this approach is to suggest to the jury that the expert did not have any particular opinion at the start of the engagement, but that he was given a lot of material to review, and having done his research and investigation as an expert in his field, he reached the opinion he is giving.

Finish—if you can—by restating the expert's opinions. This will require some leeway from the judge, so know your audience before you put your examination together, but nothing beats a good restatement of the opinion to end the expert's direct examination.

11. Bonus: How to Get Good at Direct Examination

Do them, of course. Take every opportunity, no matter how seemingly small, to get into court and put a witness on the stand.

Watch and listen to others critically. As you listen, ask yourself what the lawyer is doing and why. Ask yourself whether you would do it differently, and why. If you can't get away to watch trials live, read trial transcripts, again critically.

Read articles on trial practice, like Jim McElhaney's articles in each month's *ABA Journal* or articles by different authors in the ABA's *Litigation* magazine. Read lawyer books, like *To Kill a Mockingbird* or *Inherit the Wind* or Scott Turow novels. Watch lawyer movies like *My Cousin Vinny*. Watch the second half of *Law and Order* shows to see what a crisp three-minute direct examination sounds like.

Finally, read good stories. Ask yourself why this story is good, what is says about the human condition, what is says to you. You may learn how to help your witness tell a good story the next time you are putting someone on the stand.

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