3. DIRECT EXAMINATION

Common Mistakes on Direct Examination

By Ben Rubinowitz and Evan Torgan

While many trial lawyers focus on the excitement and challenge of a strong cross examination, these same lawyers often overlook the importance of a strong direct examination. While it is true that cross can be exciting, it is also true that a powerful direct can win the case. Avoiding simple mistakes on direct examination will unquestionably strengthen your position and, at the same time, help you achieve the verdict you want.

Listen to the Answer

Too often trial lawyers are bound to their notes during direct. It is not that these lawyers are unprepared. Quite the contrary: these lawyers have, unquestionably, rehearsed the testimony with the witness and have prepared incessantly. The trial mantra "prepare, prepare, prepare" is something they have done well. The problem is that these same lawyers read their questions to the witness, forget to listen to the witness' answers and assume that they have received the same answer as they had during preparation. A classic example of this mistake - not listening - is demonstrated by the following questions asked by the over-prepared, inattentive lawyer who fails to listen:

Q: Where do you live?

A: Three children.

Q: How old are you?

A: 21, 15 and 8.

Q: How old are your children?

A: It happened on January 1, 2010.

While this is a gross example of the "non-listening" trial lawyer, more common examples occur during virtually every trial:

Q: Describe the traffic conditions?

A: Traffic was good.

Q: What happened next?

The failure by the examining attorney to continually evaluate the sufficiency of the answer leads to disaster. Here, there is no explanation of the word "good." Had the attorney been listening to the insufficient answer he could have easily solved the problem by following up with appropriate questions such as:

Q: Tell us what you mean by "good" or

Q: Describe in more detail what the traffic conditions were at that time.

Indeed, often times what appears to be a sufficient answer is, on reflection, insufficient:

Q: Describe the man's height?

A: He was tall.

Here, at first blush, the answer might seen appropriate. However, it is unclear what the witness himself means by the word "tall." Follow-up in this scenario is

mandatory and the lack of detail is easily cured:

Q: Tell us what you mean by “tall.”

The point is that, to be successful, the trial lawyer must listen to the answer and continually evaluate the sufficiency of the response given in Court. Reading the next question to yourself as the witness is answering the previous one is also a road map for disaster. If the answer has not specifically elucidated the point to the trier of fact, additional questions must be put to the witness at that time to ensure that there is no ambiguity.

Simplifying The Testimony

Closely related to the failure to listen is the failure to simplify the testimony to the trier of fact. Too often, professional witnesses and police witnesses speak their own language. Lawyers fall into this same trap by using “legalese” either to try to sound important or because they have become so familiar with certain legal language that it is second nature to them, even though it may well be foreign to the jury.

Imagine the following scenario in which a straight forward question is put to a police witness:

Q: Tell us exactly what you saw on June 12, 2010 at 3:30 p.m.?

A: I saw the subject approach the complainant with an instrument in his hand.

Here, the answer is clear as mud. Needless to say, simplification and follow-up are mandatory. The failure to simplify the words “subject” “complainant” and “instrument”

could prove fatal to the outcome of the case. Consider a similar scenario with a physician:

Q: Doctor, describe the injury to the patient's leg?

A: He suffered a comminuted fracture to the distal femur.

Here, the failure to reduce the "medicalese" to common understandable words will prove fatal to the presentation of the severity of the injury. Similarly, imagine the scenario in which a lawyer uses words fully familiar to himself during the questioning of a witness, but words which sound down right silly to jurors:

Q: Had you executed the matter prior to the time in which you were deposed?

To jurors, this poorly phrased question might be asking about a death sentence from someone who lost her crown. Needless to say, the failure to simplify and clarify serve only to weaken the presentation of appropriate direct testimony.

Emphasize Key Points

In any direct examination, there will come a time when an essential or key point must be brought out. While an attorney should never move to the next subject area until he has made certain that he has brought out sufficient factual material to present a clear and compelling argument on summation, the failure to emphasize essential points will lessen the chances of success. There is a tendency on direct examination to move the story along too fast by asking the simple questions, such as "What happened next?". The problem with using this question and racing through direct is that it fails to emphasize and

reinforce the key points that are essential for summation. Put simply, repetition wins cases.

Consider the following example in which a lawyer, in bringing out the nature of the injuries suffered by the plaintiff, moved the testimony along too quickly:

Q: What happened next?

A: As I was crossing the street, the bus struck me.

Q: What happened next?

A: I was knocked down and I was taken to the hospital.

Q: What happened at the hospital?

Here, appropriate emphasis on a key point is entirely missing. The better approach is to frame the crucial point in time and emphasize the key points by using those parts of the answer that should be highlighted:

Q: What happened next?

A: As I was crossing the street the bus struck me.

Q: Where were you when the bus struck you?

Q: What part of your body did the bus strike?

Q: Tell us, step by step, what happened to you as the bus struck you?

Q: How did you feel when you were struck?

Q: How did you feel immediately after the bus struck you?

Q: Describe the pain you felt at that time?

Clearly, this series of questions, focusing on a limited point in time, paints a far more graphic picture for the trier of fact.

Transitions

Another technique to draw the jury's attention to the importance of the next subject area to be discussed is the appropriate use of transitions. Phrases such as "Did there come a time that (something happened)" work; however, the language is awkward. A portable technique that works in many situations is to use the "day, time and place" formula. Direct the witness' attention to two of the three words in the formula and you are well on your way to clarity:

Q: Let me direct your attention to June 12, 2010 (date) at 3:30 pm (time). Where were you? or

Q: Let me direct your attention to Bellevue Hospital (place) June 12, 2010 (date). What time did you arrive?

Transitions do not have to be formulaic. They do, however, have to focus the trier of fact's attention on something of significance. The beauty of using transitions is that they allow for immediate direction and clarification to both the jury and the witness:

Q: Let me direct your attention to the points in time when you were on the ground after being struck by the bus. How did you feel?

Q: What did you see?

Q: Tell us what you did at that time?

Q: Tell us what was done for you at that time?

Transitions are nothing more than directional guidance to both the witness and the trier of fact. Questions that begin with the following words offer such guidance:

Q: Let me direct your attention to (the next subject area)

Q: Calling your attention to....(a point in time)

Q: Focusing your attention on (a specific event, part of a contact, page, line etc.)

Successful use of transitions allows for immediate focus and removes ambiguity from the line of questioning. Conversely, the failure to use transitions serves to create confusion.

Conclusion

Whereas a successful cross-examination shines a bright spotlight on the questioner, an artful direct examination causes the skillful litigator to recede into the background while the witness occupies the attention of the jury. Of course, the witness cannot provide compelling direct testimony without a well orchestrated series of questions: one that recognizes when answers require further elaboration, ensures that the language used is easily understandable, enables the story to flow in a logical and comprehensible fashion, and accentuates the vital points in the presentation.

By simply staying in the moment and listening carefully to the witness providing testimony on direct examination, the savvy litigator directs his witness, and ultimately his

case, into the light most favorable to the trier of fact.

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DIRECT EXAMINATIONS

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A. INTRODUCTION TO DIRECT EXAMINATION

Most important part of case
Most difficult
Only segment of trial where your success depends on a team effort – you often don't get to pick your teammates

B. GOALS

Introduce your client and direct case to the jury
Lay out and sell your prima Facie case to the jury
Establish both your credibility and that of your case to the jury
Give life to your opening statement
Do damage control in anticipation of cross examination or lay traps for your adversary to fall into
Lay appropriate foundations for physical and documentary evidence
In the appropriate case, undermine and lay bare your adversary's case

C. PREPARATION OF WITNESSES

Initial preparation by the attorney including:

a) digest all transcripts
b) accumulate, read and organize physical and documentary evidence
c) research and identify proper foundations for admission of evidence
d) outline the elements of your prima facie case as well as those of the defenses arrayed against you-pattern Jury Instructions are very helpful
e) make an extra copy of all transcripts and exhibits to be used with each witness to give to the witness and insist that they are read.
f) outline the direct and potential pitfalls and inconsistencies in a logical order and cross reference to depositions and exhibits

Meet with the witnesses and meet again and again over a period of weeks.

Begin with a general outline of issues, prima facie case, defenses and the procedure to be followed. Continually refine the discussion and become more focused to the point of practice directs and cross examinations. Never write out the actual questions and regularly alter the order and language so as to avoid a "rehearsed feeling, The witness should readily acknowledge meeting with counsel and being aware of questions ahead of time when asked on cross, answer "Of course" is the best response.

Educate witnesses on every detail including what the courtroom looks like; who sits where; where you will be during the direct; how they should dress; what jewelry they should or should not wear; who they should make eye contact with and when; who they should address their answers to; what to do in the event of objections; the volume of their voices; outline the necessary evidentiary questions which will be asked to qualify or authenticate every exhibit to be used with the witness - no surprises allowed here.

Review the hearsay rule - How the witness phrases his or her answer may avoid objections. i.e., avoid attributing facts to a hearsay source and force your adversary to voice a timely objection as to a missing foundation. Have a "Plan B" for when your adversary is on the ball and a timely objection is sustained. The silence in the courtroom when you failed to anticipate the need far a Plan B is quite deafening. The fear of that silence has led to many late nights of preparation.

Review discovery responses far all parties and use them to supplement your outlines. Then review them with the witnesses as necessary. Be particularly careful with responses verified or sworn to by the witness such as pleadings, answers to interrogatories, depositions, affidavits, etc.

Advise the witness on the importance of truth telling and the potential for disaster if they are caught in a lie.

D. PRESENTATION OF EVIDENCE
and
E. TECHNIQUES IN QUESTIONING

Develop empathy for your witness right up front -"Ever been a witness before?
"Nervous?"
Have client's family in courtroom and introduce them

Keep it simple and in a logical order for ease of understanding. Have the witnesses use language that is natural to them.

All significant exhibits should be blown up and displayed so as to be visible to all – or – where necessary, circulated to the jury, with a copy for each juror so as not to interfere with your presentation. Use a laser pointer.

Control the room.

Remind witnesses to keep their voice up. Be prepared for jurors who fall asleep and when they do, calculate whether or not you're better off!

Begin and end on a high note. Avoid ending on a sustained objection.

Be efficient and offer as smooth a presentation as possible. Maintain a reasonable pace and have exhibits pre-numbed and marked for identification if the court will permit it. Have sufficient copies for your adversary and the court, as well each member of the

jury, where appropriate; hustle in distributing them. With the court's permission read the relevant portions of a document to the jury once it's admitted.

Don't share your laser pointer with your adversary. In vigorously representing your client, look for every possible advantage within the bounds of ethics and the law and seize it.

In describing damages, injuries, or losses, witnesses should be graphic and forthcoming, but credible. Avoid ANY exaggeration, overstatement or fluff that may in any way jeopardize the witnesses' credibility. Trust is everything. Nevertheless, the witness must understand it is their moment to shine and tell their story.

Ask experts about their fees on direct. Establish their foes as being customary and ordinary and non-contingent. Their credibility is their stock in trade. Did they ever do work for the adverse party, or another member of the industry associated with the adverse party, or opposing counsel?

Highlight favorable testimony with voice inflections. Avoid asking leading questions, except of preliminary matters or with inarticulate, or particularly old, young or hostile witnesses. Consider pressing the limits to see how far your adversary and the court will let you go. Once the line is set, don't challenge it.

Listen to the witness's answers from the juror’s perspective. Review where the answer may be unclear.

Anticipate likely questions on cross-examination and ask them yourself to demonstrate your case's credibility and the fact that you're not running away from the facts. Be careful not to go too far and educate your adversary unnecessarily. Be selective - don't open a door your adversary won't be able to open without your help.

F. ETHICAL CONSIDERATIONS

The lawyer's role is that of producer, director, casting and costume designer. The lawyer is not the script writer and must avoid the temptation to become one.

Your representation should be aggressive and zealous but remember that you will run into this adversary and judge again. Your reputation and license should never be jeopardized by crossing lines of ethical propriety.

DIRECT EXAMINATION

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I. DIRECT EXAMINATION

A. PREPARATION OF CLIENT STARTING POINTS
1. Review examination before trial
2. "Any questions"
3. Dress rehearsal
4. Basic ground rules
5. The whole truth and nothing but the truth
6. Spoke to attorney - yes I did

B. THINK LIKE THE CLIENT
1. Fear
2. Worry
3. Memory problems
4. I.Q.
5. Language Barrier
6. Possible use of videotape

C. NUTS & BOLTS - FIVE POINT CHECKLIST
1. Prima facie case
   - elements
   - PJI
   - recent caselaw
2. Order of proof
3. Order of questions
4. Listen to answers
5. Sequence of questions builds in language of answer

II. ROLE OF THE LAWYER

A. THINK LIKE A LAWYER
1. Look at witness
2. Have witness look at you
3. Simplify, simplify, simplify
4. Position in courtroom during direct - usually close to jury box
5. Some movement for emphasis

6. Be supportive - coach not master (nod head, show compassion)
7. Stand of side of lectern if possible
8. Keep control - ask witness to raise voice if needed - use transition phrases as guide posts
9. Move to re-open direct or redirect if needed

B. DRAMATIC FLAIR
(Think Like a Juror)
1. Humanize the client
   - background, family
   - "are you nervous"
2. Timing - pace - pauses
3. Choose emotional - graphic language in questions and answer
4. Voice raise, lower, silence
5. Catch phrases - easy to remember (use on summation)
6. Suggest corrections if obvious confusion (editor)
7. Methods to "cut-off" if needed

III. SPECIAL EFFECTS

A. USE OF DEMONSTRATIVE EVIDENCE
PURPOSE: HOLD A'ITENTION AND CLARIFY TESTING
1. Charts - simply
2. Models (test run)
3. Photographs
4. Blow-ups
5. Use of blackboard
   (make sure witnesses is prepared on this)
6. Slides
7. Proper evidentiary foundation
8. Meaningful usage

IV. DIRECT EXAM OF EXPERTS

A. PREPARATION
1. Team approach
2. Ask and listen
3. Provide detailed facts and information
4. Don't rush
5. Explain need for control in courtroom
6. Do your homework before you meet
7. Help me! - Input on questioning
8. Give expert make up of jury prior to testimony
9. Sound bite concept

B. USE OF DEMONSTRATIVE EVIDENCE BY EXPERT
   1. Let the expert do the teaching
   2. Remember jury vantage point

C. DIRECT EXAM OF EXPERT
   1. Highlight credentials
   2. Keep questions and answers as juror friendly as possible
   3. Don't be afraid to use emotional "power" words during expert testimony

V. MOTIONS IN LIMINE
   1. In the Interests of Justice -Relevance
   2. Discretion of trial court
   3. Motion limits proof to be admitted at trial
   4. Prejudicial effect outweighs probative value
   5. Criminal past
      - Irrelevant as remote in time
   6. Entries in hospital record
   7. Police report
   8. Scars - photographs
   9. Subsequent repairs
   10. Strategic concern - make motion prior to jury selection if possible