

## Direct Examination

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Everyone wants to open, cross and close. That is where all the drama, all of the excitement are right? Opening and closings are a good trial lawyer's happy place.

But ask any experienced trial lawyer and she will tell you that a powerful direct wins cases. More importantly, a good direct does two things that an opening and closing can't do, and that even the best cross typically never does:

1. It satisfies your burden of proof. It is the time when you get your evidence in front of your jury.
2. It builds value. I often tell clients a lawyer who is well prepared can prove 99% of case a without direct exams, but the 1% is the most important piece. The "so what" is answered with an effective direct examination.

So how do you ensure you accomplish those two things during your direct:

## Preparation

- 1) Prepare, prepare, prepare.
  - a. Know the facts of your case inside and out.
    - i. Must know the case better than anyone.
    - ii. Be organized and don't waste time.
      1. Jurors are away from their typical lives, and they want the case to move forward.
      2. They will appreciate a lawyer who is organized and moves the case forward.
    - iii. Know the problems with your case.
      1. "One thing we had to determine."
      2. Never "the defense will say."
      3. Have a plan to address the "warts."
      4. Starts in your opening statement.

2. Step one to preparation - Look at pattern jury instructions ("PJI").
  - a. This is a road map of what you must prove.
    - i. Looking at the PJI is one of the first you should do when preparing for a case.
      1. They can provide a roadmap for direct examination.
  - b. The basic purpose of direct exam is to establish the essential proof necessary to support your claim.
    - i. A direct examination should tell a story, but you have to be certain that story includes all of the necessary elements to win your case.
      1. Those elements can be found in the PJI.
      2. When you visit the jury instructions during your summation, you want to be able to point the jury exactly to testimony you elicited on direct exam, proving each and every element of the case.
      3. Talking about the elements of proof in an opening or summation does you no good if you did not present evidence to fulfill those elements during your proof.

3. Create a witness checklist.
  - a. Use the PJI to create trial checklist.
    - i. When preparing for direct exam, along with your question outline, prepare a proof checklist.
    - ii. List each and every element you have to prove with respect to liability and damages.
    - iii. Next to each element make a list of which witness or witnesses are going to provide that testimony.
      1. Ensure that you elicit that testimony from those particular witnesses.

4. Expect the unexpected.
  - a. No matter how much you prepare, there will be unanticipated testimony.
    - i. A good knowledge of the facts, as well as your overall roadmap, will allow you to respond appropriately and get your case back on track.
    - ii. Having a complete understanding of the facts, good and bad, and what you must prove will make a direct exam a much more enjoyable and effective exercise.

5. Understand the theme of your case.
  - a. Create a theme to guide your direct examinations – the theme of a case could be as simple as a one-sentence explanation of your theory.
    - i. It's a specific statement as to why you should win.
    - ii. Themes not only guide your trial, but they guide your proof that you elicit through direct exams.
    - iii. Themes start in jury selection. They grow in opening statements, and they conclude in your summation.
  - b. The cement that holds your theme together comes from direct examination.

## The Outline

6. Once you know your facts, the law, and your theme, prepare an outline.
  - a. What should your outline contain?
    - i. Open ended questions.
      1. No leading.
        - a. Young lawyers have a difficult time asking non-leading questions, especially when they feel pressured.
        - b. As a general rule of thumb, if in doubt begin questions with words such as "who, what, where, why, or how."

- b. Have goals on your checklist -- and get the witness there.
  - i. Have "answers."
  - ii. It is your job to elicit what information you need.
  
- c. Typically a chronological outline is easiest to follow, but not a hard rule.
  - i. Try to tell a story from start to finish without jumping around.
  - ii. Questions should follow the theme and order of your opening.
  - iii. Remember where this witness's examination fits in your roadmap.
    - 1. Be constantly aware of what other witnesses have said and what they are likely to say.
    - 2. Helps allow the use of effective hypotheticals.

- d. Smooth transitions between subjects.
  - i. Use the date, time and place formula.
  - ii. Let me direct your attention to January 1, 2017, at 2:30 p.m.
  - iii. Let me direct your attention to the few moments you were struck by the vehicle.
    - 1. This not only brings the jury's attention to a specific focus point in your story, it also may help get your witness focused and back on track.
    - 2. Don't be afraid to go out of order to follow flow if necessary.
    - 3. The worst thing to say, we will get to that.

7. Do not wed yourself to an outline.
  - a. Too often a natural instinct when nervous or stressed is to be bound to your notes during a direct.
  - a. The problem with this is that if you simply read question after question to the witness, you tend to forget to listen to the witness's answers.
    - i. You make the dangerous assumption that they'll provide the information you discussed during your preparation.
    - ii. Failure to continually evaluate a witness's answer to make sure that you elicited the necessary information can lead to at best embarrassment, and at worst a total disaster.
    - iii. Almost always had the attorney simply listened to the witness's answer before moving onto the next question, any problem could have been addressed with a very simple follow-up question.

## The Dress Rehearsals

8. How to puts checks on your proof list and get your witnesses to the finish line.
  - a. Meet with witnesses. Then meet again. Then meet again.
    - i. Educate your witnesses on every detail including:
      1. The set up of the court room.
      2. Who will sit where.
      3. Where you will be standing.
      4. What type of clothing they should wear.
      5. What jewelry to wear and not wear.
      6. When they should make eye contact with you or the jury.
      7. Who they should direct their answers to.
      8. What to do in the event of any objections.
      9. What exhibits you will show them.
    - ii. Your witnesses should never be surprised by what you or the defense attorney does.

- b. Explain their “role” to them.
  - i. They must create a relationship with the jury.
    - 1. They must understand the importance of building credibility.
    - 2. Discuss demeanor.
      - a. No Jekyll and Hyde.
    - 3. Focus on key juror(s) and right time.
      - a. Leaders and bowling pins.
    - 4. Talk to the jury, not just the lawyer.
      - a. Please explain to the jury...
    - 5. Prepare your witnesses for objections.
      - a. They are inevitable.
      - b. Make sure they know what it means so they do not become flustered or change a good answer.

- 6. Prepare for and anticipate cross.
  - a. Part of preparing a witness for direct examination includes preparation for cross.
  - b. Understanding your case’s vulnerabilities and likely theme of cross-examination can help you conduct that much better of a direct exam.
  - c. Address your cases warts head-on on direct exam.
    - i. Take the thunder away from cross-examination as much as possible.

- c. Meeting(s) should lead into practice runs.
  - i. This means conduct mock examinations!
    - 1. Helps ease nerves of both the witness and an inexperienced questioner.
    - 2. It ensures you and the witness are on the same page.
      - a. Make sure the witness knows the point of the question, not just the question itself.
      - b. On the stand should not be first time they hear the questions.
      - c. You never want to hear “I don’t understand.”
    - 3. To tell the story effectively, you and your witness have to both know your theme and have worked on presenting that theme well in advance.
    - 4. You have the responsibility to control the flow of the conversation, but always allow the witness to tell her story in a manner most natural to her.
      - a. An interesting conversation between the two of you will capture the jury’s attention.
      - b. This will not happen without preparation.

## The Use of Exhibits

- 9. Use Exhibits!
  - a. Pre-mark and pre-enter if possible.
    - i. This expedites the trial and shows the jury you are prepared.
    - ii. Also avoids lengthy argument or dismissing the jury to allow court to rule on admissibility of an exhibit.
  - b. Demonstrative exhibits are powerful.
    - i. A picture is truly worth a thousand words.
    - ii. Blow up your best photographs, charts, x-rays, MRIs.
      - 1. Aids the jury in understanding the witness testimony.
        - a. Especially helpful with expert testimony.
          - i. Dr. what we looking at?
    - iii. As with questions, trial should not be the first time a witness sees an exhibit.



## KISS

10. Strive for simplicity.
  - a. No legalese.
    - i. For example: you don't proceed through an entranceway, you walk through a door.
    - ii. You don't exit the vehicle, you get out of the car.
    - iii. You don't describe your observations, you tell us what you saw.
  - b. Use a conversational tone.
    - i. Be sure that you introduce your witness and her background sufficiently with personal information so the jury can feel acquainted with the witness.
    - ii. Tie in jury selection questionnaires wherever possible.
    - iii. Jurors will be more comfortable listening to a witness if some personal connection can be established, and they are more likely to give that witness the benefit of the doubt.

- i. As a lawyer trying a case, you may have been involved in a case for years and you know the facts, even technical ones, better than anyone.
  1. But always remember this is the first time the jurors will hear anything about your case.
  2. You must craft your direct examinations in such a way that the conversation you have with your witness can be digested and understood by an average high school graduate.

## Your Role

11. Basic tenet of direct – the witness is the star.
  - a. Consider where you stand.
    - i. Jury should be between you and the witness.
    - ii. Avoid becoming the center of attention if possible.
    - iii. You are just the director, the show is coming from the witness stand.
  - b. What are you doing when the witness is answering?
    - i. Not looking at the next question, or you are not listening!
    - ii. Gives the jury the impression that the answers are not important.

- c. You should be watching the jury. Not in a creepy way!
        - i. Don't forget the jury. Always be attentive to the jury.
        - ii. Watch the reactions to key evidence.
        - iii. If you are in a Court that allows note taking, pay attention to when jurors take notes.
          1. If you write something down, they will write it down.
        - iv. Make sure they can always see the exhibits and hear the evidence.
          1. Ask through the Judge, not directly.
          2. Shows you are considerate of their importance.

## Put the Good Stuff on Repeat

12. Loop your best proof (some call it tagging).
  - a. Emphasize key points. Then emphasize them again.
  - b. Repetition wins cases.
  - c. During every direct examination there will be certain points where you will elicit essential proof and information from the witness.
    - i. You should never move on to the next subject until you are certain you have elicited enough information to make a compelling argument during summation with respect to one of your elements of proof.
    - ii. But don't sell yourself short by stopping once you elicit a key piece of information once. Reuse your good answers. Loop them into your next question.

For example, you are taking the direct examination of your client, the plaintiff, in an accident where she was struck by a vehicle while crossing the street. At the point in time where a witness is at the intersection, beginning to cross the street, consider the following questions and answers:

- What happened next?
  - Answer: As I was crossing the street a car hit me.
- What happened next?
  - I was thrown into the air. I woke up a few moments later in the grass and I was taken to the hospital.
- What happened at the hospital?

At first glance, this may appear to be a perfectly effective way to tell the story of your client being struck by a vehicle. But think about how much more information you could elicit and reinforce for the jury if you simply dug a little deeper into those answers and then looped the responses back into the next question.

Consider this approach:

- What happened next?
  - I was thrown into the air. I woke up a few moments later in the grass and I was taken to the hospital.
- Where were you when the car struck you?
- What part of your body did the car strike?
- After the car struck you, what happened next?
- How did you feel when the car struck you?
- After the car struck you, were you in any pain?

What you are doing here is obvious, yet effective. You are taking every opportunity you can to remind the jury and drill into its head that everything it hears that witness describe is a direct result of that car striking her.

## The Finale

13. Finish Strong.
  - a. Remember primacy and recency.
    - i. Jurors have short attention spans.
    - ii. They will remember the first and last thing they heard.
      1. Maybe a few things in between.
        - a. Unless you looped it!
  - b. You want to conclude on a high note.
    - i. Something favorable to your case and hard to dispute.
      1. What do you miss about the old you?

## The Re-Direct

14. Often over looked, but one of the most important parts of an effective direct examination.
  - a. Re-direct examination is usually necessary.
    - i. Don't fail to rehabilitate your witness.
    - ii. If damage is done on cross, be ready to use re-direct for rehabilitation purposes.
    - iii. A few properly formed questions can undue an otherwise damaging cross-examination.
      1. Pay close attention during the cross-examination.
      2. Watch the jury.
        - a. Look for visual clues.
        - b. Did they write something down?
        - c. Did they nod their head?
      3. Hit the key "issues" and sit down.
        - a. Do not getting involved in a protracted re-direct and re-cross just to get the last word.
        - b. This aggravates the Court and bores the jury.