**DIRECT EXAM**

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You all have probably heard that "a trial is theater" – and to an extent, this is true. Especially with jury trials. But what does this mean, particularly to a trial lawyer who is facing the prospect of an upcoming trial? It means that your mindset must not only be about evidence and witnesses and exhibits, but you must place yourself in the role of a theater director whose job it is to plan the production, develop the storyline that encompasses all elements of your claim or defense and orchestrate the timing and sequence of witnesses and exhibits. It is within this framework that we consider the subject of our discussion today – Direct Examination of witnesses.

The first consideration is the sequence of the witnesses you intend to have testify in the direct portion of your case. The sequence should follow your storyline, with an introduction, a middle and an end. In other words, start out with a strong witness who can introduce the storyline of your case in a natural, logical way, and end with a strong witness who can wrap up your prima facie case and leave a positive, credible impression with the jury. Other necessary but weaker witnesses should be sandwiched in between. Selecting a witness who understands

[1] A nod is due to Fellows A. Roy DeCaro of Philadelphia, PA and Gerald A. Klein of Newport Beach, CA for use of some of their ideas in this piece.

the overall story of the case and who knows enough about the facts is ideal, and that choice will lend itself to a comfortable, intuitive introduction to the story of your case. In making this selection, consider credibility and self-interest – even though a party may have the most detailed knowledge of certain facts, if another witness who is disinterested in the case can also tell the story, that witness may be preferred due to their superior credibility. And speaking of credibility, building trust and credibility between yourself and the jury is critical. In a world where lawyers are denigrated and often see as TV hucksters, it is very important to use every available opportunity to build a trust relationship between yourself and the jury.

Now, for some specifics:

Utilize the basic tools of direct examination, which are open ended, non-leading questions that elicit a narrative response. To do that, begin your questions with words such as: Who. What, Where, When, How and sometimes Why. Using this simple format throughout direct examination will avoid leading questions, will elicit narrative responses and will allow you to keep up the tempo of your case. Tempo is very important because it creates a comfortable flow and avoids awkward pauses that distract the jury and the judge and departs from the seamless presentation of your storyline. My old mentor, John Snow, of Snow, Christensen & Martineau fame and an early Fellow of The College, was a stickler for tempo.

He avoided any break in the rhythm of the case that would make the Judge and Jury uncomfortable or distract their attention from the important details of the case and the testimony being presented. From the many cases I have tried, I have learned to respect the rhythm and the tempo of the case. It is important - but I digress.

To keep your examination flowing, it is also helpful to use the occasional transitional phrase. Examples include: “describe”, “explain”, “what happened next” or “did there come a time that”. The objective is to periodically jog your witness with these transitional phrases to keep the testimony flowing and stimulate further detail on a subject or cause a slight redirection if the witness gets off point. Using these phrases deftly allows you to shape and mold the testimony to fit your storyline while keeping up the tempo and maintaining the rapt attention of your fact finders.

Repetition and re-emphasis are also techniques that can be used to effect during direct examination. This is often referred to as “double direct” examination, and goes something like this:

Q: How did you feel after the accident?

A: I felt pain in my back with a knife-like pain shooting down my right leg.

Q. How much time elapsed from the accident until you felt this knife-like pain shooting down your right leg?

A: About two minutes.

You get the idea. Do not over-use this technique, but it can occasionally be an excellent tool to emphasize a point and etch it into the collective memory of the jury.

Another effective direct examination tool is the use of demonstrative evidence in connection with the testimonial evidence that you present. With the wide availability of digital tools currently installed in courtrooms, there is no reason not to share scene photos, contract terms, or drawings or photos of whatever object that is important to your case and is linked to the testimony of your witness. Remember that in today's society we get almost all our information from screens: cellphone, computers, iPads and television. Jurors will expect counsel to use screens to tell the story of the case – embrace this and do not disappoint.

It may be trite to say a picture is worth a thousand words, but it is true and using demonstrative exhibits can greatly aid in the jury's understanding of your case. For example, I once had a case that involved the question of whether a slurry tank in a mill designed to process and recover gold from crushed ore was functioning as designed and represented, or not. To demonstrate the problem

(which was awkward to explain to a lay jury), we had the plant engineer make a short vignette that demonstrated operation of the tank in question juxtaposed side-by-side with a similar tank that functioned properly. The little video worked perfectly and showed the jury exactly what the engineer was talking about when he criticized the operation of the slurry tank at issue. Moreover, the jury bought into it and seemed proud of the fact that they fully understood what the witnesses were talking about. Animations can explain manufacturing processes, chemical reactions, physiology and other abstract concepts that are very difficult to explain verbally. Seeing a process evolve and play out in real time can be crucial to a jury's understanding of key issues in a case. One important thing to consider when using demonstrative exhibits – particularly the electronic variety, is laying the proper foundation as a predicate to admitting the exhibit into evidence. Historically, a demonstrative exhibit was considered an exhibit that was used merely to illustrate the testimony of a witness. That simplistic approach has largely been abandoned with further analysis and the increasing sophistication of demonstrative exhibits that in fact impart information beyond the witness's testimony and add *real* evidence to the record. The basic rule is that proper foundation for an exhibit requires that it be authentic, reliable and relevant. However, some exhibits such as computer animations may require additional elements. A complete discussion of the subject is beyond the scope of this

presentation, but I refer you to the treatise of Thomas A. Mauet, Trial Techniques, pp. 185-186 (7th Ed. 2007; and, More than Words: Rethinking the Role of Modern Demonstrative Evidence, 52 Santa Clara L. Rev. 1 (2012).

Another aspect of direct examination that bears comment and discussion is the direct examination of expert witnesses. Remember that an expert is "a witness who is qualified as an expert by knowledge, skill, experience, training, or education [who] may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." URE 702(a). Note that the very definition of an expert witness defines someone who can help the jury to better understand the case, and that should be of utmost importance when you select an expert to assist you in educating a jury. Counsel often make the mistake of choosing the expert with the most impressive academic credentials instead of the witness who is qualified but also relatable, has "walked the walk" and who can engender the confidence of the jury and lead to a better understanding of the case. I learned this lesson the hard way in a case I tried many years ago against my friend Dick Burbidge. We both needed an expert in mortgage financing. I chose a Harvard educated fellow who had superb academic credentials and Dick chose a local mortgage broker educated at BYU who was a jovial fellow and who related to the jury. I paid heavily for my poor choice, but the experience indelibly etched

this lesson on my frontal lobe and I never made that mistake again. It is not the expert with the best academic credentials who wins, but the one that relates to the jury and sells her opinion.

After choosing your expert, you then need to prepare that person to testify. You need to thoroughly educate the expert on the facts of your case and then work on simplification and straight talk. Discourage your expert from over-using technical jargon, acronyms or arcane language. Make certain that your expert understands that the opinions given need to be explained in lay persons' terms. Finally, rehearse with your expert how you intend to present credentials and background facts in conjunction with the expert testimony. I like to do this by having the witness introduce herself and then explain to the jury what I have hired her to do in the case. Then I ask what she has done to prepare herself to be able to give that opinion, including education, training and practical experience. This can and should all be done in a very conversational manner, thus avoiding a boring recitation of credentials that will destroy the tempo of your case and distract the jury. Although one generally should not lead during direct examination, remember that leading questions are generally allowed respecting matters that are undisputed and preliminary. Thus, when setting up the opinion and providing background information you can occasionally lead your witness a bit to retain tempo and keep the jury's interest. Remember not to over-teach with your expert. It is not

necessary for the jury to know how to build an automobile just to understand why the brakes failed. Stay focused on what matters. And finally, if you have bad news or a disagreement between expert opinions, bring it out on direct and deal with it. For example:

Q: I understand that some experts may suggest that the brakes were under-designed on this vehicle – what do you say about that?

A: [Witness explains.]

Then if necessary, to draw the point out you can use the techniques and words we discussed earlier to provide focus and repetition.

Q: Why did you conclude there was no under-design?

A: [Witness explains.]

And so on. The idea of course is to be able to put your own spin on a controversial issue and face it up front, so it does not appear as though you were hiding or avoiding a sensitive point. In other words, anticipate cross-exam and steal the thunder by disarming the point on direct.

## SUMMARY

For effective direct examination, create your storyline, select and sequence your witnesses, keep the examination conversational and narrative and mind the

rhythm and tempo of your case. If you do this, you should keep the attention and focus of the jury, shape your case as desired and present your client's cause in the best light possible. Moreover, you will enjoy the presentation more and your stress level will abate – when the courtroom is happy, you will be too. Good Luck!