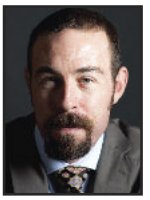


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Directing the direct when your witness is not an expert

Curiosity on direct examination can be the key to revealing the Perry Mason moment in a trial


Cooper

By Miles B. Cooper

Some time ago I was asked to help a lawyer with his first jury trial. He finished voir dire, opening, a cross-examination of a corporate witness under Evidence Code section 776. All were masterful, textbook. You could tell he practiced and studied. The next witness, late in the day, was a direct exam of a percipient. The defense lawyer, a veteran, quickly figured out the issue and pressed his advantage.

"Objection, leading."

"Sustained."

"Objection, leading."

"Sustained."

It continued for another few minutes until the day came to a close. We packed up and got in the car for the drive back.

"You're going to need to tell me how to do directs," he said. We spent the ride back talking about them.

Cross-examinations get the glory – Directs tell the story.

Almost every lawyer, and for that matter juror, craves the Perry Mason moment. In the movies they seem to always happen on cross. Jack Nicholson's Col. Nathan R. Jessup, who "God-damned right" ordered the "Code Red" in A Few Good Men. Lawyers strive for that crackle, that intensity. With a little effort, your directs can produce similar moments.

You must be curious

In fact, in the top right corner of every direct exam outline I prepare, those words appear in bold. Because the moment you lack curiosity, the moment it becomes a question-and-answer based off a prepared script, you will put the jury to sleep. Your witness should know what you plan to ask about but you must vary the questions and follow the paths that present themselves during an exam.

The direct exam is the time for the witness to tell the story. You provide the right questions to make that happen. With percipient witnesses, plaintiffs and cameo witnesses, your job is to get them talking. You want to try to get people who are unaccustomed to speaking in public to use word pictures. *Who*, *what*, *where*, *when* and *how* are the keys. Open-ended questions, yes, but that is not enough. "How were you feeling at that moment? Close your eyes and take us there. Describe what it smells like." You must pay attention and capitalize on the unscripted moments. The first few moments when that jovial fellow from last night's prep is now monosyllabic on the stand? Ask him if he's done this before, if he's nervous. The jurors will relate to someone who is as uncomfortable as they were during voir dire.

Vary the presentation

Nothing is duller than endless hours of someone talking at you (With apologies to Fidel Castro if he is reading this, Guinness world record for his speech notwithstanding).

Jurors share commonalities with elementary school attendees. They generally don't want to be there, and their attention span wanders. Before a witness takes the stand, you should figure out how you will be holding the jurors' attention. With a cameo, you should work with the witness beforehand to find some pictures, cards, trophies or mementos that help demonstrate the loss. Displaying them on the screen is good. But don't stop there. Pass the originals around the jury box. Give the jury a chance to see and touch the materials themselves. Doing a before versus after comparison? Have your co-counsel write the categories down on butcher block so the jury can see the juxtaposition of what your client could do before versus after. Mark it as an exhibit. While it will not go into the jury room, you can pick it up during closing, saying, "Remember John Smith when he was telling us about some of the changes in Joe's life?" The visual reminder of the testimony will help return the jurors to that moment.

Limit your time

Anyone who has used a focus group or conducted a federal or chess-clock trial knows that you can tell the story even if your time is short. Remember that even when you are in a courtroom without limitation. Focus on the key points with the witness. Much like a cross-exam, consider stopping if you've hit key points and a palpable moment occurs. Don't go through the entirety of your outline just because it is there. Watch the jury and listen to your co-counsel to get a sense of when to stop with a witness.

A direct connection?

My co-counsel listened throughout the ride home. The next day we were back in court. The witness was recalled to the stand. The direct was flawless, as was the rest of the trial. After a good verdict, we spoke with the jury. They told us they felt they knew our client and the harm he suffered. Not from the experts. Nor the cross-exams. But from the stories told by the client, his co-workers and friends during direct exams.

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