

Direct examination: Telling the story

Direct examination requires its own storyline sequence with a beginning, middle and end

By Christa Haggai Ramey

Direct examination is not exactly the sexiest part of the trial. But it is one of the most important parts. The direct examination is how you tell your client's story. Sure, the jury has some idea. They have participated in voir dire and heard your opening statement. But direct examination is typically where the facts unfold.

This is where you let the jury hear who did what and how that has impacted your client's life. This is also where you will either solidify or lose credibility with the jury. This is credibility you will need for your cross examinations during the defense's case. This is also credibility that you will certainly need during closing.

How you decide to present this evidence may change in each case. There are often obstacles that will get in your way. But – like any good story – you need a beginning, a middle and an end. This is true for your case-in-chief in general and for each direct examination individually.

I have seen and heard a lot of great storytellers in our profession in action. They all have something in common. They are authentically themselves as they elicit information from their clients. They all keep in mind their goal throughout the trial. How do we get justice for our clients? How do I let this story unfold so that the jury understands everything?

Witness preparation

Your client

Something bad happened to your client. That is why you are in trial! They are scared, hurt, and want to help. And they must have you to spend the time with them to guide them through this process. Throughout the life of the case, you should spend some time getting to know your client. You should go to their home. You should meet their family, their friends, and employer if necessary. The more you know about your client, the better position you are in to prepare him or her for testimony. What is more, the closer you are to your client, the better they will do in trial answering your questions. You have asked them these questions all along. The direct exam can just become a conversation.

Also remember to have them review their depositions several times before testifying. You do not want them to be impeached, even on a minor thing. Their deposition may have been taken a year or more before trial. Some things might not be the same now as they were then. Make sure you address any changes in your client's condition throughout litigation. This is not inconsistent testimony, it is a progression of an injury or illness (either better or worse).

Remember that testifying can be a very scary thing! Most people are not used to being in court or used to speaking in front of people they do not know. I have had clients clam up on the stand to the point where it was difficult to get them to communicate. You need to make sure that your client is as comfortable as possible while testifying, and preparation is the only way to make this happen.

Lay witnesses

You should have a purpose for each witness you are calling, including your lay witnesses. Are they necessary to prove your case? Some people are better at speaking and communicating than others. You should keep this in mind when determining which lay witnesses you will call and why.

I made the mistake early in my career of putting a lay witness on the stand when I only met with her one time – 30 minutes before she took the stand. I immediately told my client that I thought she was reluctant and would not be that good. The client assured me that this would be fine. It was not fine. I had a reluctant witness that had mixed loyalties on the stand. I looked terrible.

Expert witnesses

When I was a young lawyer, I feared expert witnesses – I did not want to appear young or inexperienced. I embrace this now. They actually know more about their field than I do. I need to learn from them during the course of litigation. In this regard, you should be preparing your expert witness and your expert witness should be preparing you from the beginning of your case; that is long before expert discovery. Resist the temptation to believe that expert witnesses have been in more trials than you so they need little or no preparation. You need to know what they are going to say. You also need to make sure that they say everything that you need them to say. Having said this, I think expert witnesses are the easiest to direct during trial. But, they are the hardest to prepare.

There are times, for instance, when an expert will want to tell you what you need to prove your case. Knowing the science and knowing the legal burden of proof are two entirely different things. So, I always meet in person with my expert witnesses well in advance of trial to outline their testimony with them. Essentially, you are preparing your expert and your expert is preparing you.

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Witness order

Often, I feel like when I am preparing for trial I will set the perfect witness order for story-telling purposes, then it all falls apart. But, when you can take control of order, it can play a role in how the case is processed by the jury. As a trial lawyer, like it or not, you have zero credibility with the jury. Accordingly, when thinking about order – *first do no harm!* The first witness you put on the stand should be as close to unimpeachable as possible. And, this is not your client. They also have little credibility (you have even less). For instance, in an auto-accident case, I like to put on the police officer who investigated the accident first.

Your next witnesses should follow with the story of the case. What happened? Then begin to move to the liability phase. Some of these witnesses will overlap. Then you end with your damages witnesses. Your client is best right in the middle of it all. Bottom line, you want to arrange your witnesses to tell the story of the case. What happened when. This is the timeline of the events – it must have a beginning, middle and end.

Having said that, the best-laid plans do not always work. As you are putting together your witnesses, you will have to also work around your witnesses' schedules. Make sure you have all of your witnesses' schedules, particularly your professional witnesses like doctors who have clinical and surgical practices. These folks need as much lead time as possible to make things work.

Another thing to keep in mind when planning your witnesses is problems or challenges defense counsel will encounter. While there is no rule on this point, most judges will require that you work with opposing counsel in accommodating witnesses with scheduling conflicts – taking witnesses out of order. We all hate it. But, it happens. Therefore, when I am planning my witnesses and order, I call or email defense counsel and, point blank, ask them – "do you have witnesses that have to go on any particular day that we might need to take out of order?" If the answer is yes, you should accommodate them. But, you also might want to re-work your own order based upon what defense expert will be going right in the middle of your case in chief, always keeping in mind your persuasive storytelling.

Finally, when looking at witness order, you must always tell defense counsel what witnesses you will have going the next day. Again, there is not a specific rule on this point, but it is common courtesy that the court will impose on you if you don't have the common sense to afford it yourself. Remember, manners, civility and propriety are society's redeemers. This will help things along the way.

Technique

What is your role in direct examination? In law school, we learn to simply ask open-ended questions and fade into the background. That is not always the case. It truly depends upon the witness. One thing you need to certainly cover with each witness is the "no-no's" at trial. Did you have any motions in limine granted? You better tell them not to refer to or blurt out inadmissible evidence. This could result in the judge granting a mistrial. It is a big deal. You should also make sure that they don't talk about the usual inadmissible things like insurance.

Expert witnesses

For the most part, you should never lead an expert witness. It appears as if you are telling your expert what to say. Your expert loses credibility in some respect. If you have prepared your case and your expert, this should be one of the easiest aspects of trial. Let your expert witness shine. They are there in the first place because of their expertise and know things that the common juror does not know. You should always begin with qualifying your expert witness. You cannot miss a step on this. This is the foundation for all of the professional opinions he or she will give.

After your expert gives each opinion, make sure you cover the basis for each opinion. Now pay close attention here. Listen to what your expert is telling the jury and make sure that they are covering everything. When I am qualifying my expert, I like to deal with bias up front. I am building him or her up as someone who is remarkable in their profession, so much so that they often get called to court to testify. Of course you are compensating your expert for their time.

I talk about their compensation for their time for having to cancel or reschedule surgeries to be in court. Bottom line, jurors know these folks are getting paid. Don't hide it.

At times an expert witness' role can overlap. For instance, an orthopedic surgeon will not only have opinions about injury causation, but will also be a nice witness to discuss damages. Be careful not to skip over this. You are discussing all the treatment, surgeries and rehab with this expert. This is good for helping you with describing damages. Likewise, an accident reconstruction and biomechanics expert will be talking about the crash itself and the way the human body moves within a car or on a motorcycle. All of this is part of damages, not just liability.

Damages experts play one of the most important roles in your case. But economists and life-care planners are hard to get through in terms of testimony. It is not sexy or exciting testimony. You are talking about needs and numbers. But, this is some of the most critical testimony in your case. I try to get through this as fast as possible without boring the jury, but emphasizing the numbers.

Lay witnesses

Every witness you put on the stand should have a clear purpose. This is particularly true with lay witnesses. If they are a fact witness to how an accident happened, this is all you need to discuss with them. But, make sure you cover everything, including their vantage point, exactly what they saw, and who they told.

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Do not keep them on the stand too long. If the lay witness is there to discuss damages, then you have a different job. These are hugely important witnesses. You should first discuss how they know your client – what is the relationship and its duration. Establish the basis for their testimony about the ways in which your client's injuries have impacted their life.

Your client

Your client will likely be scared to death to get on the stand. You should have spent all necessary time with them before taking the stand. I always prefer that my client tell the jury the answers to my questions, not me. In other words, I want my client to feel comfortable making eye contact with the jury from time to time. However, this can make matters worse if your client has a fear of speaking in public. In that case, I stand as close as the judge will allow me to the jury stand and speak to the client from there. I don't think that there is a wrong way to do this.

The most important part is your client's comfort. Don't use notes while questioning your client. Just talk to them. I approach my client's testimony as a conversation. The jury is just listening to this conversation. You are asking what happened to them. This is their only chance to tell their story. The rules about not leading are important for credibility reasons. However, from time to time you may need to lead a timid client. Some people freeze while testifying. They might give shorter answers than you want or even may forget things. Make sure you cover all bases – the incident, including what they experienced during it and the aftermath. The jury needs to fully understand what happened and its impact.

Be a storyteller

As trial lawyers, we are all storytellers. We are the conduit through which our client tells his or her story. Each witness should have purpose. And, you should not be the star of the direct examination – you should fade into the background.


Ramey

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