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The basic elements of direct examination

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In theory, at least, an effective direct examination should be one of the easiest things to accomplish in the courtroom. The witness is almost always friendly; in fact, it's often your own client. The testimony is almost always entirely predictable. And the goal is usually pretty straightforward: telling your side of the story.

Nonetheless, too many direct examinations are neither as clear nor as compelling as they ought to be. Maybe that's because too many lawyers view direct as a simple, almost mechanical, task: Just put your witness on the stand and press "play."

But a truly effective direct examination cannot be created on the fly; it requires careful organization and planning. Moreover, it requires discipline — in particular, the discipline to ask questions carefully, without leading and without excess "noise."

In our upcoming columns, we will talk about different parts of the challenge of effective direct examination. But let's begin at the beginning. There are six basic elements of an effective direct examination: (1) introducing the witness, (2) setting the stage, (3) telling the story, (4) showing the evidence, (5) defusing problems and (6) concluding effectively.

1. **Introducing the witness**

Most lawyers ask a handful of questions up front to introduce and "humanize" the witness. A few questions about a witness's background (such as residence, occupation, family or education) are normally permitted, even if technically they aren't always entirely relevant.

But be careful not to overdo this. If you spend too much time on the witness's background, the jury will quickly become impatient. And if you spend time on truly irrelevant matters ("How old are your grandchildren?"), it may seem like you're insulting their intelligence.

2. **Setting the stage**

Take time to set the stage before plunging into the story. Everything in life happens in a context, and the jury will likely need to know that context to understand the story completely. Also, it takes a while for the jury to become oriented. You don't want to move so quickly that jurors are left behind.

The context may be as simple as a physical location (for example, a dark alley or a brightly lit liquor store), or a location in time (for example, Christmas 2013). More likely, it will be a combination of time, place and background events (for example, Wall Street during the financial crisis of 2008). It may be a complex combination of factors. Whatever it is, the context almost certainly matters, and you will need to have your witness explain it.

If the setting is a physical location, like a highway intersection in an automobile accident case, the jury will need to be able to visualize it. It's hard to think of a reason why a lawyer would not use diagrams and photographs to help jurors do that, but too often they don't.

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3. **Telling the story**

With rare exceptions, the testimony should follow a chronological narrative. It's easiest for the jury to follow if you start at the beginning, and end at the end. Take your witness through the story one step at a time. Break the testimony into "digestible" pieces; don't try to put too much into a single question or answer.

Direct testimony often requires explanatory digressions of one kind or another. Make sure you're explaining things, but try to be sensible about it. Digress in a way that helps explain the story, but doesn't impede it, and make clear when you're leaving and coming back to the main story.

"Let me stop you there. What do you mean by 'subcutaneous'?"

[witness explains]
"Let's go back to the evening of April 20th. What happened next?"

4. **Showing the evidence**

As we have said before (and will no doubt say again), too many lawyers talk too much and show too little. Use charts, photographs, diagrams, graphs — anything to put a visual depiction before the jury.

Don't forget, of course, that you're making a record. In a demonstration, it's easy for a witness to fall into using shorthand words: "this," "that," "there," "here" and so on. Follow up with a clarification: *"May the record reflect that the witness is …"* or *"Can you please mark that spot on the diagram with …"*

5. **Defusing problems**

Many witnesses have flaws of one form or another. Try to defuse them to the extent you can by bringing them out on direct. You don't want the jury finding out about them on cross, where they may be exaggerated by the fact that you "hid" them on direct. (Some lawyers use the acronym BOBS, for Bring Out the Bad Stuff.)

Normally you want to put the bad stuff in the middle, neither first nor last. But if your witness has very serious issues (like being a serial murderer), you might as well get that out right up front.

6. **Concluding effectively**

Ideally, your direct will end with something that has a powerful and persuasive impact. But that hardly ever happens. Unlike cross-examination, it's usually difficult to end a direct examination on a dramatic note.

That doesn't mean you should just meander your way to a confused and muddled end. A high percentage of direct examinations end with a lawyer asking the judge for a moment, followed by a long pause, a review of notes, a consultation with co-counsel, and maybe an inconsequential question. Don't do that. If nothing else, you're signaling to the judge and jury that you aren't very well-prepared.

Effective direct examination is an important trial skill that is far too often overlooked. You can probably get away with a poorly planned or poorly executed direct. But you don't want to do just the minimum, you want to win. Improving your direct examinations can dramatically improve your odds.

Previous installments of Tried & True can be found at masslawyersweekly.com. Judge F. Dennis Saylor IV sits on the U.S. District Court in Boston. Prior to his appointment to the bench, he was a federal prosecutor and an attorney in private practice. Daniel I. Small is a partner in the Boston and Miami offices of Holland & Knight. He is a former federal prosecutor and teaches CLE programs across the country.