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Direct examination and the friendly witness

By: F. Dennis Saylor IV and Daniel I. Small March 30, 2017

In our last column ("Direct examination B: to lead or not to lead," March 13), we talked about the importance of avoiding leading questions in direct examination. Many lawyers assume that giving up on leading questions means giving up on control.

Of course, that isn't true. You still get to ask the questions, and the witness is usually friendly. But you have to make sure the direct examination goes the way you want it to. That requires both preparation beforehand and attention during the trial.

Preparation. First and foremost, prepare your witness. That includes going over not only the anticipated testimony, but how you expect it will be delivered by the witness and what might go wrong. Make sure the witness understands that you are in charge and that the witness has to take his or her cues from you. Tell your witness you may need him to stop talking, or to go back over something, or even to be interrupted.

As part of his witness preparation, Dan sometimes analogizes to sports broadcasters who use slow-motion replays. You can't always follow the story in real time; often, it happens too fast, and you have to stop, slow it down, and go over it frame by frame.

Mistakes. All witnesses make mistakes. Prepare your witnesses for that likelihood. Tell them that it's OK, jurors know that witnesses are humans. And tell them that when they make a mistake in the courtroom, you're going to stop and try to fix it. Explain to them how you can use a document to refresh memory.

Of course, you need to be listening carefully to make sure you catch any mistakes (especially ones involving numbers, dates or times, which may be easy to miss).

Pace. Whether out of nervousness, eagerness or both, witnesses often talk too fast. By doing so, they risk confusing jurors or losing them entirely. It's up to you to recognize the problem and slow things down.

You probably can get a sense in your preparation sessions whether your witness is likely to be one of those people. If it happens in the courtroom, don't be shy about trying to stop it. There's nothing wrong with saying something like, *"Mr. Witness, I'm going to ask you to slow down a bit, to make sure we can all follow"* or, *"Let's back up for a moment."*

There are also more substantive reasons to vary the pace. If there is an important piece of testimony, you almost always want to slow down and spend time on it. The whole case might turn on those answers. Don't just rush to the next set of questions.

Pieces. Tell your witness in preparation that you want the answers to contain one thought at a time, usually expressed in one sentence, one phrase, or even one word. Witnesses will often jumble things together, in a way that might make sense to them, but not to the jury. Elicit evidence one point at a time. Don't try to put the whole case in all at once.

Narrative. Avoid long narrative responses. Most of the time, you do not want your witness to be giving a narrative answer of any kind. It may be objectionable, and it's not likely to be effective. The jury may not follow the story, and important points will be buried among minor ones. Break up the answers if you have to: *"Let me stop you there."*

Listen. Remember to listen to what the witness actually says. Be prepared to react to a wide range of unexpected testimony, including:

- mistakes
- missed facts
- new issues
- unexpected opportunities

Direct examination can be a somewhat deceptive environment for both the witness and counsel. Because the witness is usually friendly, the lawyer and the witness may wind up in synch with each other, but leave the jury behind.

It's your job to control a witness, even a friendly one, and to make sure the testimony is clear and effective.

Previous installments of Tried & True can be found here. 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.