The Art of Direct Examination

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Effective direct examination in which counsel questions witnesses without asking leading questions is a key to victory at trial. Developing a vivid and successful direct examination—one so persuasive and memorable that jurors carry it with them as they enter their deliberations—requires at least three sets of skills: command of the rules of evidence, skillful listening, and mastery of courtroom basics. Each can be learned and honed over time with guidance, practice, and discipline.

A winning trial strategy evolves from a command of the rules of evidence. This is a simple truth that too many lawyers either overlook or ignore. Attorneys practicing criminal law frequently know the rules of evidence better than civil litigators because they tend to try cases more often. Opportunities exist for civil litigators to develop their trial skills by participating in pro bono activities, such as the Los Angeles County Bar Association’s Trial Advocacy Project. Civil attorneys may find similar opportunities in drafting and responding to declarations filed in support of written motions.

A declaration is nothing more than carefully tailored testimony in writing. The court may consider the evidence in a declaration only if it is admissible and not subject to an objection under the Evidence Code. Persuading a court to admit or reject evidence means directing the court to the correct evidentiary standard. By doing so, counsel who draft declarations gain an opportunity to develop a better understanding of the rules of evidence.

While trial preparation is essential, overpreparation can distract an advocate. Questioning a witness requires knowing the facts, researching the law, outlining the questions, asking the right questions—and listening to and watching witnesses as they deliver the answers. The examiner should not only listen to a witness’s answer but also observe the witness’s conduct while answering. Counsel should put their pens down after asking a question and truly listen and watch the witness. Witnesses do not follow scripts, and neither should advocates.

Sometimes witnesses—especially sophisticated witnesses—remember facts or recognize gaps in the case that an advocate—especially an inexperienced advocate—overlooks. These witnesses may try to draw a lawyer’s attention to a problem. The lawyer needs to listen carefully to profit from this opportunity.

This situation can emerge in a variety of ways. In one scenario, an experienced police officer from an elite unit is testifying in a drug possession case. He responds to the questions of an inexperienced prosecutor, who asks how the officer was able to see the defendant drop a bag containing drug paraphernalia in the dead of night on a dark street. The prosecutor asks, “Were the patrol car’s headlights facing the defendant?” The officer responds, “No.”

However, the prosecutor does not ask about lighting from overhead lamps. In answering the prosecutor’s routine questions, the officer twice explains how his partner drove past streetlights while following alongside the defendant, who was walking down the street. The prosecutor, glued to his notes, misses the cue until the officer is practically shouting about the lighting. This prompts the defense attorney to object to the officer’s testimony, an objection that finally awakens the prosecutor. So advocates must always listen and observe intently when a witness is answering a question. Your next question—maybe the most crucial question of all—depends on your listening skills.

Courtroom basics must become second nature. With a little luck, a lawyer who stumbles over his or her questions may charm the jury—the first time. After that, lack of preparation frustrates everyone. With so many trial elements to juggle, a lawyer should not have to worry about the basics when conducting a direct examination.

**Outlining the direct examination.** Direct examination is the means by which attorneys prove their client’s case. It presents the evidence promised in the opening statement and develops the inferences necessary for the jury to decide the case correctly. To do this, a direct examination must 1) elicit the elements of the civil claim or criminal charge and 2) present what the jury instructions require the party to prove. An outline is a crucial first step in orchestrating a powerful direct examination.

Some attorneys use the jury instructions as a means to outline the direct examination. This often leads to disjointed and tedious testimony. The correct outline for a direct examination addresses the three issues in the question that is always critical to a case: Who did what to whom? The answer, in turn, should appear in the broader context of when, where, how, and why. Using the jury instructions as an outline will bore everyone—but telling a story in which the advocate weaves the elements of the claim or defense makes the case colorful and memorable.

The opening statement. Consider how a juror, a stranger to the case, may react to another stranger, a witness, who is stepping...
into the witness box. The juror wants to know who the witness is, why the testimony is important, and why the juror should believe the witness. Counsel should address these matters in the opening statement. Tell the jury whom they will meet and why they should believe your witnesses. “Ladies and gentlemen, Officer Smith was there. He saw the defendant drop the drugs and the pipe. And he could see the defendant drop the drugs and the pipe because of the well-spaced, brightly shining streetlights, photographs of which you will see.” With an outline of the direct examination as your road map, you can ensure that the key facts to which each witness will testify are clearly and memorably explained to the jury.

**Headlining.** When the witness begins to testify, remind the jury who he or she is. The process is sometimes referred to as “headlining,” because it involves brief announcements of the content to follow:

Q. “Officer Smith, you are a sergeant in the Los Angeles Police Department?” (A brief leading question is permissible.)

A. “Yes.”

Q. “I’d like to ask you about the work you do in the elite Metropolitan Division of the Los Angeles Police Department.”

As you move to the next subject, make sure you present a fresh set of headlines.

**Credibility.** As the direct examination begins, always make sure to first establish the credibility of the witness. Elicit information linked to the topic on which the person will testify. Whether the witness is a police officer in a drug prosecution or a vice president of human resources in a wrongful termination claim, establish credibility by discussing the witness’s training, education, and experience. Next, try to eliminate bias, self-interest, or a motive to lie. For instance, if the vice president of human resources no longer works for the defendant business, emphasize this fact: “Mr. Jones, do you still work for Acme Company?”

Sometimes people mistake nervousness for dishonesty. If the witness is nervous, address the issue rather than avoiding it:

Q. “Mr. Jones, have you ever testified in a courtroom?”

A. “No, sir.”

Q. “Are you nervous?”

A. “Yes.”

Q. “Mr. Jones, that’s natural—any of us would be. Will being nervous affect your testimony?”

A. “No. I’m just nervous.”

**Marking exhibits.** Exhibits in civil cases are often premarked, unlike in many criminal cases. Yet, even in civil actions, the need to mark exhibits in the middle of testimony arises. Every trial lawyer should know how to do this. The basics are: 1) describe the exhibit briefly, 2) confirm that the opposing side has seen it, 3) receive permission to mark the exhibit, 4) mark the exhibit, and 5) establish its foundation for admission into evidence. Memorize this formula:

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**Description:** "Your Honor, I’m holding a one-page document, dated January 2, 2003, with the words ‘Employee At-Will Agreement’ printed on the top of the page."

**Confirmation:** "I have previously shown it to counsel."

**Permission:** "May it be marked for identification as Defendant’s Exhibit A?” (The court responds, “It may be so marked.”)

**Mark:** "With the court’s permission, I will place an ‘A’ on the bottom right corner and circle it. May I approach the witness?” (The court responds, “You may.”)

**Establish:** "Mr. Jones, do you recognize Defendant’s Exhibit A?” (The witness responds, “Yes.”)

After the witness has laid the foundation, or at a more convenient time—perhaps at the close of the case in chief—the advocate should simply ask: "May Defendant’s Exhibit A be admitted into evidence and published to the jury?"

**Anticipatory rebuttal.** Most testimony is deficient in some way. One goal of cross-examination is to expose the weakness of testimony by focusing on 1) the meaning of the testimony—which may involve alternate explanations of the evidence, 2) deficiencies in the witness’s perception, 3) faults in the witness’s memory, or 4) lack of truthfulness. Your direct examination of the witness should anticipate some of these attacks. Advocates can use the advanced technique of anticipatory rebuttal to bolster the credibility of a witness. Anticipatory rebuttal is a unique approach in which the questioner prompts the witness to respond during direct examination to the attacks expected from the opposing attorney during cross-examination.

For example, during a DUI prosecution, the arresting police officer is prepared to testify about observing that the defendant’s eyes were red and watery and concluding that this was evidence of impairment. During cross-examination, the defense attorney will certainly ask the officer to admit that some people have red and watery eyes for reasons not linked to alcohol impairment, such as fatigue or allergy. Using anticipatory rebuttal, the prosecutor should ask the officer during direct examination why the officer concluded that the condition of the defendant’s eyes suggested impairment when there were potentially more innocent explanations. The officer may state, “The slurred speech, odor of alcohol, and lack of balance made me conclude that alcohol, and not pollen, caused the defendant’s bloodshot and watery eyes.” The direct examiner anticipates the point that will be sought on cross-examination and then rebuts it, thus denying the cross-examiner the benefit of establishing the point. Using anticipatory rebuttal gives the direct examiner the opportunity to put the first spin on potentially damaging evidence.

**Reinforcing testimony.** Before ending direct examination, recall the central issue of the testimony and reinforce it. Tell the jury again why the testimony is important. “Officer, do you have any question whether you saw the defendant open his hand and drop the baggie in which you found the drugs and crack pipe?”

**Cautionary notes.** Numerous things can, and do, go wrong during direct examination. Advocates need to be agile in handling the problems that frequently arise. These include:

**Bad questions.** Never ask a question that contains a double negative. For instance, what if a lawyer asks, “You didn’t go there?,” and the witness answers, “No.” Did the witness go there or not? Some questions are clunkers. Alternatives always exist. **Surprise answers.** Every lawyer will experience the situation in which bad responses are given to good questions. The only acceptable response is to maintain a stoic bearing and move on.

Before trial, always walk a witness through the demonstration you intend to present to the jury. Consider this actual example of a failure to rehearse a presentation. A prosecutor asked the victim to step out of the witness box and approach a map of an intersection posted on the bulletin board near the jury. The prosecutor said, “Using this red pen, please place an ‘X’ in a circle on the street corner on which the crime occurred.” The witness stood baffled. The prosecutor asked again. The embarrassed witness mumbled, “I can’t read maps.”

**Dismount.** Close the direct examination with professionalism and courtesy: “Thank you. Nothing further at this time.” Above all else, your reputation is your livelihood. Zealously protect it by preparation and professionalism.