

The Art of Trial Advocacy

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First Steps Toward Effective Direct Examination: Planning and Preparation¹

[E]ffective direct examinations that clearly, forcefully, and efficiently present the facts of the case will usually have a decisive effect on the outcome of the trial.²

Anyone who as a teenager was subjected to questioning by a parent about a minor indiscretion has experienced effective direct examination. The withering series of questions—short, focused, with little room to evade—produced more than enough information for the parent (a.k.a. judge) to enter findings of fact. There was no need for cross-examination or the testimony of other witnesses. Our experience shows that the direct examination questions and responses are key to establishing the facts. The direct examination is just as critical to the trial advocate as it is to the parent.³

To be successful, counsel must prepare to conduct direct examination effectively and completely. An effective direct examination is much more than simply avoiding leading questions. It is the presentation of relevant, material, and competent evidence in a manner that allows the panel to “relive reality from your side’s perspective.”⁴ Through effective direct examination, counsel can accomplish the goals of introducing undisputed facts, enhancing the likelihood of disputed facts, laying foundations for the introduction of exhibits, reflecting upon the credibility of witnesses, and holding the attention of the panel.⁵ This process begins with preparation and planning. More specifically, counsel must plan out the content, organization, and techniques to be employed in the direct examination of witnesses.⁶

Planning for direct examination is simply one of many tasks that must be accomplished in preparation for trial, and it must

be done within the framework of planning to present your entire case. Determining the content, organization, and techniques to be employed is a matter of determining what facts must be presented to the fact finder, which witnesses can present those facts, and what is the most logical sequence for presenting those witnesses.

Start by conducting a proof analysis. The proof analysis will identify the elements that must be proved, the evidence to prove each element, the theory of admissibility, and the foundational requirements. Second, prepare your closing argument. This will identify those important facts that do not show up on the proof analysis.⁷ From this you can determine the content of the testimony of each witness. The analysis at this stage, however, should focus on more than what you expect the witness to say. Professor Mauet describes the good direct examiner as being much like a film director. The film director can, through the use of different techniques, portray the facts in a certain way, minimizing the unimportant, while emphasizing the important.⁸ Analyze your reason for calling a certain witness, identify every fact that the witness can present to the court, both favorable and unfavorable, and focus on those facts that are most important to your case. Since the attention and interest of the panel is always at a premium, you must exclude clutter, unprovables, implausibles, impeachables, and door openers.⁹ In other words, avoid details that are not helpful to your theory, and testimony that can be challenged by effective cross-examination.

In determining the sequence of testimony and witnesses, your goal should be to present your case in a manner that is easy for the panel to follow. The panel members are not as familiar with the facts as you are. Consequently, you must tell the entire story in a clear and coherent way. Panel members remember information as part of a story, or based on relationships. One simple technique is to follow chronological order—both within a witness’s testimony and in the sequence of witnesses. The proverbial “story line” is familiar and effective. Another tech-

1. See generally STEVEN LUBET, MODERN TRIAL ADVOCACY (2d ed. 1997); THOMAS A. MAUET, TRIAL TECHNIQUES (4th ed. 1996); THE ADVOCACY TRAINER: A MANUAL FOR SUPERVISORS, tab B, module 1 (1997).

2. MAUET, *supra* note 1, at 73.

3. LUBET, *supra* note 1, at 45.

4. MAUET, *supra* note 1, at 73.

5. LUBET, *supra* note 1, at 45-47.

6. *Id.* at 50.

7. Lieutenant Colonel James L. Pohl, *Trial Plan: From the Rear, March!*, ARMY LAW., June 1998, at 21.

8. MAUET, *supra* note 1, at 74.

9. LUBET, *supra* note 1, at 53-55.

nique is to take advantage of the effect of primacy-recency. The gist of this theory is that panel members remember most details that are presented at the beginning and end of a witness's testimony. By presenting the most important or dramatic facts first and last, you will increase the odds that the panel will remember the facts you think are important. Apposition, or "the placement of important facts in a manner that emphasizes their relationship,"¹⁰ is another organizational approach. Also consider duration, or the "amount of time that you spend on certain facts."¹¹ Obviously you spend the most time on those facts that are most important to your theory of the case. In all cases, analyze the facts, determine which organizational approach will be most effective, and always start strong and end strong.

There are many tried and true techniques for conducting direct examination. At the most basic level, the goal is to get the witness to tell the story by using short, single-fact, non-leading questions. Scripting questions well in advance of trial is one method of ensuring that you do not omit important points. Be aware, though, that there are pitfalls to scripting questions. Counsel must avoid the temptation to go "back to the pad" as the witness is answering the last question. If your witness says something different than what you were expecting, there is a good chance that you will miss a significant change in the story. In addition, when you don't listen to your witness's answers, you send a message to the panel: this answer is not important. Why would the panel listen to an answer when you do not?¹² A good direct examiner is a good listener, and has the ability to follow up on the witness's last statement, thereby insuring that the point is made before moving on to the next area for questioning. This is a good start, but additional techniques can make your direct examination even more effective.

An effective direct examiner asks clear questions that highlight important information. Use plain, simple, everyday language; avoid legalese as much as possible. Highlight important testimony by having the witness explain testimony that may be confusing to the panel.¹³ One method of emphasizing important testimony is to begin with a broad overview, then lead the wit-

ness back through the testimony in more detail. Use a diagram or photograph, if appropriate. This technique allows the witness to grab the panel's attention and set the stage for the important details that follow. It also provides an identifiable structure to your direct examination. These techniques will enhance your chances of convincing the panel that your theory is the correct theory.

The effective direct examiner also uses directive, transitional, and headline questions¹⁴ to ensure that the witness and the panel recognize when there is a change in the subject area or focus. The technique of looping, or incorporating the witness's last answer into the body of the next question, is an effective way to emphasize the important points in a witness's testimony and transition to the next important point.¹⁵ Looping and transitional questions focus the members on what's important.

A good direct examiner makes the testimony memorable. Ask questions as if the event is happening right now. Using the present tense reaches the members' visual memory. If the members see a mental image of the story, they are more likely to remember it. Another way to reach visual memory is to use diagrams or photographs.

Finally, and maybe most importantly, focus the panel's attention on the witness. Your goal is to have the panel watch the witness, not you. Position yourself in the courtroom so that the witness is facing the panel and so that you are out of their view. On direct examination the witness is the information giver, not the attorney. As the members are watching the witness, they are evaluating the witness's credibility.

This brief discussion barely scratches the surface of how to conduct an effective direct examination. Certainly, there are many other techniques that counsel can use to ensure that his case is viewed in the most favorable light. But it all starts with planning. Direct examination is critical to effective advocacy and counsel cannot afford to take it for granted. LTC Burrell.

10. *Id.* at 56-57.

11. *Id.*

12. Major Charles Pede, *The Art of Trial Advocacy: Lawyering Through Your Eyes*, ARMY LAW., Nov. 1997, at 45.

13. *Id.* at 86.

14. LUBET, *supra* note 1, at 68.

15. ADVOCACY TRAINER, *supra* note 1.