

Dancing on Direct: Direct Examination of Witnesses

By Chip Rice

Preparing for the direct examination of a friendly witness is like choreographing a dance scene in a movie. Whether you are a new litigator or an experienced trial lawyer, you need a lot of planning and practice to be sure that the dancers make their way through an intricate series of steps while still seeming graceful and almost effortless.

Many jurors will have trouble understanding the underlying facts in a complex trial, but they will have no trouble reading the nonverbal signals. After all, they have seen enough movies and TV shows to know what lawyers and trials are supposed to look and sound like, and they won't hesitate to judge the honesty, confidence, and competence of the various players. So pay attention to sending the right nonverbal signals when preparing and presenting the direct examination of a friendly witness.

Make the Witness the Star

The jury or other fact-finder wants to hear from the witness—not the examining lawyer. You should appear to be nothing more than a transparent conduit for the questions in the fact-finder's mind. The less the lawyer is noticed, the better.

In this dance, you have to play Ginger Rogers—not Fred Astaire—by calling attention to the witness instead of yourself. That's hard for most litigators to do, because we are used to trying to take control of the situation, but the appearance of such control during the direct examination will make your witness seem less honest and competent. You have to exercise that control ahead of time, like a choreographer, and avoid the temptation to look like you are leading the dance. Once the examination begins, you need to lean back, not press forward.

Ask short, simple questions that allow your witness to shine by displaying his or her intelligence, energy, and sense of responsibility about his or her work. If the witness tends to be a little stiff, try to bring out his or her sense of humor. If your witness comes off as a little cold, try to find ways for him or her to show some emotional warmth for others.

The jury will pay more attention if the attorney and witness look like they enjoy and respect each other. Use your time together to learn about what your witness cares about and develop a personal rapport. Then show your regard for your witness by actually listening when he or she is answering your questions at trial.

You also have to listen carefully to the witness for another reason: You need to make sure that each answer is complete and persuasive, and then follow up if necessary. In addition, you don't want to miss any particularly vivid or persuasive language that the witness uses, because repeating that language in your subsequent questions will heighten the power and continuity of your examination.

At some point during your questioning, your witness will forget what you have practiced and give an answer that you weren't expecting. Don't show any consternation. Instead, swallow your pride, apologize for confusing the witness and ask very simple, direct questions until you get the witness back on track. It's better for the jury to think that you made the mistake—not the witness.

Outline Your Case and Each Witness's Testimony

You can't prepare a direct examination without understanding your case as a whole, so outline the points that you need to prove (and disprove) for your case and outline which points should be addressed by each of your witnesses. Give yourself enough time to change the order, workload, and approach for your witnesses as you learn more about the strengths and weaknesses of each one from document review and face-to-face meetings.

Make as many points as possible with the witnesses who are more precise, nimble, and sympathetic so that those who are less attentive or attractive will have less ground to cover. Once you've figured out which points a particular witness should cover, arrange those points into a clear and coherent narrative with a beginning, a middle, and an end.

Try to start and close with your best material, because the listeners (especially a jury) will usually pay the most attention to the beginning and end of any presentation. Start by establishing the credibility of the witness and his or her place in the grand scheme of the case. End by repeating the most important points—but do it quickly so that you don't bore or annoy the fact-finder.

Structuring most of your examination in chronological order will make it easier for the fact-finder to follow the story, but think about varying the chronological order as a way to add some drama to the narrative. For example, beginning at the end by starting your examination with some question about the current situation or the



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nature of the damages can make the jury sit up and pay attention before you get into the details.

Your outline should also include the documents that you want the witness to authenticate or explain, and it should include the likely points of attack on cross-examination.

This outline should not be set in stone. Don't assume that you know everything from reviewing the documents and discussing the case with your client. Try to learn as much as you can from talking with each witness in your preparation sessions so that you develop a complete picture of what actually happened (as well as the most likely alternative scenarios) and what each witness can and will say on the stand. Then adjust your witness outlines so that you are asking the right questions with each witness.

Practice, Practice, Practice

Once you have decided what you need to cover, you should spend as much time with the witness as possible. As any professional dancer knows, practice is the only way to make the final performance seem fluid and natural.

Start your discussions with each witness by going over your outlines of the case as a whole and the witness's testimony so that the witness understands the big picture and how the different pieces fit together. If he or she understands the scope, order, and pace of the examination, he or she will find it easier to focus on each question as it comes instead of being in a rush to make all of the important points at the first opportunity.

Don't turn your outline into a script of specific questions and answers. You and the witness will be less flexible and alert if you learn questions and answers by rote. It's better to spend your time simply asking and answering questions about each topic in your outline—over and over again—until both you and the witness decide how to best convey the necessary information.

Role-playing will help your witness develop a sense of familiarity with the facts and the process and a sense of self-confidence about both the underlying incidents and his or her ability as a witness. It will also help you learn what pushes your witness's buttons so that you know what questions to ask and how to ask them to elicit all of the legal points and highlight your witness's best personal features. Then, once the examination starts at trial, you can have what seems like a natural conversation with your witness.

Use Leading Questions Sparingly

The Federal Rules and most state courts limit the use of leading questions, i.e., questions that suggest the answer, on direct examination. Regardless of these limits, you should avoid asking your witness leading questions, because he or she will sound

like your puppet instead of the star of the show. In addition, most leading questions elicit only a "yes" or "no," so they don't give the witness a chance to impress the jury with straightforward explanations.

There are exceptions to this general rule. Most judges will allow leading questions to establish preliminary matters or undisputed facts, and they (and the jury) will even appreciate the time saved. For example, using leading questions to present an expert's qualifications will prevent your expert from reciting his or her accomplishments in too much detail and seeming too boastful to the jury.

Many judges will allow leading questions until opposing counsel objects, but don't abuse the privilege. Even if the judge allows leading questions, you may be doing too much of the talking and keeping the spotlight off your witness. You have to police yourself—especially when you get to the heart of the witness's testimony.

Of course, some witnesses will need some guidance on the stand—no matter how much you practice—because of nerves, a failing memory, or some other problem. The easiest way to give them a lifeline is to structure your examination around the key documents. That will help the witness keep everything in chronological order (or whatever other order you had planned). In addition, you can point the witness to specific provisions or passages in a document to remind him or her of particular points before asking your questions. Be careful of overdoing this, however, because it may undercut the credibility of the witness.

Anticipate Cross-Examination

All of your preparation and practice for direct examination will be wasted if your witness can't stand up to cross-examination. Again, preparation and practice are the key to minimizing the damage, because the examining lawyer loses all control, except the power to object, once the cross-examination begins.

Most lawyers try to anticipate cross-examination by asking about potentially harmful documents or other evidence during the direct examination. That allows the witness to give his or her best possible testimony about troublesome areas without feeling under attack. But you may want to wait and let the witness explain the harmful document or other evidence when asked on cross-examination. If you have confidence in your witness's ability to stay cool under stress, waiting for cross-examination may be better, because it will give your opponent less time to digest and then attack the new explanation.

No matter what you do on direct examination, the attacks will come on cross-examination, so make sure your witness is as ready as possible. Both you and the witness should read any prior

deposition or other testimony carefully so that the direct testimony is consistent. Nothing deflates a case faster than letting your opposing counsel begin his or her cross-examination by quoting deposition passages that contradict the witness's more recent sworn testimony.

But don't stop there. Think hard about how you would attack this particular witness if you were on the other side, and do some role-playing so that the witness can get used to facing hostile fire. Get one of your colleagues to take on the mock cross-examination, because it will be hard for you to be as aggressive as necessary. It's also better for your relationship with the witness, because it can be a little disturbing to a witness to have his or her lawyer suddenly turn into a hostile questioner.

Finally, warn your witness that, no matter how hard and long you have prepared, he or she will probably be surprised or flustered at some point in the cross-examination by some question or document that you haven't discussed in your preparation session. Make sure that your witnesses understand that they can hurt their credibility by acting defensively or evasively, so they need to keep answering each question as directly and honestly as possible—instead of looking like they are consciously reviewing all of the strategic ramifications of the question before answering. Remind your witness that you will have a chance to address any problems on redirect examination, so he or she should be patient on cross-examination and not try to fight the questions.

Keep It Interesting

No one will pay attention if you act bored by your own direct examination. Use your tone of voice and body language to convey that you think what the witness is saying is important. For example, a moment of silence after a particularly important answer will stress its importance to the jury.

Use moments of transition to highlight key points. After telling the witness (and, of course, everyone else) that you are about to finish with Point A, ask a few more questions to elicit a repetition of the key facts for Point A. Then pause and announce where you are going next.

Display demonstrative exhibits or key pieces of evidence to the jury to add variety and emphasis to the examination. Most people today are used to getting their information with the benefit of visual aids, so don't assume that everyone on the jury will understand what you are trying to say without some visual emphasis—even if it's just a highlighted document or rough diagram. For witnesses who are natural teachers, find ways to get them to stand up and go to the blackboard or easel to diagram what they are saying.

Direct examination is often more difficult and more important than cross-examination, so make sure that you and the witness are well prepared. Then, once the dance starts, keep the spotlight on the witness and try not to be discouraged by the unfortunate fact that, if you really do your job well, you may not be noticed much at all. 