

# THE RECORDER

131TH YEAR NO. 151

www.callaw.com

MONDAY, AUGUST 6, 2007

ALM



20TH CENTURY FOX

## DIRECT DIRECTIONS

*Let the witness take center stage during direct examination*

By Chip Rice

**M**ost lawyers find it hard to get excited about preparing for a direct examination of a friendly witness. It's not nearly as much fun as cross-examination or oral argument or any other task that allows us to be the center of attention.

But direct examination is often the key to winning a trial or arbitration because it is usually the initial — and often the primary

---

*Chip Rice, a partner at Shartsis Friese in San Francisco who specializes in securities and other complex litigation, is a regular contributor to Litigation.*

— way that the judge, jury or arbitrator learns the most important facts about the case at hand. And it can immunize the witness and your case against the potential damage from cross-examination.

Direct examination is difficult to do well because it requires careful preparation, lots of practice and the willingness and ability to recede into the background. Once the examination begins, the fact-finder wants to hear from the witness, and the lawyer should seem to be only a transparent conduit for the questions in the fact-finder's own mind. No matter how well you prepare, you will de-

feat your own goals if you look like you are controlling everything or otherwise draw attention to yourself. The less the fact-finder notices you, the better. At that point, it's not about you. It's all about the witness.

You normally want the fact-finder to like, believe and respect any witness that you call for direct examination (except, of course, when you call a hostile witness for adverse questioning). To achieve that, you want your questioning to establish the honesty and integrity of the witness and to elicit his or her most attractive and impressive qualities. Try to ask questions that allow your witness to

shine by displaying their intelligence, passion and sense of responsibility about their work. If the witness tends to be a little stiff, try to bring out his sense of humor or concern for others.

Ultimately, the most effective and most interesting direct examination is one in which the attorney and witness show that they like and respect each other. Use your preparation time to learn about what your witness cares about. Then show your respect for the witness by actually listening when she is answering your questions during the trial.

Before you even begin meeting with the witness, figure out what facts must be established or corroborated and what opposing points should be refuted when the witness takes the stand. Then organize these outlined points into a clear and coherent narrative. Try to structure your examination in chronological order to make it easier for the fact-finder to follow. At the same time, decide what documentary evidence to use and when to show each piece to the witness.

Begin and end with your best stuff. That's because the fact-finder (particularly jurors) will usually pay the most attention to the beginning and end of any presentation. Start by establishing the credibility of the witness and his place in the grand scheme of your case. End by repeating your most important points – but do it quickly so you don't bore or offend the judge, jury or arbitrator.

Once you have decided what you need to cover, you should spend as much time with the witness as possible. Begin by reviewing your outline so that the witness understands the big picture and how the different pieces fit together. If he understands the scope, order and pace of the examination, he will find it easier to focus on each question as it comes instead of trying to make all of his important points at the

first opportunity.

Resist the urge to turn your pre-examination outline into an actual list of written questions. You and the witness will be less flexible and alert if you learn questions and answers by rote. Instead, it is better to spend your time prior to trial simply asking and answering questions about the areas of your outline until both you and the witness get a feel for how best to cover the necessary information.

This kind of role-playing will help your client develop a sense of familiarity with the facts and the process and a sense of self-confidence about both the underlying incidents and her ability as a witness. And it will help you learn what pushes your witness' buttons so that you know what questions to ask and how to ask them in order to elicit all of the legal points as well as all of the witness' best personal features.

Leading questions — those that suggest a particular answer — are generally prohibited during direct examination. Even more importantly, most leading questions elicit nothing more than a “yes” or “no” answer, which can make the witness sound like your puppet and the exact opposite of the image that you want the witness to project. Avoid questions that begin with words like “did,” “didn't,” “were,” “weren't,” “should” or “shouldn't.” Instead, use words such as “who,” “what,” “where,” “when” and “how,” with an occasional “describe” or “explain” thrown in. You can always fall back on “what happened next” although doing so misses the opportunity to ask a more focused question.

Most judges will allow leading questions to establish preliminary matters or undisputed facts and may even appreciate the time savings that such questions create. Many judges will also allow leading questions until opposing

counsel objects. But try to police yourself, especially when you get to the heart of your witness' testimony.

Of course, some witnesses, no matter how much you have practiced with them, will still need some guidance on the stand because of nerves, a failing memory or some other problem. The easiest way to give them a lifeline is to structure your examination around key documents. Doing so 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 of particular points before asking your questions. Be careful of overdoing this, however, because it may undercut the credibility of the witness.

Your direct examination won't matter much if the witness is cut to shreds during cross-examination. So prepare your witness — both substantively and emotionally — as much as possible. Start by making sure that you and your witnesses have read their depositions and that your direct examination is consistent with all of their answers. Nothing deflates a case faster than letting your opposing counsel begin her cross-examination by quoting deposition passages that contradict the witness' 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. Do some pretrial role-playing so that the witness can get used to facing hostile fire. Warn your witness that, at some point in his cross-examination he will probably be surprised or flustered by a question (often backed with a document) that you have not covered in your preparation session. Make sure that witnesses understand they can hurt their credibility by acting defensively or evasively. Tell them to keep

answering each question as directly and honestly as possible. Remind your witnesses that you will have a chance to address any problems on re-direct so they should be patient on cross-examination and not try to fight the questions.

No one in the courtroom will pay attention to your witness if you act bored by your own direct examination. Use your tone of voice and body language to convey that you regard what the witness is saying as very important. You also have to listen carefully to what the witness actually says to ensure 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 its power and your continuity.

Use moments of transition to highlight key points. After telling the witness (and, of course, everyone else who is listening) 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 take a pause and announce where you are going next.

Finally, try to use demonstrative exhibits or key pieces of evidence to add variety and emphasis to the examination. For witnesses who are natural teachers, find ways to get them to stand up and go to the blackboard (or, more commonly today, a whiteboard) to diagram what they are saying.

Direct examination is often more difficult and more important than cross-examination so make sure that you and your witnesses are well prepared. 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. ■