

How Not to Regret Your Direct Examination

Exploring the Human Story

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Regret. How often do we look back and wonder whether we could have done things better, worked harder, been clearer, obtained a better result? Especially with those trial skills we don't often get to practice. Presenting a powerful and persuasive direct examination is one of the most challenging parts of a trial. In our discovery and pretrial work, we get to practice argument and deposition-style cross-examination, but rarely do we get the chance to prepare a witness thoroughly and then present him or her to a judge or jury. And how hard it is for most litigators to step back after all the hard preparation and let the witness be the star! To avoid regret after direct examination, listen to the witness, get to know the witness, and weave your examination around his or her human story—the interesting and unique aspects of the witness that best highlight and teach about the issues in the case.

Direct examination, at its best, is mentoring. If you listen to and get to know your witness, break down some of the witness's insecurities and concerns, offer pointed and sometimes tough suggestions and criticisms, and become a teacher in an unfamiliar area, your witness will testify confidently and persuasively on the subject matter. When you say “No more questions,” you can take pride in your witness's testimony and performance and be confident that the witness will hold up on cross-examination.

The Importance of Listening

The most important lesson for a great direct examination is to listen during the preparation sessions. Listen hard. In the beginning, resist the temptation to lecture too much or tell the person exactly what he or she needs to say. Chances are you've already spent significant time preparing the witness for deposition; you know the witness's primary areas of expertise and the documents that will be most important. But before a trial examination, take the time to listen to the witness's entire story, including the parts you didn't have the time to learn before the deposition. More often than not, the witness will have important testimony you've never heard that reinforces other themes in the case. The other side will never expect it. You'll probably have an outline ready before your first preparation session, but if you first take the time to listen to the witness and ask some probing questions, you'll find yourself adding entire new areas to the outline that will buttress other parts of your case and establish for the jury who the witness is and why he or she is important and believable.

Once you have listened to and learned the witness's story, start integrating the information into your outline. Reiterate that you want only the truth from the witness, and your questioning will focus squarely on those areas for which the witness



has solid personal knowledge. I call these areas the home bases, where the witness can always come home safely and feel comfortable. Clearly define the home bases with each witness for each case before deposition and trial. Make sure the witness understands that you will try to avoid any areas that make him or her uncomfortable. Your witness needs to trust you—you will enable the witness to present his or her unique and important story in the most compelling way possible. By the end of the process, the witness should be comfortable and confident. The witness will be all in with no regrets.

Next, review with the witnesses the key exhibits that will form the backbone of the examination. Again, listen to be sure you're absorbing the witness's view of the documents, not simply reinforcing your own preconceptions. It always amazes me how many important things I learn from witnesses the night before they testify at trial—sometimes after years of litigation. Of course, you must prepare the witness on what other witnesses have testified and help the witness through any questions or misunderstandings. Identify those documents and areas of testimony on which the witness has important additional information and avoid repetition. Don't force things. If an area is important to the case but not central to the witness's story, save it for someone else. Exposing a witness to an area not within his or her home bases provides fodder for needless—and often harmful—cross-examination. Make your points only with the appropriate witnesses. Don't later regret leading a witness into unfamiliar territory.

Once you're satisfied that you know the witness's story, areas of expertise, and expected testimony, it's time to start working

on nuance and style. Multiple sessions and repeated rounds of practice questions are a must. This is when you hone your direct examination style. Your witness must be sufficiently prepared and confident that you can simply introduce subjects and then ask when, what, and why. One reason leading questions aren't permitted on direct (other than for background) is that they are a poor way to present the witness's story. Your witness must be the star during his or her testimony; you're just the facilitator or director who launches the witness on his or her way and gently keeps the witness on track.

Don't write out your questions. If you do so, you'll be reading instead of listening. Outline the key topics and expected areas of testimony, grouped chronologically or by major topic. My outlines reflect a synopsis of the expected testimony, not the questions. I then shoot for simple, open-ended questions to elicit the witness's account. My outline allows me to see if the witness answered as expected or if I need to follow-up. For example, the outline might look like this:

- May 19 Email Confirming Contract Termination (*Ex. 35; already in evidence*)
 - Sent by Glenda Wright
 - To Alan Perkins
 - May 19
 - Purpose: provide confirmation of termination of contract
 - Second paragraph (*project on screen; read to jury*)
 - Second sentence: meaning?
 - Confirming that termination letter sent by overnight mail
 - Outlining steps to sever the parties' relationship
 - Return of unsold inventory
 - Payment of outstanding invoice
 - Response by Perkins?

This sort of outline allows you to introduce the topic and then ask open-ended “when, what, and why” questions to obtain the expected testimony. Depending on the witness's answer, you might ask one, two, or even three questions to fully elicit each expected point. The outline above might result in these questions:

- “Now, Ms. Wright, let's turn to this email dated May 19, marked as Exhibit 35. Did you send this email?”
- “To whom?”
- “When did you send it?”
- “Why did you send Mr. Perkins the email?”
- “Let's look at the second paragraph. Would you read the first three sentences for the jury?”
- “Focusing on the second sentence that we now have highlighted on the screen, would you explain what you meant by that statement?”

Illustration by Eva Vasquez

- “As I understand your testimony, you were confirming that you had previously sent the contract termination letter, Exhibit 5, to Mr. Perkins?”
- “What else did you mean to accomplish through this email?”
- “How much unsold inventory did Mr. Perkins have?”
- “Was the inventory returned?”
- “What else did you want to achieve with this email?”
- “How much was owed on that outstanding invoice?”
- “Was it paid?”
- “When?”

By structuring your examination with major topics and bullet points of expected testimony and then asking simple “when, what, and why” questions, you’ll be forced to listen hard to see if your witness provides the testimony you were expecting. Because you have not written out questions, your examination will closely follow and react to the witness’s testimony. By using your outline as an “expected testimony” checklist, you’ll avoid a major regret later—namely, reading the transcript and finding that the witness said something different than what you thought he or she said, all because you weren’t listening closely enough and thought you had everything scripted.

It amazes me how many important things I learn from witnesses the night before they testify at trial.

During preparation sessions, you will offer many suggestions and even pointed criticisms of the witness’s word choice, clarity, demeanor, etc. That’s how you’ll make the witness strong. Witness strength and confidence are essential; hubris and condescension are deadly. Be candid and direct with the witness in terms of his or her strengths and what the witness needs to improve. If the witness has distracting ticks or mannerisms, take videos so he or she can see and minimize them. Empower your witness by explaining who’s on the jury and who among them is likely to be a leader. Teach the witness how to make eye contact with jurors, particularly the expected leaders. You will remind the witness to do so by starting several questions with: “Would you explain to the ladies and gentlemen of the jury why you. . . .”

These preparation sessions can be difficult, intense, and tedious, but they are the heart of direct examination preparation.

On key areas, you’ll have the witness run through the testimony five to 10 times, which can be frustrating. But each time, as the witness becomes more secure in his or her ability to present home-base testimony clearly and persuasively, you’ll build a strong and confident source of evidence.

Cross-Examination

You’ll also prepare the witness for cross-examination. In many cases, the witness will have been deposed and you’ll have a good idea of the areas vulnerable to cross-examination. You’ll cover particularly problematic issues in the direct examination so as to neutralize their impact. Again, the most important messages to the witness are to tell the truth and stick to the home bases where he or she truly has personal knowledge. An honest answer that a particular topic is outside someone’s personal knowledge is always better than trying to stretch recollection in an attempt to be helpful. Role-play cross-examination extensively—be tough and aggressive—working on key areas multiple times. Especially where the other side will stress previous deposition testimony or statements in documents, reviewing the potential cross-examination multiple times will make the witness comfortable with the testimony and his or her word choice so that the testimony will not appear defensive or troubling.

Look for opportunities to plant what I call “ticking time bombs.” Often a key fact will come out in deposition or a document—and the other side loves it. You know they can’t resist asking about it. But at times, something will occur after the deposition that changes the otherwise troublesome meaning of the earlier statement or better explains it. Normally, you’ll want to include the potentially harmful facts in your direct and thereby present them in the best light. But if you have a fact that is no longer (or much less) damaging, and you have confidence that the other side can’t resist asking about it, think about skipping it on direct and letting your witness deal with it on cross. Then, when the other side asks the question, your witness will pounce as you sit back and smile. It will be your adversary’s moment for regret—for asking a question to which your adversary thought he or she knew the answer.

Once you’ve fully prepared your witness, make sure the witness sees the courtroom in advance and, if possible, sits in the witness chair prior to giving testimony. Point out where the judge and court reporter are, where you’ll be, and most important, the jurors’ seats, especially the potential leaders of the jury.

Calling Your Witness

When it’s time to call your witness, stand tall, announce your witness’s name confidently, and give your witness a welcome smile as he or she walks to the witness stand. If the court

permits, stand right next to the far end of the jury box when you ask questions. That way, while looking at you, the witness is also looking in the direction of the jury. Start out with personal facts about the witness: education, residence, expertise, and maybe even family matters so that the witness is comfortable from the outset presenting his or her human story. Then move to substantive areas with a topic heading that tells the witness (and the jury) where you're going:

- "Let's now turn to the termination of the contract. What was your involvement with that process?"
- "When did you first raise the subject of the termination clause?"
- "What was your understanding of the termination clause?"
- "Why was it important to you?"
- "Did you discuss the termination clause with Mr. Perkins?"
- "What did you tell him?"
- "How did he respond?"
- "Based on these discussions, what did you do?"

There will be no need to ask leading questions because the witness will be fully prepared and comfortable with the questions you're posing. The process will enable the witness to convey the information directly to the jury without substantive prompting from you. And if the witness needs a little orientation for a particular area or question, ask a follow-up "why" question:

- "I'm wondering why you thought the plaintiff understood the termination clause? Can you tell us about that?"

Pay attention to the jurors during the examination to see if they're following the witness's testimony. When you notice a juror looking quizzical (or nodding off) and so perhaps missing an important point, reconfirm or follow up:

- "Ms. Wright, I understand Mr. Perkins returned the unsold inventory in two weeks? Why was that important to you?"

When the witness makes a particularly important point, ask a question to reinforce it (looking at the jury when you ask the question, thereby prompting the witness to direct the answer to them):

- "Ms. Wright, are you saying that in paying the final invoice, Mr. Perkins never raised any objection to the termination of the contract?"
- "Did you find that important?"
- "Please explain why."

Use your outline to orient you and to confirm that the major points are covered, but focus your attention on the witness and the jury.

If you have the opportunity, get your witness out of the witness chair. Maybe the witness can draw something on butcher-block paper or point out a key provision in a displayed document. Most of us are more confident and persuasive when we stand and move while talking, rather than sitting in one place. Ask the witness to "explain in more detail to the ladies and gentlemen of the jury" any particularly important points. These and similar words force the witness to address the jury, gain confidence, and start communicating rather than just talking. Smile at the witness often to reinforce your confidence in him or her. However it works for your case, transform your witness from a passive talker into a confident and persuasive teacher. The witness is the expert in his or her home bases and areas of knowledge; the witness needs to feel and come across that way.

Structure the questioning to start and finish strong with areas about which the witness is most confident and which are important to the case. When you're done, thank the witness for his or her testimony and have a seat. As cross-examination proceeds, you can remain relaxed, knowing your witness is fully prepared and should do fine. If necessary, follow up with redirect, but keep it short to reinforce the comfort and confidence you have in the witness. Redirect is rarely very important and often turns into a ping-pong match of who gets to ask the last question. Stick to the bare minimum. And remember, even the most confident witness will never regret getting off the stand!

When the examination is done, confirm that the witness may be excused (and not be recalled to testify) and walk the witness to the door with a big thank you, as you call the next witness.

One of the nicest compliments I ever received came from a witness I handled on direct. She came into the first preparation session meek and afraid, thinking she had little of importance to contribute. Over several sessions, we spent seven hours preparing for a one-hour examination. It was hard work. She thought I was being too tough and asking her to do too much. But as the preparation went on, she realized that the details of her marketing job really were important and highly supportive of the company's attempts to support the plaintiff. When she walked into the courtroom, her head was high, and she ended up being a stellar witness. She breezed through cross-examination with a matter-of-fact attitude because she was fully prepared and comfortable in what she knew, and she realized that as long as she stuck with her home bases, she would be fine. She was confident, interesting, and persuasive. Afterward, she said I was her new "life coach." "You were pretty tough on me," she said, "but you built me up and gave me the confidence and tools I needed. I feel great!"

No regret there! ■