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Clear, Persuasive &Memorable Direct Examination: Telling the Story Through Your Own Witnesses

INTRODUCTION Based upon Herb Stern's *Trying Cases to Win* methodologies and the *Persuasion* methodologies.

I. PURPOSE

The purpose of direct examination is to argue your client's case, or tell his/her story of innocence or reduced culpability, through the witness to the jury. A secondary goal of direct examination is to achieve what Stern calls the ***Wimbledon Effect***.

II. CONDUCTING DIRECT

A. Delivery

1. Hind legs—Standing up unless required to sit

   a. Allows for strategic positioning of attorney

      i. Podium or Table edge

         -Podium can be a "position of power" or it can

be a place to hide (situational decision)

ii. Near jury

-When it is important for the jury to see the witness's face in order to understand and/or make decision on the credibility of the story

iii. Near witness box

-Dealing with identifying and admitting exhibits

-Prior statements of witness

b. Allows for attorney movement when the timing of the story being told makes it necessary. The key concept to remember is: ***Movement with Purpose*** or, in it's opposite form: *No movement without purpose*.

i. Exhibits and demonstrations

ii. ***3-Dimensional story telling***

iii. Allows for creations of storytelling ***zones*** in the well of the courtroom

2. Caveat: Do not interfere with the jury seeing, and always make sure that the jury can see, the following people and things:

a. The witness

b. The exhibits

c. The demonstration (especially when a point is being made)

B. ***The Wimbledon Effect:*** The courtroom dynamic whereby the jury are physically engaged in the direct examination along with the attorney doing the direct and the witness being directed. The dynamic takes the form of the jury members turning their heads–or just their eyes, depending upon the relative positions of the attorney, the witness, and the jurors–from the attorney when he asks the question to the witness as he or she answers, and back again. Much like those in attendance at a tennis match will turn their heads or eyes to watch the tennis ball move from one side of the court to the other as each player strikes the ball.

1. Achieving the *Wimbledon Effect* allows the attorney to know that the jury is <u>actively</u> listening to the exchange between the attorney and the witness. They have heard the question and are looking for a specific answer from the witness and then they look back to the attorney again for the next part of the story.

2. This sort of *active listening* allows each of the jurors to form a mental picture of what is being described in the story, as told by the witness, in his or her mind's eye. The story comes alive to them as they, through the confluence of their mental <u>and</u> physical efforts, are actually drawn into and become witnesses to the story being told.

B. Academic positions to the contrary

1. There are several methods, or schools, of advocacy which take a different view regarding direct examination. These positions/methods/schools are WRONG!

   a. Don't ask a lot of questions: Minimize the number of questions asked during the course of the examination. Ask questions that seek information in broad strokes.

b. Stay out of the examination: The witness needs to be the star of this portion of the trial and the lawyer should only be heard or seen in the event a new, broad-brushed, question needs to be asked. Some even advocate that the attorney stay behind the jury to stay out of sight.

c. Let the witness tell his/her own story: The attorney must not appear to be influencing the witness's story. The witness has a story to tell and no one knows that story better than the witness, so the witness should be the one to tell it.

d. Jury wants to hear the witness and not the attorney: By this time in the trial, the jury is tired of hearing attorneys put their spin on things and just wants to get the "unvarnished truth."

e. Again, ALL OF THESE VIEWS ARE WRONG! But, why are they wrong? They are wrong because, if they are believed and adhered to, they keep the attorney from persuasively telling the client's story by keeping the attorney from accomplishing any of the Four Tasks of Direct Examination.

C. Four Tasks of Direct Examination: Which, if accomplished, will help the attorney achieve his or her goal of successfully arguing the client's case and telling the client's story. Additionally, if the attorney can accomplish each of these four tasks, it is far more likely that the client's story will be the one the jury latches onto at the end of the case.

1. Make testimony **CLEAR**

a. The testimony must be understood both on its own and within the context of the entire story

b. Exhibits must be understood as the *bona fides* of the witness's testimony

2. Make testimony **MEMORABLE**

a. What good does it do to have a witness testify to important matters only to have the jury forget the testimony moments or days later.

b. Unless the jury remembers the testimony**,** it may as well have not been offered. The jury has to take the testimony into the jury room with them.

3. Make testimony **PERSUASIVE**

a. If the jury understands the testimony and remembers it, but it doesn't move them to accept your story or to render the verdict you want, what good was it?

b. Persuasion depends upon so much more than the simple telling of a story. HOW the story is told is what moves people to accept it just as much–probably more–as WHAT was told.

4. Make testimony INVULNERABLE TO CROSS-EXAMINATION

a. Remember: When you are done, the prosecutor gets to cross-examine the witness. If he or she can undo all you have done, your efforts have been for naught.

b. Invulnerability comes from the careful and strategic organization of the testimony of each of the witnesses

(Complete with the introduction of, or referral to exhibits) and from the careful and strategic organization of the order of all of your witnesses.

III. COMMON ERRORS OF DIRECT EXAMINATION

A. Fewer Questions and Long Narrative Answers

1. These are the enemy of each and every one of the of the Four Tasks

   a. The run-on witness is boring after just a few moments. Frequently, the narrative answer is not an answer at all after the first few moments. The answer becomes unclear and utterly unpersuasive.

   b. After a few moments, the jury shuts down to all the extraneous information they are being pelted with and, once that happens nothing that follows is able to be remembered and is unpersuasive.

   c. These sorts of answers turn witnesses into advocates of their own causes. Witnesses are NOT supposed to be advocates of anything. They are supposed to be reporting facts. Advocates are biased in favor of the causes they advocate. BIAS is an easy and readily understandable to destroy the ability of the witness to be seen as a fair reporter of the facts. The witness's testimony is less persuasive because of the bias.

      1. Witnesses begin to "drive the car." As you are supposed to be the jury's tour guide, why do you want the witnesses, or any of them, leading them through the story? The answer is that you don't. You are the advocate. Therefore, like "K" in *Men in Black*, you get to drive the car.

d. Subjects witnesses to destruction during cross. The more the witness says, the more openings the cross-examiner has.

1. Long answers make testimony more vulnerable to cross and, if the cross is successful, the witness has been neutralized or, worse, has actually harmed your chances of having the jury accept your story as the truth.

2. SOLUTION: More Questions

a. The three-fold purpose of using more questions is to:

1. Break testimony into small, digestible, pieces. This way, the jurors can readily comprehend the testimony and how it fits into the specific story the witness is telling as well as the broader story being told by the attorney.

2. Get repetition. This helps the testimony become memorable by allowing the respective jurors to "see" the testimony in their mind's eye and to hear the key portions of the testimony on a number of occasions.

3. Use emphasis. More questions allow the attorney to stop on important points, to use exhibits effectively, to do demonstrations, all in order to emphasize that which the jury must understand and remember in order to be sold on the truth of the story being told.

b. Questions are weapons. These are the weapons the advocate wields in the battle that is going on in the courtroom. We have to realize that we need to be able to use these weapons to fight for our client's cause.

Questions are clubs in our hands and they are the tools of our trade. This is the way we build the persuasiveness of our case and the truthfulness of our story. Questions are not to be avoided by us because we are afraid to use them or because "scholars" indicate a dislike for them in favor of rambling narratives by witnesses.

B. Written questions (and, answers?)

1. Most of us are **afraid** to ask questions. This is the truth is we would be honest with ourselves.

2. We believe that when we ask a question three things can happen: The answer can be believed (good for us); the answer can be disbelieved (bad for us); or, the answer can be believed only to be disbelieved after cross-examination (bad for us).

   a. Analogy: Woody Hayes and Ohio State football: Hayes used to be the football coach at Ohio State. He was famous for the "three yards and a cloud of dust" (rushing based) offense. He didn't like passing the football because he said that when you threw the ball three things could happen, two of which were bad. So, it took him forever to institute a passing offense.

   b. We cannot operate inside the well of the courtroom with this sort of mentality. If we have properly

analyzed the case and prepared the theory and themes; if we have prepared the witness properly; and, if we structure the examination correctly, we will succeed in having the client's story told.

3. Unreal Fears. The fears we have about asking questions are unfounded and they are unreal. They are ghosts and shadows only.

   a. We are afraid that we will forget <u>what</u> to say

   b. We are afraid we will forget <u>how</u> to say it

   c. We are afraid that we will forget the <u>order</u> in which to say it

   d. It is <u>not</u> the fear of forgetting something, the way of saying it or the order of what we want to present that scares us. These things may be problems for us, individually, of course. If that is the case, the advocate must devote time to work on this aspect of his or her advocacy. But, in general, these "surface fears" are not what make us want to ask fewer questions.

4. Real Fears. What really bothers us and scares us is not what we might do to ourselves through our own inadequacies, it is what the opponent might do to us.

   a. It is the fear of not having the proper words because of the various objections by the opponent. We are afraid of the following objections by the opponent:

1. *Leading*: But, the opponent may not object. That is, unless you demonstrate a complete inability to ask a non-leading question. Then, you are dead.

2. *No foundation*: This is particularly difficult to confront when one is trying to have physical evidence admitted.

3. *Evidence-based objections*: Which tend to interrupt the flow of the examination.

5. Our responses to our fears (real or unreal) is to do the following:

   a. Write down questions.

   b. Write down questions and answers.

   c. Write down the full script.

      1. This requires that the witness be some sort of memory expert.

   d. Keep a checklist (pen in hand).

   e. Examine with our head down.

6. The singular flaw with all of these responses to our fears is that none of them help us advance the truthfulness of our client's story or th rightness of his or her cause. This is because these responses are:

a. Not calculated to tell a story.

b. Not calculated to be an argument.

c. Not calculated to be emphasize clarity.

d. Not calculated to be memorable.

e. Not calculated to be persuasive.

f. Not calculated to achieve the *Wimbledon Effect.*

7. These sorts of responses are calculated to do only the following thing:

    a. Get stuff in the record so that the attorney can "tie it up later."

        i. These are the ***Words of Death*** for an advocate. ***"Tie it up later,"*** or ***"Save it for closing argument"*** **or** ***"Let the jury come to its own conclusions"*** are words that indicate the advocate has abandoned his or her efforts at persuasion in the moment (sometimes a large moment) and has opted for simply getting information past the threshold and into the record.

8. **The problem with this approach is that who would knowingly opt for opaqueness and confusion if they could be clear, precise and drive the point home in the moment of its introduction and presentation?**

9. Results with written questions

a. *Charlie Chaplin Effect.* This is a herky-jerky effect which results from never being able to write down enough questions. There is no filler and no smoothness to the examination.

   i. It is not an argument and it is not a story. It cannot be clear enough, because the advocate has not written enough questions for the presentation by the witness to be "seamless."

b. Chronologies: The death of interesting and rarely persuasive because the important events rarely happen in any sort of an order. In the construction of a story or an argument, one must be free to go back and forth, grouping facts to tell a persuasive story or to make a compelling argument.

   i. A chronology cannot accomplish the goal of telling a story through the witness by the use of short questions and repetition

   ii. *"What happened next"* Syndrome. This is not advocacy when prosecutors do it, why would we think it important to emulate when it is our turn to call witnesses?

d. No fact-grouping which is critical for the jury's understanding of the points being made in the moment the advocate desires them to be made and understood.

e. Written question/answers do not produce an argument; they are not a story; they are not persuasive; and, they are not memorable.

i. Such methods of dealing with our fears abandon the concepts of both primacy and recency

IV. PREPARATION OF DIRECT: ONE METHOD

A. Forming questions on direct examination

1. General Rule: Never form a question in your mind before you ask it. Understand what you want from a witness and the order of the points you need to make. The specific questions will come to you at the time of the examination.
2. Sequence

a. Write out the witness statements the way, and in the order, you want to hear them. Write this as a narrative.

b. Do not show this to the witness

1. Pure work-product and not discoverable as this is simply your own musings

c. Prepare a fragmentary outline from the narrative.

1. Then, rip up the first writing and toss it out. If the writing has been done on the computer, delete it in favor of saving the fragmentary

outline.

d. Using the fragmentary outline, ask the first question, hear the answer, see the next frame of the film in your head. Hear the next question and hear the next answer in your head the way you want the witness to say it.

1. Each subsequent question will come to you

2. This method helps you learn to tell the next piece of the story in the way you want it to be told. It allows you to paint as clear a picture of each point as that point needs to be painted.

3. The story you tell will not be herky-jerky and will be much closer to achieving the Four Tasks.

3. Use "Transition Questions" when you leave one area for another.

a. Term of art. These are not really "questions" at all. They are statements which help avoid the *Charlie Chaplin Effect.*

V. HALLMARKS OF GREAT DIRECTS

A. **Transition questions** (above)

1. Allows you to move the witness and the listener great distances in time and space in a moment during the examination

B. Leading without using leading questions

1. A "leading question" is one that suggests the answer

a. It is a subjective standard. On the margin, everybody can agree on what is, and what is not, leading. But, in the middle, no one knows and there is rarely going to be agreement. Reasonable people can differ on what sis suggestive of an answer, or leading.

i. "Argument" in opening.

ii. "Holding" in football.

2. Examples:

a. Weren't you in Dayton on June 5, 2007? (Very)

b. Were you in Dayton on June 5, 2007? (Also, very)

1. Subjectively, it doesn't sound as bad as the other because we asked the other question first

c. Do you recall whether or not you were in Dayton on June 5, 2007?

1. Any question can be <u>made to sound</u> non-leading by the questioner appearing to give the witness a choice.

d. Were you in Dayton or at your office on June 5, 2007?

1. *Any question can be <u>in fact</u> made non-leading by the examiner <u>actually giving</u> the witness a choice.*

2. McCarthy calls this the *dichotomous question* and criticizes this approach. His criticism assumes exaggerations in the choices given and

ignores that through the development of evidence in the case, natural choices will appear and be available to be used by the examiner.

C. Small digestible pieces

1. By the use of numerous questions, the examiner is able to begin breaking the testimony into small pieces which the jury can digest easily.

D. Repetition

1. Allow the examiner to emphasize themes or other important matters. How can the attorney achieve the sort of repetition?

2. Bush League approach:

   a. *"Huh?" "I'm sorry, I didn't hear that answer?"*

   b. Problem is that this approach is dishonest and tends to destroy the attorney's credibility which can never be sacrificed, lost or stolen during the trial.

      1. Jury knows that you heard the answer and that you are a liar. You chose to tell a lie to get a good answer repeated.

      2. If you will lie about something as small as the last answer, what else would you lie about? What else would you do to win the case?

3. *Looping* is a better approach and the one that is currently

taught as the highest form of the art. It is not, but it is world's above the Bush League approach to having an answer repeated.

a. The examiner *loops* the answer to the last question into the next question.

I. *Q. What bar did you go to?*
A. The Dew Drop Inn.
Q. Why did you go to the Dew Drop Inn?
A. To meet some friends.
Q. What friends did you meet?
A. Bob Smith, Betty Anderson and Bill Dyer.

b. Not a great technique because there are certain costs to using this technique.

1. The examiner can only repeat the answer one more time: In the <u>next</u> question.

2. The examiner tends to lose control of the witness as the examination moves from the purely preliminary stages to the move important areas.

3. Similarly, there is the potential for the witness to run on in a long narrative as the examination progresses. This is because the examiner begins drawing a bigger and bigger loop as the examination expands.

4. Calling for **details**

a. This is the highest form of the art. It allows the advocate to paint word pictures through the witness's telling of the story piece-by-piece. It also allows the attorney to gloss over unimportant details in favor of focusing on painting with exacting clarity those points which must be understood an remembered by the jury for them to believe in the truth of the client's story.

b. "Open" questions vs "Closed" questions

    1. Open = No specific response asked for. The exam is turned over to the witness. "*What happened next?*"

    2. Closed = Calls for specific details while limiting the witness's opportunities to talk on *ad infinitum. "How tall was he?" How fast was the car going?"*

c. Ask a lot of closed questions about an event and you can get all the argument you want, all the repetition you want and all the emphasis you want.

    1. Example: Assault in a bar