

Re-Examining Direct – Creating a Real Conversation, Not a Q&A

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Introduction

Direct examination is our most-used courtroom skill. But it's hard to do well because we juggle so many conflicting variables – tough witnesses, complex procedural rules, baseless objections, fickle judges, sleeping jurors. And we seldom get helpful advice on how to conduct an effective direct examination. Instead, we mostly get stern directives to “meet the elements” or “tell a compelling story.” So in following that advice, we often become amateur technocrats or playwrights, with predictable results: our direct examinations sound overly formal, clumsy, and fake.

We'll fix that by transforming testimony from a stilted Q&A session to a natural conversation like one that a witness would have with a neighbor or friend. Jurors will believe this genuine conversation – even a formal, structured one – because it will contain the truth signals that jurors look for in everyday life. And since your witness has just had a genuine conversation with you on direct, she will more effectively stand her ground under the slings and arrows of outrageous cross.

Ironically, we'll organize our spoken conversation using three writing concepts – headings, context, and the lowly paragraph. Then from modern kindergarten we'll add a fourth concept: using visuals to confirm a witness' oral claims. This combination of words and visuals creates sensible, believable testimony. And after just a few minutes of retooling our approach to direct, standing at the podium will be fun again.

Discussion Outline

I. Effective Direct Examination is a Team-Teaching Conversation

- a. Direct examination shouldn't be a debate, lecture, television show, movie, or play.
- b. Rather, it should be a carefully structured conversation between you and an honest witness – a team-teaching conversation.
- c. Treating direct examination as a conversation transforms your tone, word choice, and body language. In response, your witness will relax, use normal words, and speak freely from personal knowledge, not from a script.
- d. When jurors see and hear a real conversation, they won't wince each time a witness stumbles or corrects herself (like they might when a figure skater falls or an actor botches a script). Minor stumbles and nervousness are normal in everyday conversations, so a jury won't hold them against your witness.
- e. You are at your best when the jury perceives you as a teacher, not as a combatant. When you maintain that role, an aggressive defense lawyer becomes an obnoxious classroom heckler.
- f. It's not the witness' job to direct the conversation, it's yours. So eliminate vague questions like "What happened next?" Instead, give careful thought to the pace, tone, and content of your questions.

II. Start with Simple Words

- a. Real-world conversations are built on real words.
- b. So don't ask: *"Directing your attention to the date of May 10, 2010, did you have occasion to proceed to the address of 1793 Jackson Lane, and what, if anything, did you see upon your arrival at that location?"*
- c. Rather, ask *"Were you at O.J. Simpson's house on May 10? When you first arrived, what did you see?"*
- d. In your written motion practice, you often use headings, topic sentences, and highlighting to provide the fact finder with context and meaning. Do

- the same for the jury and the witness during direct examination by providing visual and audible cues.
- e. Slow down and ask one fact per question, allowing the jury to digest the testimony in understandable chunks.
 - f. And remember that the jury can't press "rewind," so repeat key points from time to time. But do it honestly, with visuals, not with silly techniques like "*Can you repeat that again? I didn't hear you.*"
 - g. Choose the themes, structure, and pace of the direct examination, but let your witness choose her own words. Then adopt and use her words yourself. Jurors instantly sense when a witness is using lawyer words, and they don't like it.

III. Add Immersive Audio, Video, and Other Visuals

- a. Using words alone is like riding a unicycle to work. You can get there, but it's slow and awkward – and potholes are truly dangerous.
- b. But using *both* words and visuals is like riding a mountain bike to work. You'll get there faster, with better balance, and potholes are less of a threat.
- c. The eye is the window to the soul and the key to lasting comprehension. Jurors are six times more likely to remember something that they've been shown rather than told.
- d. Yes, Dr. Seuss had it right – mix words and visuals for greatest impact.
- e. So unashamedly bolster your witnesses at every turn with audio, video, or other visuals.
- f. When adding audio, video, or other visuals, seek to provide perspective and context; set the scene; bolster your witness' credibility; take issues out of play; or immunize your witness.
- g. If you don't have a great visual, make one. Create a chart, draw a picture, or simply write key words on a blackboard.
- h. And don't neglect to use drawings and diagrams during trial preparation. Your scribbles and doodles often become effective trial visuals.

IV. Use the *Page Method* to Prepare and Present Testimony

- a. Break your key testimony ideas into paragraphs.
- b. Use one page for each paragraph.
- c. Write the key point at the top of each page.
- d. Use a big, sans-serif font to help you keep your place in the conversation.
- e. Add details to the page until you've fully explained the key point.
- f. Then add exhibits and visuals to make the testimony tangible and real.
- g. When standing at the podium, keep this single-issue page in front of you to keep you focused when the witness strays from the key point.
- a. When you've made your key point, simply turn the page, signaling to the witness (and the jury) that you're changing subjects.

II. Help Your Witness Prepare for Direct

- a. On the stand, your witness will be under great, unfamiliar stress. So she will need simple, clear rules and boundaries that she can remember and apply under fire.
- b. Give her five: (1) Stay on topic; (2) don't argue; (3) don't guess; (4) politely insist on the truth; and (5) stay one emotional level below defense counsel.
- c. Then add visual and audible cues to keep her oriented and on message.
- d. And practice with your witness to give her confidence and allow you to debug her testimony. But avoid role-playing. Instead, practice in the same way she will testify – by having a real conversation with her.

III. Inoculate Your Witness Against Cross

- a. Inoculation doesn't necessarily prevent all symptoms of a disease. So warn your witness that under cross, she may still feel dizzy and stammer out something that doesn't make complete sense. That's ok. You'll fix it.
- b. Take possible defense issues off the table by using lots of exhibits on direct. The defense can't argue effectively with good exhibits.

- c. Raise and discuss everything harmful with the witness before trial. Then discuss that with the witness on direct.
- d. Provide enough context on direct for each critical point so that the jury can see that the testimony makes sense. Remember that your jury is hearing this for the first time.
- e. Don't set your witness' feet in cement with over-particular questions like "Are you 100% sure?"
- f. When something goes wrong, take the blame. *"Sorry, that was a poor question. Let me try again."*

IV. Ignore Defense Counsel

- a. When interacting with defense counsel, focus on your role as a teacher, not as a combatant.
- b. Speak every word to defense counsel with the jury in mind. They're always listening intently when you interact with defense counsel. Be gracious.
- c. Treat objections as gifts; they only occur when you've stung the defense.
- d. Highlight the offending point again in every answer to a defense objection – drive the nail home.
- e. Cheat by placing pre-drafted answers to expected objections in your notes. If possible, include a quote directly from the controlling rule.

V. Summary

- a. Treat direct examination as a team-teaching conversation.
- b. Combine words, pictures, and audio to support your witness' story.
- c. Use the Page Method to insure that you're telling the whole story.
- d. Practice. And then practice again.