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Calling Your Attention to the Direct Examination: How to Avoid the What Happened Next Question

by Christina L. Hunt*

When presenting a direct examination, whether it is the testimony of your client or of another witness, you must remember one thing—*prepare* your case. Without preparation, a number of consequences inevitably follow:

(1) you will definitely lose your client's case;
(2) your client will call you every day and drive you insane;
(3) your client will then proceed to the penitentiary;
(4) he will say unflattering things about you (and you will deserve it);
(5) you will lose potential new clients;
(6) he will file habeas corpus papers *pro se*;
(7) he also will sue you for millions of dollars, and, he will do that *pro se*; and
(8) most insulting of all, *you* will be the object of your client's preparation—he will cross-examine you with skills you had no idea he possessed and will present direct examinations with a flourish.

At that time, you should go on and place your application and resume with your local prosecutor's office.

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To avoid these dire consequences, *you must prepare.* First, decide whether you need to present testimony by direct examination. Is the information obtainable through other sources, such as cross-examination? Is the information vital to the theory of the case? Does the presentation of direct examinations open new problems or areas? Often those stones we want to throw during closing argument can be picked up on cross-examination. If you get what you need during the State's case, you may not want to open doors on Direct that may have bad material behind them.

Second, determine whether there are tactical advantages in avoiding direct examination. Some jurisdictions, like Georgia, have a provision that allows the defendant the last closing argument when no defense evidence is tendered.[1] When the best defense focuses on the lawyer's closing argument skills, you do not want to lose this tool. Perhaps your client has an extensive criminal record. In most jurisdictions, avoiding direct examination of the defendant avoids his impeachment during cross-examination.[2]

Although most criminal defense lawyers can give numerous reasons to avoid direct examination, we must also carefully study the possibilities of presenting direct examination. Sometimes, direct examination of the defendant must be presented in order to further persuade the jury. At other times, expert testimony on an issue must be presented in order to further the theory of the case. Character witnesses, either for the defendant or against the victim, may be used if their testimony completes the defense's theory of the case. With usually limited investigation, defense counsel can almost always produce event witnesses that the State fails to call, but there is certainly no duty to call those event witnesses who fail to support the theory of defense.

In selecting other witnesses, you must carefully and thoroughly prepare their direct examinations, just as you will prepare the defendant's testimony. Character witnesses should be reputable people with whom the jury can relate. Nothing could be more humiliating than to discover during the cross-examination of a defense character witness that *his* criminal record is more reprehensible than the defendant's. Because some courts require certain magic words before character evidence may be introduced at trial, preparation of the character witness should include a briefing on such words.

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1. O.C.G.A. § 17-8-71 (1990).

2. A recent Eleventh Circuit case, United States v. Scott, 909 F.2d 488 (11th Cir. 1990), contains an excellent discussion on the defendant's right to testify. This right, protected by the Constitution, cannot be waived by counsel, and thus, each defendant should be prepared to testify to safeguard against the unpleasant side effects of the unprepared testimony of the defendant.

Expert witnesses are usually professional witnesses. Hundreds of articles have been written on the preparation of expert witnesses by the members of the civil bar. The scope of this article does not permit a thorough discussion of such preparations; however, generally speaking, if you have the time and a willing expert witness, many of the techniques used to prepare the defendant also apply to the expert witness. Most importantly, defense counsel must prepare her expert witness by emphasizing the use of ordinary words and analogies that convey complicated concepts to the jury.

Event witnesses must also be carefully prepared. Event witnesses generally relate a story that must be organized and interesting to capture the jury's imagination. Many of the techniques used to prepare the defendant must also be used to prepare the event witness.

In any event, witnesses for the defense are available for the picking. You must simply decide this question: Does this witness add to the theory of the defense? If the answer is yes, call the witness. If the answer is no, let the witness remain on the bench in the witness room.

Whether you are preparing the defendant or other witnesses, certain preparation techniques can better armor the defense during presentations. First, decide on an organization for the direct examination. In the majority of criminal cases only the prosecutors have presented direct examinations. As a result, defense counsel often present their direct examinations as if they were prosecutors. Accordingly, examinations are organized around chronological events, and our questions sound disjointed and stilted, even to our ears. Why is this? Because we do not use natural or planned organizations. We also insist that the question, "What happened next?" is an effective question, and, therefore, our direct examinations sound like mere copies of the prosecutor's case.

Life, however, is not always organized around chronological events.[3] Take the general areas you need to probe, and place them on notecards. Divide each notecard into subcategories. In looking at the areas, remember that each story has an "unravel" point at which the story seems to unfold naturally. Determine what the unravel point is in each area, and mark it on your card. Shuffle your categories until you get the most effective organization. Organizing around the moods and emotions of essential testimony is a method which, although seldom used by many of us, has extraordinary impact. We are told that jurors tend to remember what is heard first and what is heard last. If this has a grain of truth, then the important testimony should come first and last in the presentation. This is not possible to do with the chronological direct examination. The ex-

3. A few direct examinations are best organized chronologically. However, wherever possible, a chronology should be varied with other organizational types.

amination may also be organized around the themes of your case. Time, emotion, theme, and order of importance all represent possible organizations. The defense counsel merely needs to select one and prepare the direct examination from that angle.

Defense counsel should select power words and plain words for use during direct examination questioning. Power words do not mean legalese, but rather those words that convey strong pictures to the jury. Also, strive to use plain English. You want to be conversational in style and allow the answers, not the questions, to stand out to the jury.

In preparing a witness, the video camera represents one of the most effective tools that we can employ. Nothing compares to allowing a witness to see his actual testimony before trial.[4] Lawyers carefully prepare their closing arguments and often practice the argument in front of mirrors and people. Law students are now being trained with the assistance of video cameras. Seminars in trial technique often use video equipment as teaching aids. The use of video equipment is not to make up stories with the witness or to teach the witness *what* the truth should be; rather, video equipment can be used to teach the witness *how* to communicate the truth effectively. With the aid of video equipment, you can review the testimony and point out communication problems to the witness. During a video-tape review, you will want to make certain that the word choice conveys the message that the witness wants to send. For example, suppose the witness makes the comment, "When he pulled out the gun, I got mad," and suppose that the theory of your case requires that the anger be explained. It is entirely appropriate to ask the witness during preparation what he means by the term "mad." It is neither appropriate nor ethical, however, to ask the witness if he meant "frightened" instead of "mad" when you have reason to believe that "frightened" is not the truth.

Remember, since the jury not only hears the words but also sees the witness, a large portion of the communication is nonverbal. In addition to assisting the witness with proper word choice, the video replay is helpful in correcting bad body language. When the witness can see himself covering his mouth with his hand during the testimony, the behavior is easily corrected. The same is true with certain facial expressions, such as inappropriate smiling, and verbal tics, such as the use of the word "okay." In addition to practicing direct examination testimony before the video camera, defense counsel should also practice and replay the cross-examina-

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4. O wad some Pow'r the giftie gie us
To see oursels as others see us.
It wad mony a blunder free us,
And foolish notion.

Burns, *To A Louse on Seeing One on a Lady's Bonnet at Church*, in VIKING BOOK OF POETRY OF THE ENGLISH SPEAKING WORLD 629, 631 (R. Aldington ed. 1941).

tion to the witness. Successive reviews of testimony may tend to "overpolish" a witness. If the best aspect of the witness is his or her total naivete, do not attempt to review the testimony more than once.

Prepare the witness for cross-examination. Determine what areas are likely to be explored during cross-examination and explore those areas with the witness. The best preparation is an actual cross-examination. When possible, have another lawyer cross-examine the witness. Make certain that all possible cross-examination styles are covered: the reasonable cross, the soft cross, the angry cross, and the harsh cross. Remember, since prosecutors very seldom are called upon to polish their cross-examination skills, do not limit the preparation of the witness for cross-examination to closed-ended or leading questions. Instead, try to trick the witness in as many ways as possible.

Preparing a witness for cross-examination also allows us to determine what areas need to be explored on direct examination in order to take the punch out of the prosecutor's treatment of the witness. If possible, examine problem areas and incorporate them into the direct examination. If a witness has a criminal record, consider confronting that evidence during direct examination. If there are unexplainable actions, such as why your client went three miles out of his way to borrow the gun with which he shot his worst enemy, go ahead and tackle that problem during the direct examination. Never allow your witness to appear evasive during direct examination or cross-examination.

Prepare your questions ahead of time but do not carry the actual questions into the courtroom with you. Think of the actual examination as a probing into the areas you divided by index cards and allow the examination to develop from those areas. Do not think that you can get by with the prosecution standard: "Let me call your attention to May 1st—what happened next?" After preparing the questions, review them with your client. Ask him if he can think of anything else that he needs to tell the jury. *Don't prepare a script.* Scripts sound disjointed and phony, and an appearance of impropriety seems to stick with them.

Instruct your client to answer only the questions asked. If you ask a question about the time, you do not want an answer about the place. It appears evasive when the question is not answered directly, and, additionally, when a witness begins to volunteer information it is never the information that you want. Tell the witness that this instruction also covers cross-examination. Volunteering additional information at every opportunity begins to look like an explanation. The more explanations you have to deal with, the weaker your case.

Prepare your client for possible objections. If you are going to object during cross-examination, inform your client. Tell him not to answer the question if he sees you stand up and scream "*Objection*!" If he sees the prosecutor stand up and object, tell your client to wait until a ruling is

made by the judge before answering the question. Most of all, tell the witness not to do the objecting himself. Explain to your client the purpose of objections, and pray for the best.

Has your client ever been in a courtroom? In my experience, most of my clients have extensive experience in a courtroom, but most of that experience has been unpleasant. Take your client into the courtroom where the case is likely to be tried. Let him sit in the witness chair. Explain to him where everyone will be: the judge, the jury, the prosecutor, and you. *Do not practice testimony in the courtroom.* You never know who is hiding under the judge's bench. Even if your client has prior courtroom experience, this technique is often a useful tool, particularly if you are attempting to discourage the client from testifying.

Does your witness know how to dress appropriately for the courtroom? Do not expect them to know how. For example, it is probably inappropriate for the client accused of rape to come to court with an open vest and no shirt underneath, a silly hat, and a large gold Playboy Bunny charm on his chest. Likewise, it is possibly unwise to allow a drug defendant to dress as if he stepped out of the television program *Miami Vice*. Also, in a burglary case, make certain that your client is wearing his own clothes. I have clients bring their clothing to my office for prior approval. I also give them a specific written list of what is appropriate to wear during trials. A suit and tie is not always what we want. Remember the theory of your case. His appearance needs to reflect that theory. You know that the prosecutor conducts a clothing check on her witnesses. That is the reason that the alleged rape victim always shows up in court wearing a long skirt, buttoned-up high neck blouse, no makeup, and a severe hairstyle.

How do we conduct a direct examination? First, the primary goal is to allow the witness to do the talking. You have been heard from enough. You did voir dire. You gave the opening statement, and you cross-examined. The jury is tired of your voice. Think of yourself as the Director. You will direct the flow of information, but you will not inform. *Let the witness do the talking.*

Second, avoid questions that call for a yes or no answer. That is your goal on cross-examination, not direct. Do not confuse the two. Do not ask leading questions. Begin with the journalistic questions: *who*, *what*, *where*, *why*, *when*, and *how*. These are open-ended questions that ask for information from the witness rather than the lawyer. Why do we, as lawyers, find direct examinations difficult? Because we think we have no control over the examination. This is not true if we will prepare.

Maintain a conversational flow on direct. Think of the first time you spoke to your client. He told you the story—you did not tell him the story. Conversational tones are easier to listen to and tend to humanize your witness and yourself. Maintain eye contact with your witness. Do not be stiff or look bored. Save the boredom for the prosecutor's directs.

Most of all, be patient. You will get your answer eventually. Avoid the use of the question "So, what happened next?" or "Let me call your attention to the day of May 1st, at approximately three o'clock p.m." Who really talks like this? Those questions totally defeat the purpose of a conversational direct examination. Use plain, direct, and short questions featuring "K-Mart" words.

Attempt to anticipate what the jury wants to hear. You are the only outlet they have for asking questions. Be the thirteenth juror and ask those questions. Know the answers to the questions. Nothing is worse than having an unanticipated answer hurt your client. Know the answers to even the simplest questions.[5] The only way to know the answer is to ask the question during the preparation stages; therefore, *never ask a question if you do not know the answer.* Questions to which you do not know the answer are like oysters; only a very small number contain a pearl.

Use demonstrative evidence. Even better, use demonstrative evidence which involves the jury. Demonstrative evidence, which can be seen, touched, tasted or felt, is best utilized when the witness is prepared. Demonstrative evidence also tends to alleviate boredom and create excitement in the courtroom. Direct examination is the perfect place to use a demonstrative aid since you have ample time to prepare the witness for its use.

"Mirror" the witness. By "mirroring" the witness, you reflect the tone of voice, the facial expression, and the volume of speech that the witness has adopted. "Weaving a phrase" is another form of "mirroring." This occurs when you pick up a phrase from the witness and incorporate it into the next question. Mirroring and weaving are both forms of active listening, a skill essential to direct examination. During active listening, we pay attention to what the witness is saying and actually become emotionally involved in the conversation. You cannot expect the jury to become involved in the conversation if you yourself do not become involved.

A word about the redirect examination. Why do it? Redirect means rehabilitation. It does not mean "another opportunity to allow the jury to hear my wonderful, melodious voice." My personal rule of thumb is to avoid redirect. If you have prepared, anticipated the cross, and plugged

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5. This point was brought painfully home to an attorney who asked such a question of his defendant during a hearing on a Motion to Suppress. During that hearing, the central question became one of credibility between the defendant and a State Trooper. The defendant alleged that he had not consented to a search of his car, but the Trooper alleged that the defendant had consented to the search. When the defendant was asked during direct examination if he would lie to win the Motion to Suppress, he answered truthfully and promptly by stating "absolutely." The defense lawyer sat down with a stunned look on his face, and the prosecutor jumped up gleefully to cross-examine.

all the holes, redirect should be unnecessary. Redirect examination has the unpleasant side effect of pointing out to the jury that something went wrong for the defense during the prosecutor's cross-examination. In addition, redirects are extraordinarily hard to prepare and often do more harm than good without such preparation. There are occasionally tactical reasons to prepare a redirect. For example, if you have a real "zinger" of an answer to a cross-exam question that you want to stand apart from the direct, then redirect is appropriate. Redirect is also proper if you have a planned purpose for it. If you have no other purpose for redirect other than rehabilitation, you have not adequately planned the direct.

The most important rule to remember during direct examination is to *be patient*. If you have thoroughly prepared your witness, the answers are coming. If you attempt to jump ahead and haul your witness around like a mule in a harness, the direct will be stale and boring. Furthermore, you will begin to lead the witness and will not allow the witness to do the talking. Direct examination is much like the practice of Zen. You must pay attention to the moment and the totality of that moment. To do more than that is to filter out the essential. The next moment will be here after this moment, and worrying about it will not get you there any faster. *Be patient*. Don't worry, your witness is prepared and so are you.

Anyone can present an effective direct examination. All it takes is 1% inspiration and 99% preparation. Remember that direct examination can be even more rewarding than a great cross-examination. What happens next, if you follow the rules, will be an acquittal.