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PERSPECTIVE

# Trial tips for direct and cross-examination

By Dan L. Stanford

This article will present tips for direct and cross-examination at trial. Most lawyers believe direct and cross-examination are polar opposites with different goals, different techniques, and different approaches. As one example, on direct examination the witness is the “star” – not the attorney. Whereas, on cross-examination, which I believe to be God’s gift to trial lawyers, the lawyer becomes the star attraction. Both require preparation and practice.

## Direct Examination

For direct examination, begin by understanding your objectives. It must be to tell your story, to get necessary evidence admitted, to build credibility for you, your client and your case, and often to respond to opposing witnesses’ testimony.

Next, remember and look closely at your case theme. What is the overall theme you have decided to present to the jury? In trial preparation ask yourself if the witness is necessary to support your case theme? If not, don’t waste time calling that witness.

The process by which you create an effective direct examination is virtually the same for cross-examination. Start by setting the goal for each examination. What precisely do you want to accomplish

with each witness? Then, determine the sequence of both witnesses and the questions for each witness. Try not to duplicate and bore the jury. Next, formulate the questions. Finally, and most important in delivering your examination, look, listen, and follow up. Always be prepared to take advantage of a great answer and go off script to drive a point home.

Next, be prepared, be organized, and practice. You should develop your examinations during the months of discovery and not the night before you call the witness to the stand. Start strong and end strong, or build to a strong ending. Don’t end flat. You and the witness should know every question and every answer before calling the witness. In preparation and execution work on establishing a good relationship with the witness. Also, be sure to deal with bad facts on direct examination to both establish credibility with the jury and soften the blow of expected cross-examination. Don’t ever let the other side be the first to hit your witnesses with the bad facts, especially when the witness is your client.

As stated above, on direct examination you must make the witness the star, not you. That is accomplished by asking open-ended questions. The magic words for direct examination are who, what, where, when, why and how. You can begin many of these questions with “please describe” or “please tell the jury.” I start every direct

examination of my clients with, “Please introduce yourself to these folks and tell them where you live and work.” Never “state your name for the record.”

Finally, ask simple and clean questions. Remember your audience and work hard to try and not impress them with your brilliance. Don’t be afraid to break up your direct examination into sections and announce to the witness and the jury each time you move from one section to the next. “I’d first like to ask you about your family background.” “I’d next like to ask you about your work experience.” “Next, I want to move to the day of the accident and ask you about that.” Many young lawyers are too intimidated or inexperienced to break up their direct examinations with the simple announcement of each introductory section. But it sure helps the jury follow your efforts.

## Cross-Examinations

On cross-examination it is time for the lawyer to become the star, not the witness. In a jury trial there is nothing more satisfactory or impressive than an effective cross-examination. It is why I grew up with Perry Mason!

Your first goal must be to attempt to maintain control at all times of the witness. I say “attempt” because every cross-examination, especially of experienced experts, will start to go off the rails at some point by the witness attempting to

take control. Don’t allow it and don’t be afraid to move to strike the answer and use the court to get your “yes” or “no” answers.

However, prior to the actual execution of your cross-examination you must spend time developing a plan, outlining the examination and organizing it by topic. Ask yourself for each witness you intend to cross-examine, “What is the purpose of this cross-examination?” Is it to use the witness to support your case theme? Or, is it to limit the effectiveness of the witnesses’ direct examination? Or is it to discredit the witness? Have a point to each cross-examination.

Organize and direct each of your cross-examinations to one

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or more of the four attributes of witness testimony: meaning, perception, memory and veracity. Ask yourself as to each witness you are going to cross-examine, "which of these attributes of their direct examination do I intend to attack?" If you think you'll attack perception, use the key underpinnings of opportunity, capacity or reasons to perceive. Again, ask yourself if there is a basis to use one of these to undermine the witnesses' testimony on direct.

The most effective lawyers at cross-examination ask only ques-

tions calling for a "yes" or "no" answer. And, the real pros devise questions where 90% + should result in a "yes." That means you are the one testifying! Either way, obtaining only yes or no answers to your cross-examination questions greatly serves to reinforce your credibility with the jury.

Some simple do's and don'ts in presenting any cross-examination: Ask only leading questions. Listen to every answer, pay attention and follow up on any "gifts" given to you by the witness. Be brief, with short plain words.

Never ask a "why" question or a question to which you do not already know the answer. Similarly, don't ask one too many questions. Do not quarrel with the witness. Use the Court, if necessary. Do not permit the witness to explain. Do not repeat testimony the witness gave on direct examination. Don't lose your cool and stay in control. Never argue with the judge or opposing counsel in front of the jury.

Remember, cross-examination is your show and your opportunity to shine. Have fun with it!

This column is the fifth in a series of 6 monthly articles:

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