



The Storytelling Method of Direct

By: Deja Vishny*

Direct examination. Not exactly the phase of the trial that gets criminal defense lawyers all excited about their case. We think of ourselves as artisans of cross, crafters of opening, brilliant orators exhorting the jury in closing to acquit our clients. We learn from our early days in practice that prosecutors are good at direct, defense attorneys excel in cross and never the twain shall meet.

But a good direct examination can be a crucial part of a trial. Many times we in the defense bar think of trial work as standing poised with our swords, stabbing away at the state's case, cutting in the holes and winning on reasonable doubt. This, of course, frequently works and we all have stories of not guilty verdicts built purely on cross. Yet many cases are not winnable without putting on some type of case, whether it be an eyewitness, an expert, or our client explaining what didn't (or did) happen. When a winning theory of the case requires the production of evidence that can't be obtained on cross, or a persuasive direct will be the *piece de resistance* that wins the case, we in the defense bar will find ourselves conducting direct examination.

All trial work is ultimately storytelling and the key to a good direct is discovering the story that the witness has to tell. This requires a thorough interview of the witness, whether they are the most polished expert or the least articulate layperson. All too often, either because we are in a hurry or we think we know what a person's story is, we ask leading questions of our clients and witnesses. This can lead to overlooking important details which may ultimately be key to the winning case. A good interview is conducted mainly through the use of open ended questions—questions that can't be answered with a yes or no. Interview your witness with questions that begin with the five W's: who, what when, where, why (and of course, how). Then listen to the answers. Often you will have to depart from any pre-planned agenda to ask follow up questions to discover the details of your witness' story. Ask questions that relate to the senses and elicit emotion in order to help your witnesses tell their stories. What were you (hearing, seeing, smelling) when the police stopped you? Often you can learn things by asking questions using superlatives: What was the most frightening part of what happened?

Be sure to think of what the prosecutor might want to know or what information they have and what point of view they will have in questioning your witness. This way, when they ask questions of your witness at trial, both you and the witness will be prepared instead of feeling ambushed.

After you have obtained the witness' or your client's story and made the decision that you will be putting them on the stand, you must prepare for the actual direct examination. Too often the direct examinations we see in

***Deja Vishny** heads the Homicide Practice Group in the Milwaukee Office of the Wisconsin State Public Defender. She is also Training Coordinator for the agency. She teaches Trial Advocacy at Marquette Law School and is on the faculty of the National Criminal Defense College. She also serves as faculty for the Wisconsin Public Defender's annual Trial Skills Academy.

court consist of little besides asking the witness their name, directing your attention to the date, what if anything unusual occurred and a string of questions that mainly ask “What happened next?”.

A powerful direct examination will depart from this paradigm. What is the purpose of saying “directing your attention” and asking “What if anything happened”? Worry that we won’t sound like a lawyer? Fear of drawing an objection for asking a leading question? Many times when we ask questions like these, we are mindlessly regurgitating what we’ve heard others do in the courtroom. While headlines or topic starters are a smooth way to being an examination or transition from one topic to another, we can use more jury friendly language such as, “I’d like to ask you some questions about the day you were arrested” and go from there.

Preparing to assist your witness to tell their story in an effective and persuasive manner takes some thoughtful work on the part of the trial lawyer. A useful technique to design the most powerful testimony is to write a summary statement of what the witness has to say. You don’t need to include every detail, but make sure that all of the important points of their testimony are in the statement.

Take some time to review the summary you’ve prepared. What is the best way to unfold what happened? Is there a key detail that is particularly attention grabbing which will engage the listener? Where is the emotional center of the story? What is the final thing in the story that the jury should be left with?

Chronology is a good way, but not the only way to tell a story. A colorful detail or emotional statement may be a better starting point in order to get the jury engaged in the witness’ story.

Books are organized in chapters and a story told in the form of a direct examination should be structured in chapters as well. Begin a chapter with a topic heading; this will help orient the witness and focus the jury on what will be discussed. Then prepare questions that will thoroughly explore that topic until the story is ready for another chapter. You can make a list of all the chapters that are required in order to present the witness’ testimony. Then the chapters can be arranged so they flow in a smooth and persuasive order. Remember the rules of primacy and recency: begin with an interesting point and end with something memorable that gives a sense of closure to the testimony.

After you have created the summary statement and organized the chapters, it’s time to write the questions that will elicit the answers that constitute the testimonial story. A good method, especially for newer lawyers, is to split a page down the middle, writing the story in the form of answers on the right side of the page and then formulating the questions that will elicit those answers on the left. This will help you give thought to the types of questions to elicit the answers and avoid drone of “what happened next”. You can also avoid scripting questions that become the fodder for lawyer joke websites, where you can find gems of trial practice such as, “Were you alone or by yourself...How far apart were the cars at the time of the collision...Were you there until the time you left?”

You want to be sure that key points in the testimony are highlighted so the jury will remember them. Often you can help the jurors visualize what happened by first setting the scene and then placing the action in the scene. When the witness states an important fact, take the answer and include it in the body of the next question. Be sure to use this looping technique at crucial junctures in the testimony.

Another valuable technique, particularly in presenting a dramatic moment in the testimony, is to switch from questioning the witness in the past tense to the present. You should not inform the witness in advance that you will do this. A majority of witnesses will automatically respond in the present tense which will lend a sense of

immediacy and urgency to the moment. This is particularly effective when presenting the crucial moments in a self defense case.

All cases have themes or key words which are important to the theory of the defense. Language is important and our choice of words conveys different images to the listener. Be sure to pay attention to the use of these words and weave them in your direct examination.

A good witness examination consists of show and tell, so we should be prepared to use demonstrative evidence with the witness to help visualize the story and maintain juror interest. Prepare exhibits or demonstrations in advance and review these with the witness so they know what to expect. Nothing is worse than a bumbling re-enactment which opens the door to a “if the glove doesn’t fit...” line in your opponent’s closing.

While redirect is always available to clean up any confusion or misimpressions caused by the cross examination, your direct should be comprehensive enough to preempt the major areas where the prosecutor plans to score points. For example, in a self defense case, the prosecutor may plan to cross examine your client about why he didn’t leave or call the police on the person he injured or killed. This area should not be left untouched in your direct. Ask your client why they couldn’t leave. Be sure the jury knows that you want to bring out the entire story for them to hear and answer all of the questions they may have.

A common pitfall in redirect is the lawyer tries to answer every minor point raised by the prosecutor in cross. Consider whether every bit of minutiae needs a response; it may not. On the other hand, if a disaster occurred on cross, you may not be able to do much on redirect, particularly if you have to ask questions and you’re not sure if it will make things better or worse. Always remember that when we encounter a problem, what we really need to rehabilitate is the case, not the witness.

We’ve all heard the phrase, “the best laid plans...” and know that disaster lies ahead. Direct examination cannot be prepared in a vacuum. This is one of the two parts of the trial (the other is voir dire) where we are not the star of the show. Unlike cross examination where we are seeking control to impart information, in direct we are acting as a facilitator for the witness’ story. The witness is the star of the show and the salesperson for our side of the case. This means that the witness is a partner in the preparation of their testimony.

This is not to be confused with having the witness write out their testimony or going through elaborate rehearsals prior to taking the stand. It does mean that the lawyer should review the testimony, including exhibits and demonstrative evidence with the witness. The witness should know how the examination will proceed and what information you are seeking to elicit. The internet is replete with examples of bad trial dialogue such as:

Q: Are you married?
A: Yes.
Q: What did your husband used to do?
A: A lot of things I didn’t know about.

Witnesses must be made aware that they will be called on to sometimes give lengthy responses in order for the story to be told with open ended questions. You must also prepare them for cross examination by asking questions that will probably be asked by the prosecutor, including any tactics that the prosecutor may use to try and rile a client who is testifying.

While you are never going to coach a witness on how to answer a question, it is always appropriate to give feedback to the witness about flaws you observe in their testimony, such as using slang, mumbling or not answering questions fully.

Sometimes we put witnesses on the stand who are of limited intelligence and as a result of their cognitive deficits do not provide much more than minimal or perfunctory answers to questions. Looping each question is an excellent technique to enable this type of witness to add details to their story that they may be unable to spontaneously produce in response to more open ended questions.

The opposite problem may occur with highly educated witnesses, such as experts. Be sure they know they are on the witness stand, not in a lecture hall. Prepare them to translate technical terms they rely on in their field. The jury needs to know what a person who “infracted” had a heart attack in order to comprehend the testimony.

Witnesses, particularly those who are unfamiliar with the courtroom environment, should be explicitly instructed on the do’s and don’ts of the courtroom. Tell them to wait until objections are ruled on before they answer a question. Talk to them about making eye contact with the jury, maintaining the same demeanor on cross as on direct and not looking to you for the answers. Be specific about how to dress for court and warn them about conduct in the hallway when jurors may be passing by.

When you conduct direct, be sure to ask questions in a manner that sounds like you care about what you’re discussing with the witness. Jurors will know if you sound interested in what the witness has to say or if you are just going through the motions. They can also detect fakery such as a lawyer pretending they’ve never heard the witness’ story before or hyperbolic responses to the witness’ testimony.

Direct examination can be very frightening to us as defense lawyers. We are used to being in control and to some extent we have to give that over to the witness when we conduct a direct. It can be particularly scary when our clients take the stand. But there are many occasions where there is no substitute for what our clients have to say. As defense lawyers we often become persuaded by our client’s story and buy into their defense because of what they tell us. It is our job to work hard at helping them present their stories to the jury. With the proper preparation we can help them and other witnesses tell the whole story to the jury – and when things go well, cross the line into the not guilty verdict that our clients deserve. ■