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Trial Tips: Structure in Direct Examination Wins Cases

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TRIAL TIPS

Structure in Direct Examination Wins Cases

By J Palmer Lockard II

Every semester, I get the opportunity to

watch as students in the Civil Law Clinic represent clients for the very first time in evidentiary hearings. Almost without exception, the students who do an excellent job of representing their clients conduct a strong direct examination of their chief witness. Strength in this portion of the case can outweigh weaknesses elsewhere. After many years, I believe that I have a sense of some common features of strong direct examinations. One such feature is that a strong direct examination is well structured.

In the context of direct examination, the structure exists not only in the overall examination (usually characterized by a chronological presentation), but also in the individual questions addressed to the witness. Each question leads to the next in a way that is easy for the listener to follow. While this format sounds simple, it is often difficult to achieve in practice. Two issues are likely to create problems for the attorney in organizing the internal structure of the direct examination. First, new attorneys often follow a script when conducting direct examination. Such a script isn't necessarily written; it can be memorized. In either case, the result can be the same: Because these attorneys follow a script, they don't listen to the witnesses' answers, and their questions, at least to a listener without the benefit of the script, don't logically follow from the answers.

A second issue arises from the attorney's familiarity with the witnesses' testimony. Because the attorney conducting the direct examination already knows the substance of the testimony, she can easily jump from one topic to another without jeopardizing her ability to follow that testimony. For a listener with less familiarity with the case, however, those topics may not be logically related, making the testimony difficult to understand. For instance, in an automobile accident case, the attorney questioning the witness may jump from testimony describing the accident scene directly to testimony regarding injuries without an intervening narrative of the accident itself. Such testimony will make sense to the attorney who is already familiar with the facts surrounding the accident, but the listener who is unfamiliar with the case will often have difficulty following the witness.

Both of these problems can be alleviated by a simple strategy: The attorney must listen to the witness and use the witness' answer in formulating the questions. The suggestion that the attorney actually listen to the witness' answers has been repeated *ad nauseum*, apparently without significant effect, as trial advocacy instructors continue to send the message. However, there seems to be less explicit emphasis on using the witness' answer as a basis for questioning. That is unfortunate.



Consider the example of the witness who, under questioning, jumps from the description of the accident scene to testimony regarding injuries. The unfortunate but typical questioning might be as follows:

Q: Where were you on the morning of July 17th?

A: I was at the intersection of Main and Front streets in Mayberry.

Q: Can you describe that intersection?

A: Yes. Front Street runs in a north-south direction, while Main Street runs east-west. There's a traffic light at the intersection with a turn arrow for traffic on Front Street turning left into the eastbound lane on Main Street.

Q: What injuries did you suffer as a result of the accident?

A: My wrist was broken and I got bruises on my legs.

You may find it incredible that any attorney would make such a jump in questioning, but it happens. However, if the attorney simply used the witness' responses when creating questions, the problem could be avoided. Instead of jumping from the scene of the accident to the injuries, the attorney who uses the witness' response is forced to ask about what happened at the scene. The witness' answer describes the intersection. It contains information about the intersection, but nothing about injuries. If the attorney used the information in the answer to create the next question, the attorney would be forced to ask a question about the intersection, possibly something along the lines of "Was there any traffic in the intersection?" That structure would be much easier to follow.

Trial attorneys often get caught up in the excitement of cross-examination and closing argument. However, the truth is that most cases are won through cogent direct examinations. Structuring that examination is a basic first step to winning the case. ■



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