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### The Trial Lawyer's Guide To A Winning Direct Examination

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Law360, New York (May 21, 2014, 11:06 AM ET) -- Direct examination is not the sexiest part of a jury trial — it rarely has the drama of a cross-examination, the novelty of the opening statement, or the punch of a closing argument. But the direct examination is critical. It is nothing short of how you make your case to the jury and the court. Follow these strategies for before trial, and during trial, to ensure your direct examination is the best that it can be.

## Before Trial

### 1. Start with the Big Picture

The very first step in preparing for your witnesses' direct examination is figuring out what your story is, and what part of your story each witness needs to tell. Prepare an outline of your claims and defenses, drawing from sources such as the summary judgment pleadings, pretrial memorandum, trial brief, and jury instructions. List each claim or defense, and break it down into the component parts you must prove. Then break out the testimony and exhibits you need to prove each point. From there, you can begin to outline each witness' expected testimony, and all of the exhibits you will need to introduce.

Taking the time to complete this process will ensure that you meet every element of your proof. Once you understand precisely what you must prove at trial, you can begin to prepare an outline of which testimony and exhibits you will seek to introduce through each witness.

### 2. Prepare a Strong Outline

For a witness who has been deposed, the deposition transcript will be a good resource as to what relevant knowledge the witness has. For each point in your outline, note in brackets the page number of any relevant deposition testimony so that you can easily access it as needed during trial.

But don't stop at the witness' deposition transcript. Also search the other witnesses' deposition transcripts, and the exhibits, for material relevant to your witness. Incorporate your notes of witness interviews and other investigative sources. Make sure to include some personal background questions to give the jurors a sense of your witness as a whole person, as well as his or her education and work experience, to help the jury assess that the witness is credible and likeable.

While there is no harm in outlining the questions you might ask to elicit that testimony, don't be rigidly tied to specific questions. Instead, focus on general points. Trial is unpredictable: the court may sustain an objection to a particular question, or the witness may not provide the testimony you expect. You will need to stay flexible so that you can pose the precise questions, in the moment, that will elicit the testimony you need.

### 3. Anticipate Objections

Within your direct examination outline, carefully scaffold your questions so as to lay a proper foundation for each point you wish to elicit from the witness. As you do so, think hard about what objections you expect from the other side. You will likely have a preview of these objections during the process of exchanging exhibit lists and drafting the pretrial memo.

For challenging objections, think through your response in advance, conducting research to shore up your argument as necessary. Particularly if you are not sure how the court will rule, consider any available work-around. Can you build a better foundation that will get the document in? Is there another way to get the same point across while overcoming the objection? Could it come in through another witness or document?

### 4. Create an Organized Exhibit Plan

Your direct examination will be much smoother and more effective if you are not bogged down with tedious introduction of many contested exhibits. To that end, try to agree in advance with opposing counsel about as many joint exhibits as is practical. The process of agreeing to exhibits works best when both sides confer at least several weeks before trial to narrow the issues. Rather than dig in your heels on every exhibit, limit your objections to those that matter. If you set a reasonable tone with opposing counsel, you are more likely to reach agreement on your exhibits.

For those contested exhibits that you will seek to introduce, take an organized approach. In each witness outline, note in bold type, by number and title, each exhibit you will seek to introduce through that witness. Check them off as they come into evidence, so that at the end of the direct, before you release the witness, you can make sure each is checked. Have multiple copies of the exhibit at your (or your co-counsel's) fingertips, so that you have plenty to hand the witness, the court reporter, any trial technologist, and opposing counsel.

The goal is to avoid any fumbling during the direct examination. That sort of time-wasting will annoy the jury and the judge, and detract from the salient points of the witness' testimony.

### 5. Choose Your Star Witnesses, and Your Cameos

You will inevitably have some choices to make as to who to put forward as witnesses, and as to which witness will address which points. For example, in an employment case, multiple different witnesses may be able to testify as to the corporate structure of the defendant employer, or particular policies in the workplace.

Decide well in advance of trial who your most effective witnesses are — those who are comfortable in their own skin while testifying, to whom the jury will relate, who can convey facts and ideas to jurors in understandable terms, and who will not wither during cross-examination. Plan for those effective witnesses to cover as many of the key points as possible.

Those witnesses who are not as effective can be relegated to cameo roles, called only as needed to introduce a specific fact or exhibit as necessary.

## At Trial

### 6. Really Listen to Your Witness During Direct

During direct examination, it is critical to actually listen to the witness' answers to your questions, rather than simply preparing for the next question. This is not as simple as it might sound. By the time of trial, you will be so familiar with the facts that it is easy — if you are not really listening — to think the witness has covered a point that she missed, or to overlook the fact that the witness has volunteered something that merits further follow-up. Be fully present in the moment as the witness testifies, so that you can react quickly and naturally with your next question.



Dawn R. Solowey

### 7. Stand Ready to Slash, Even on the Fly

A good trial lawyer must be willing to slash the direct examination outline, even as the witness is testifying. If you reach a topic in your outline and feel that this witness, or a prior witness, has amply covered it, feel free to cut it. This is especially true if you sense that the jury is getting impatient. If a witness is cratering before your eyes, even before he or she has testified about a planned topic, you'll need to make a split-second decision. Can another upcoming witness on your list cover it? Can you get the required evidence in some other way? If so, cut it, and move on.

### 8. Use Technology to Your Advantage

Technology is a powerful weapon in a direct examination. A witness' testimony about a document that the jury cannot see is unlikely to command their attention. But if you put that same exhibit up on each juror's screen in the jury box, and highlight each section as the witness testifies about it, the jury will naturally be a whole lot more interested, and more likely to remember it.

Similarly, if your witness is explaining something complicated during direct, use technology to put a visual before the jury that helps elucidate the point. Let's say you want to illustrate what a certain department at your client company looked like before, and after, a reduction in force. Consider making a graphical chart that shows the before and after visually, using colors or symbols to highlight particular affected employees or job titles.

Jurors are accustomed to seeing information presented in high quality digital form, both in their workplaces and on TV and the Internet, and tend to have high expectations for such presentations at trial. If budget allows, consider retaining a trial technologist to run the technology during trial. With all of the exhibits uploaded beforehand, you will have an instant way to put them before the jury as you proceed with your direct, and neither you nor your co-counsel will be distracted with the mechanics.

### 9. Leverage Your Trial Team

Enlist your co-counsel in the direct examination process. Co-counsel should listen carefully and take notes of key points in the witness' testimony, marking anything that needs clarification, or any important testimony that the witness omitted. Co-counsel can also help you keep track of which exhibits have been admitted, and will also be able to see, from body language, if the jury or judge has reacted negatively to any testimony that would benefit from follow-up.

At any breaks in the testimony, get a quick download as to those follow-up points. Just before releasing the witness, ask your co-counsel for a signal as to whether there is anything critical to add. Working as a team, you are much less likely to overlook anything.

### 10. Get Ready to Go with Redirect

As your witness undergoes cross-examination, you need to simultaneously listen carefully to your witness' answers and be ready to spring into action with the redirect. Have a well-annotated copy of the witness' deposition transcript in hand, so that if opposing counsel tries to impeach your witness with it, you can easily follow along, and make sure that the testimony is not misread or taken out of context. Have a clean copy of the transcript uploaded into the trial technology system as well, so that you can simultaneously share pages as needed with the witness and jury on redirect.

Make a system for recording what the witness said on cross, and what follow-up questions you want to ask. It can be as simple as a pad of paper with the testimony on one side, and your follow-up questions on the other. Annotate your follow-up questions with deposition page or exhibit numbers, as necessary. Have your co-counsel do the same.

The best redirect is crisp and targeted, allowing your witness more fully to explain what opposing counsel may have put in a negative light on cross. With a strong redirect, you can ensure that your witness gets the last word.

—By Dawn R. Solowey and Lynn A. Kappelman, Seyfarth Shaw LLP

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