Direct Examination

A Forgotten Art

By Jon R. Muth

A successful trial tells a compelling story. Evidence must be woven into a narrative that resonates at a level of ordinary experience, universal morality, and basic emotion. Among all the tools at counsel's disposal for creation of the story, direct examination is the one least addressed in professional literature. The assumption may be that little skill is required to put a friendly witness on the stand and ask some questions. Nothing could be further from the truth.

The initial sentence on the Writers Store website states, "Let's face it, no matter how good your story is, if the dialogue is stilted, your movie, book, script, or play won't make it to first base." During a trial, direct examination is the dialogue that conveys the story.

Good dialogue tells the story and reveals the character of the speaker. Trial results favor convincing narratives and worthy parties. Every finder of fact is looking for the "right" answer. Disney would never have made *Cinderella* had she not gotten the prince.

There is a saying sometimes heard among trial lawyers: "I would rather have a bad case and a good witness than a good case and a bad witness." Juries—and judges, I suspect—simply don't feel compelled to find in favor of unlikeable, dishonest, arrogant, self-righteous, or uncooperative parties. And, even when the law or facts compel a decision in their favor, damages are usually minimized.

One of the most significant trial risks is the implosion of a key witness. If that happens, at best it is difficult to get your narrative back on track; at worst, the story you have carefully been telling may be destroyed. Therefore, one of the most important preparatory tasks for counsel is ensuring that all witnesses called as part of the case are well prepared, comfortable, and on their best behavior. New military officers are taught the "six Ps": proper preparation prevents piss-poor performance. Nowhere does that apply better than readying witnesses for trial.

How do you create and execute great direct examinations? Here are 10 suggestions:

(1) Construct your story before you start to outline your examinations. After you have completed discovery and fully understand the available evidence, it's time to chart your direction. If you don't know where you're going, any path will get you there. The most critical judgments are often those that jettison perfectly good evidence in favor of a better choice.

(2) Decide which part of the story can best be told by each witness. It is not necessary, and indeed counterproductive, to have noncritical details repeated by several witnesses. There may be some necessary overlap or corroboration, but witnesses should generally be complementary instead of duplicative. If it is important, jurors will remember it. How many characters need to convey the message that Cinderella really did lose her glass slipper?

(3) Good direct is good conversation. Imagine yourself sitting in your most comfortable chair in your favorite room. Imagine a new acquaintance sitting near you recounting an interesting experience. And imagine the language that would be employed and the questions you might ask to draw out the details. Would you inquire of your guest by saying, "Please state your residential address" or asking "Where are you from?" Would you test the guest's memory by asking, "Where were you at 4:36 p.m. on November 17, 2006?" or "Where were you when you saw the fireball?"

(4) Construct a lexicon for your case. Words can be powerful, so choose those that convey the emotional, rational, or moral core of the story. If the case involves technical terms or concepts, find ordinary words that convey the same meaning or, if you can't, make sure you introduce technical terminology from the earliest possible moment, likely in your opening statement. If during the examination a term isn't clear, stop the witness and get a good explanation before you proceed.

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"Trial Practice" is designed to provide advice and guidance on how to effectively prepare for and conduct trials.

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(5) Outline the direct examination in general terms. Don't write out specific questions. You are conversing, not giving a quiz. All you need at the podium is a simple checklist of the elements you are going to cover with the witness and the exhibits you will use to establish each point. Pursue your conversation, go with its flow, and then move on when the point has been made.

(6) Prepare the witness. This is never easy. Assume that your witness, no matter how sophisticated, is terrified. The once Lord Chief Justice of the King's Bench for Ireland, Charles Kendal Bushe, having been summoned as a witness, remarked, "The character of a witness is new to me, Phillips. I am familiar with nothing here. The matter on which I come is most important. I need all my self-possession, and yet I protest to you that I have only one idea, and that is Lord Brougham cross-examining me." Henry Ward Beecher, the famous nineteenth-century minister, social reformer, and speaker, when asked on the witness stand why he was hesitant in responding, apologized and said, "Because I am afraid of you."

(7) Build the confidence your witnesses have in themselves and in you. This starts with preparation, practice, and more practice. Tell the witnesses your story and their role in its development. Spend time talking informally. If you are relaxed, prepared, and confident, it will rub off. If you are disorganized and frantic, your witness will be a basket case. Treat the courtroom as an extension of the imagined living room. Ask the witness to focus on a one-on-one conversation with you. If witnesses can address the judge or jury directly from time to time, that's fine, but their heads should not be on a swivel—the "look at lawyer, receive question, think, turn head to jury, answer, turn head back" sequence looks contrived. The examiner should be positioned so the witness is talking toward the jury (or in a bench trial, the judge) while looking at the lawyer.

(8) Lead when necessary. Conventional wisdom says you can't, but hear the rule: "Leading questions *should not* be used on the direct examination of a witness except as may be *necessary* to develop the witness' testimony." MRE 611(d)(1). Note the lack of an imperative prohibition; note the open-ended exception. One possible interpretation of the rule is that leading is *allowed* whenever you can think of a really good reason to do so. Leading questions are routinely allowed to establish preliminary or background information, but are far less likely to be tolerated in the evidentiary core of the testimony. But exercise restraint. Leading questions turn any conversation into a question-and-answer session. The witness is being showcased and must be allowed to develop a narrative in his or her own words. And from a tactical perspective, the more you unnecessarily lead, the less likely you will be allowed to do so when you really must.

(9) Control and coach during the examination. Headline the subject: "Let's now discuss your experience with this type of construction." Give clear transitions: "I want to now talk about what happened after Johnny came home from the hospital." Control the pace; don't allow the witness to run away from you. "Excuse me, Carol, you are getting ahead of the story; let me back up and ask a couple of questions." If the answer is not clear or responsive, interrupt or ask for more. "Excuse me, but I meant to ask a different question than the one you just answered." In an emergency, control with a leading question, which is never more "necessary" than when a witness experiences mental power failure. Even if an objection is sustained, the witness's brain will probably reboot.

(10) Blunt the cross-examination. If you know your witness will be challenged on a point, raise it yourself and get a cogent explanation. "Doctor, do I understand that you never actually examined the plaintiff? Isn't that pretty important if you are to form an opinion? Why not?" This leaves little powder for opposing counsel's cannon and bolsters your witness's confidence in being able to survive the worst. Every obvious avenue for cross-examination should be anticipated and addressed during the direct. Even if the answer doesn't help your case, it will do far less damage if revealed by you and answered in a narrative manner on direct instead of being pounded out of a wary witness on cross.

We recall stories, connect to stories, and see ourselves in stories. We are fascinated by great dialogue that carries a story forward and reveals the essential nature of the characters. The best experience a lawyer can have during a trial is the sense that jurors have associated with the witnesses and projected themselves into the client's story. The trial may not be completed then, but it will have been won. ■

Jon R. Muth has been State Bar president (1994–1995), a Roberts P. Hudson Award winner, and trustee of the Michigan State Bar Foundation. He was named in Super Lawyers Top 10, Best Lawyers in America, and Chambers USA Leading Lawyers of Business, and was Michigan Lawyers Weekly *Lawyer of the Year 2011. He currently focuses his practice on mediation and arbitration and is general counsel at Miller Johnson in Grand Rapids.*