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HEADLINE: **Trial Advocacy, Tips on Narrative Direct Examination**

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BODY:

If you were to ask a group of lawyers what was the most important part of a trial, the answers would meet with wide variation. But unquestionably, the responses would include jury selection, opening statements, cross-examination, and, of course, summation. Certainly, we have all heard stories from trial lawyers describing a brilliant cross-examination, a captivating opening statement, or a riveting, spell-binding summation. Clearly, these are all the parts of trial where the lawyer's skill shines through. If analyzed carefully though, these are also the parts where the trial lawyers do most, if not all, of the talking.

It is a rare event for a lawyer to speak in glowing terms of a magnificent narrative direct examination. Perhaps this is so because narrative direct is the one part of the trial where the lawyer, to a large extent, remains silent. Indeed, if done properly it is the witness who shines on direct examination. The lawyer merely provides guidance to the witness to tell a story which lends support to the final argument. But the witness cannot shine without a clear understanding of the methods employed for conducting a powerful narrative direct.

Leading v. Non-leading Questions

Typically, leading questions are not permitted on direct examination. A leading question is, simply put, a question which suggests the answer. There are, however, times when leading questions are permitted on narrative direct. Most often, leading questions are permitted to bring out pedigree information or factual data which is not in dispute. Rarely will an objection be sustained in these areas since most judges want to move the trial along and leading, in these instances, serves to promote judicial economy. It is when the heart of the matter is being discussed that leading becomes improper. Recognition of the types of questions that commonly result in sustained objections on direct is essential to conducting a powerful narrative direct.

Questions that begin with the following words detract from allowing the witness to narrate a story: did, didn't, were, weren't, have, haven't, had, hadn't, could, couldn't, should, shouldn't, and so. If answered responsively each of these words at the start of a question calls for a "yes" or "no" answer. For example:

Q: Did he walk into the store?

Q: Did he take out a gun?

Q: So, he held the gun to the woman's head?

These questions merely seek confirmation. In actuality, it is the lawyer who is testifying.The better approach on direct is to begin the question with words that call for and force the narrative: who, what, when, where, why, how, describe, explain, elaborate, define, or tell us.

These words at the beginning of a question invite the witness to talk. They also prevent the witness from answering a question with a "yes" or "no" response. For example:

Q: Where did he walk?

Q: When did he enter the store?

Q: What did he do when he entered the store?

Q: Tell us, step by step, what happened at that moment.

Transition and Headings

Once you have allowed the witness to narrate a story it is essential to give the trier of fact guidance as to the next subject area. Clearly, providing an appropriate transition not only allows you to cue in the witness but signifies to the trier of fact the next subject area to be discussed. Often, the easiest way to provide a heading or transition is to direct the witness' attention to two out of three of the following subjects: the date, time and place. Direct the witness' attention to two of the three and inquire about the third. See McCloskey/Shoenberg, Criminal Law Deskbook,¶ 16.05 [4]. For example:

Q: Let me direct your attention to June 12, 2004 (date) at 12:00 noon (time). Where were you? (place) or

Q: Let me direct your attention to the store (place) on June 12, 2004 (date). What time did you arrive?

Although transitions may involve directing a witness' attention to a certain date, time or place, they do not have to. Transitions or headings allow you to focus on an entirely new subject area. Take, for example, a medical negligence case. Here, the transition allows you to focus on a new subject:

Q: Calling your attention to the point in time when the patient's endotracheal tube became dislodged, where were you? or

Q: Focusing your attention on the point in time when the patient's endotracheal tube was removed, describe what happened with respect to the patient's oxygen saturation levels.

Emphasize a Key Point

Throughout each phase of the trial everything must be done with an eye toward summation. At no point should you move to the next subject area until you have made certain that you have brought out sufficient factual material to support a cogent and compelling argument on summation. There is a tendency on direct examination to move the story along by asking the simple question: What happened next? The problem with this question is that it fails to emphasize and reinforce key points that are useful for summation.

Take the following example in which a lawyer uses this question without appropriate emphasis:

Q: What happened next?

A: The man took out a gun.

Q: What happened next?

Q: He walked out of the store.

The better approach is to frame the crucial point in time and emphasize the key facts by using parts of the significant answer to reinforce that which you want to highlight:

Q: What happened next?

A: The man took out a gun.

Q: When he took out that gun, where were you?

Q: How did he take the gun out?

Q: How was he holding the gun?

Q: When he held the gun, what were you doing?

Q: Describe exactly what he did with the gun?

Q: Before he left the store, where did he point the gun?

Needless to say, this series of questions paints a better picture for the trier of fact.

The method is portable. Consider the medical negligence example again. Assume a pulse oximeter's alarm sounded during the course of an operation after an endotracheal tube was removed. Not only must you highlight this fact, but you must emphasize the amount of time that went by before remedial medical action was taken. Although you could ask a nurse, "what happened next?" that question fails to bring out the drama of the event. The better approach is to highlight the fact by using key words in many questions for better emphasis:

Q: When the alarm on the patient's pulse oximeter went off, who was present?

Q: At the point when the alarm was ringing, what did you do?

Q: When the alarm first sounded, how many doctors were present?

Q: For how long a period of time did the alarm ring before corrective measures were taken?

Q: Describe the patient's oxygen saturation levels from the point in time when the alarm first sounded to the point when the alarm went off.

Q: How many medical personnel responded during the time when the pulse oximeter was ringing?

Listening

For every tip that can be given about direct examination there is none more important than listen to the answers given by the witness. Too often lawyers rely on their pads ---- on written questions prepared well in advance of trial, and assume that the witness will give the same response that was given during the initial preparation. At times witnesses are overprepared and their unfamiliarity with the courtroom surroundings, combined with a good amount of in-court anxiety, can spell disaster for a lawyer who relies on notes, reads his questions, and fails to listen carefully to the answer:

Q: Where do you live?

A: 31 years old.

Q: How old are you?

A: Two children.

Q: How many children do you have?

A: I was never hospitalized before.

To properly conduct direct, you must not only listen carefully to the answer offered by the witness but must continually evaluate the sufficiency of the response given in court. If the answer has not made a specific point clear to the trier of fact, put down the notes and ask another question which allows for a complete answer. When dealing with critical facts, don't leave the subject area until you are convinced that you have sufficient ammunition

to make a compelling argument on summation.

Don't Argue

Once you have mastered the technique of asking objection-proof questions on direct, you must be prepared for the inevitable. There will undoubtedly come a time when your adversary will object to an absolutely proper question for the wrong reason. Worse than this, however, is that the court will sustain the objection for the wrong reason:

Q: Describe his face.

OBJECTION: LEADING

THE COURT: SUSTAINED

You get no mileage by arguing with the court in this situation. By arguing with the court and trying to explain that a mistake was made you are, unfortunately, accomplishing two things: First, you are distracting the jurors attention from an important subject by breaking the momentum and the flow of your direct examination. Second, you run the risk of annoying or embarrassing the Judge.

It is a far better approach to argue with the court only when absolutely necessary. In this instance, the better approach is to back off and rephrase the question.

Q: Let me direct your attention to the point in time when you first saw the man. Describe what he looked like.

Q: What color eyes did he have?

Q: What color hair did he have?

Q: What else, if anything, did you notice about his face?

In almost every occasion the better approach is to try and rephrase the question using the objection as a source of strength. If rephrased properly, the improper objection will merely serve to highlight the fact that your adversary does not want the jury to hear the witness' damaging testimony. The objection has, in fact, bolstered your cause by drawing special attention to the new subject.

Conclusion

In sum, the mark of a great direct is that the lawyer's skills may go unnoticed. By insuring that the witness has told a dramatic or compelling story, the trial lawyer has paved the way to victory, while delaying his moment in the spotlight to other, more appropriate, parts of the trial.