

## **Controlling Witnesses on Direct and Cross**

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In virtually any case you try, you will be confronted with the uncontrollable witness. Unfortunately, an out-of-control witness can destroy a case. Your job is to prevent this from occurring. There are many ways to deal with the out-of-control witness, but the starting point is to listen to the witness and to pay attention to each answer.

As attorneys, we are very good at speaking to people, giving advice and pontificating, but often not so adept at listening to what people have to say. During a trial, although oratorical skills are important, good listening skills are critical. Moreover, although most trial attorneys are worried about controlling the adverse witness, controlling their own witness is just as important.

### Direct Examination

Most attorneys, while proud of their cross-examination skills, neglect the required devotion to artful direct examination. The first step to control on direct examination is to understand the parameters. While control is paramount, understanding that direct examination must be generally conducted in a non-leading format is crucial. Most leading questions will draw objections, so take control of your direct by utilizing questions that elicit narrative responses.

Questions that begin with words such as who, what, where, when, how and why should always elicit narrative responses. Therefore, most questions during direct examination should begin with such words. Here is an example:

Q: What is your name?

Q: Where do you live?

Q: How long have you lived there?

Q: Who else lives there?

Q: When did they move in with you?

Q: Why did you move there?

To continue to exercise control, you need to use transitional phrases to direct the witness into a new area of inquiry. Such transitional phrases are leading in nature, but because they include words of transition, are permissible.

Q: I direct your attention to June 12, 2010, at approximately 6 o'clock in the evening, and I ask you: Where were you at that time?

Q: Did there come a time that the police arrived?

Q: Directing your attention to the bottom of the page titled nursing notes, whose signature appears there?

Following up answers with words that cajole the witness to respond also help you exercise control over the witness:

Q: What happened next?

Q: Continue.

Q: Proceed.

Q: Go on.

Q: Describe.

Of course, even with artful questioning, and thorough preparation, you can run into an unresponsive and out-of-control witness. Take your client, for example, who has never testified in court before. Nervousness and adrenaline can take control of the situation, and the direct can end up going something like this:

Q: Where do you live?

A: I have lived there for 20 years.

Q: How many children do you have?

A: I love them. They are all wonderful.

Q: Did there come a time that an ambulance arrived?

A: I was in agony, writhing in pain on the ground.

To prevent these types of answers from destroying the direct examination, you must listen to and scrutinize the responses. Many lawyers, even on direct examination, are tied to their notes, preparing for what they will ask next. Conducting a direct is not the time to be tied to your notes. On the contrary, you must pay close attention to your witness' answers.

Q: Where did you feel the pain?

A: It was the worst pain I have ever felt in my life. I couldn't believe it. I couldn't even breathe and my life flashed ...

Q: I understand it was very bad, but I'm asking specifically where you felt that pain.

A: It was in my lower back.

The same type of control should be exercised with the expert witnesses you call as well.

Many times expert witnesses will ramble on after first being responsive to your questions. It is important to rein them in. For example, take the following approach when a physician rambles on beyond the scope of the question:

Q: Do you have an opinion, to a reasonable degree of medical certainty, as to whether or not these injuries are permanent?

A: Yes. They are permanent, and they will prevent her from working in the future and will require a lifetime of medical care. Moreover, because the disc is impinging on the spinal cord it will...

Q: Let me stop you there, and we will get to the rest of those issues later. First of all, why do you say they are permanent?

Q: In addition to finding the injury is a permanent one, do you have an opinion, to a reasonable degree of medical certainty, as to whether or not she will ever be able to return to work?

Q: What is the basis for your opinion?

A: She can't work because her herniated disc prevents her from sitting. However, she will require a lifetime of physical therapy—

Q: Permit me to interrupt you for a second. Why does that herniated disc prevent her from sitting down to work?

With an expert, as with your client or any other witness, you can exercise control while staying polite and keeping the flow of the examination going smoothly. Even though your witnesses on direct are generally friendly and cooperative, it is still an important skill to be able to maintain control over them.

#### Cross-Examination

Although maintaining control is important on direct examination, it is critical on cross. Witnesses who are adverse generally have an axe to grind and can hurt your case if given the opportunity. The key is to never allow them the opportunity. Just as non-leading questions are the rule on direct, leading questions define cross. Leading questions are those that contain within them the answer, questions that suggest the answer, and questions that call for a yes or no answer. When asking a leading question, state a fact and get the witness to agree with it.

Q: You are the defendant in this case, true?

Q: On the day of this incident you were driving a truck, correct?

Q: That truck was quite heavy, right?

Q: As a matter of fact, it weighed over 32,000 pounds, didn't it?

When cross-examining a witness, you are basically making a summation to the jury, and getting the witness to agree with you. There is not much wiggle room when the questions are leading, tight and suggestive. However, it is just as important to pay attention to the witness' answers and not be tied to a script. You must be able to distinguish answers that are responsive, answers that are unresponsive, and answers that are in fact responsive, yet add gratuitous information.

Q: You are the defendant in this case, true?

A: Yes, but someone served me in the middle of the night.

Q: On the day of the incident you were driving a truck, correct?

A: On the day of the accident it was raining real hard and impossible to see.

Q: That truck was heavy, wasn't it?

A: Not as heavy as a lot of rigs on the road that day.

Q: As a matter of fact, that truck weighed over 32,000 pounds, true?

A: I didn't have a scale.

You can follow your script, ignore the answers, continue with your notes and lose the case. A better way, however, would be to pay attention to the witness and demand responsive answers. Here is one way that examination could go:

Q: You are the defendant in this case, true?

A: Yes, but someone served me in the middle of the night.

Q: I didn't ask you when you were served, but there is in fact no question that you were served, correct?

A: Yes.

Q: And you are the defendant in this case, true?

A: True

Q: On the day of the accident, you were driving a truck, correct?

A: On the day of the accident it was raining real hard and impossible to see.

Q: Sir, my question was simple: on the day of the accident you were driving a truck, correct?

A: Correct.

Q: And because it was raining real hard, you had to exercise caution, true?

A: True.

Q: Because when it rains hard, it makes visibility more difficult, true?

Q: And as a result you have to be even more careful than usual, right?

A: Right.

Q: And you, Sir, as a professional truck driver, had an obligation to keep a proper lookout, correct?

A: Correct.

Q: And to maintain safe distance from the vehicle in front of you, true?

A: True.

Q: That truck was heavy, wasn't it?

A: Not as heavy as a lot of rigs on the road.

Q: I'm not asking you about other rigs, Sir, I am specifically asking about yours: You'd agree with me that the truck you were driving was heavy?

A: What do you mean by heavy?

Q: Sir, your truck weighed over 32,000 pounds, true?



A: I didn't have a scale.

Q: But you did have an owner's manual, didn't you?

A: Yes.

Q: And you also had a side door, right?

A: Right.

Q: And both the owner's manual and the side door indicated that the truck weighed 32,700 pounds, correct?

A: Yes.

Q: And you would admit, wouldn't you, that the front of your truck struck the back of my client's vehicle?

A: Yes.

Q: No doubt about it, right?

A: Right.

There are other ways to procure responsive answers on cross examination. One way is to simply repeat the same question over and over again until you get a responsive answer

Q: Doctor, you would agree with me that my client has a scar on his face, true?

A: It is not very big.

Q: Doctor, you would agree with me that my client has a scar on his face, true?

A: I can hardly see it.

Q: Doctor, you could agree that my client has a scar on his face?

A: Yes.

Another way is to add preambles to your questions such as "that wasn't my question, Sir"; "my question was simple"; or "Sir, that is all well and good, but mine was a different question":

Q: Dr. Smith, your examination of my client took less than 15 minutes, true?

A: My examination was thorough, and I did all I had to do.

Q: Sir, that wasn't my question. My question was specific: Your examination of my client took less than 15 minutes, true?

A: It took close to 15 minutes.

Q: And by close to 15 minutes you mean less than 15 minutes, correct?

A: Yes.

Yet another way to get responsive answers is by getting the court's assistance. However, this should be done sparingly. This should only be done after a pattern of abuse by the witness, and only if you know you will get assistance from the court.

Q: Dr. Smith, you would agree that the report of the radiologist in evidence shows a herniated disc at L4-L5, right?

A: Yes it does, but it also shows a severely degenerated disc with arthritic changes that took years to develop.

Q: My question was, the report shows a herniated disc, true?

A: It does, but I'm telling you it is not causally related to the accident. It is from years of degeneration.

Q: Sir, the radiologist called it a herniated disc at L4-L5, true?

A: Yes but it has nothing to do with the accident.

Q: Your honor, I move to strike everything the doctor said after "yes" as unresponsive.

The court: Granted.

Controlling witnesses is a very important part of trial practice: During direct examination, by asking non-leading, open-ended questions that call for narrative responses, sprinkled with appropriate uses of transitional questions; during cross-examination, by asking tight, leading questions that contain within

them the answer and simply call for agreement by the witness. Most importantly, on both direct and cross, pay careful attention to the answers before thinking of your next question, and always obtain responsive answers.

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