Common Mistakes on Direct Examination

By Ben Rubinowitz and Evan Torgan

While many trial lawyers focus on the excitement and challenge of a strong cross examination, these same lawyers often overlook the importance of a strong direct examination. While it is true that cross can be exciting, it is also true that a powerful direct can win the case. Avoiding simple mistakes on direct examination will unquestionably strengthen your position and, at the same time, help you to achieve the verdict you want.

Listen to the Answer

Too often trial lawyers are bound to their notes during direct. It is not that these lawyers are unprepared. Quite the contrary these lawyers have, unquestionably, rehearsed the testimony with the witness and have prepared incessantly. The trial mantra "prepare, prepare, prepare" is something they have done well. The problem is that these same lawyers read their questions to the witness, forget to listen to the witness' answers and assume that they have received the same answer as they had during preparation. A classic example of this mistake - not listening - are the following questions asked by the over-prepared, nervous lawyer who fails to listen:

Q: Where do you live?

A: Three children.

Q: How old are you?

A: 21, 15 and 8.

Q: How old are your children?

A: It happened on January 1, 2010.

While this is a gross example of the "non-listening" trial lawyer, more common examples occur during virtually every trial:

Q: Describe the traffic conditions?

A: Traffic was good.

Q: What happened next?

The failure by the examining attorney to continually evaluate the sufficiency of the answer leads to disaster. Here, there is no explanation of the word "good." Had the attorney been listening to the insufficient answer he could have easily solved the problem by following up with appropriate questions such as:

Q: Tell us what you mean by "good." or

Q: Describe in more detail what the traffic conditions were at that time?

Indeed, often times what appears to be a sufficient answer is, on reflection, insufficient:

Q: Describe the man's height?

A: He was tall.

Here, at first blush, the answer might seen appropriate. However, it is unclear what the witness himself means by the word "tall." Follow-up in this scenario is mandatory and the lack of detail is easily cured:

Q: Tell us what you mean by "tall"?

The point is that to be successful the trial lawyer must listen to the answer and continually evaluate the sufficiency of the response given in Court. Reading the next

question to yourself as the witness is answering the previous one is also a road map for disaster. If the answer has not specifically clarified the point to the trier of fact, additional questions must be put to the witness at the time to ensure that there is no ambiguity.

Simplifying The Testimony

Closely related to the failure to listen is the failure to simplify the testimony to the trier of fact. Too often professional witnesses and police witnesses speak their own language. Lawyers fall into this same trap by using "legalese" either to try and sound important or because they have become so familiar with certain legal language that it is second nature to them even though it may well be foreign to the jury.

Imagine the following scenario in which a straight forward question is put to a police witness:

Q: Tell us exactly what you saw on June 12, 2010 at 3:30 p.m.?

A: I saw the subject approach the complainant with an instrument in his hand.

Here, the answer is clear as mud. Needless to say simplification and follow-up are mandatory. The failure to simplify the words "subject" "complainant" and "instrument" could prove fatal to the outcome of the case. Consider a similar scenario with a physician:

Q: Doctor, describe the injury to the patient's leg?

A: He suffered a comminuted fracture to the distal femur.

Here, the failure to reduce the "medicalese" to common understandable words will prove fatal to the presentation of the severity of the injury. Similarly, imagine the scenario

in which a lawyer uses words fully familiar to himself during the questioning of a witness but words which sound down right silly to jurors:

Q: Had you executed the matter prior to the time in which you were deposed?

To jurors, this poorly phrased question might be asking about a death sentence from someone who lost her crown. Needless to say, the failure to simplify and clarify serve only to weaken the presentation of appropriate direct testimony.

Emphasize Key Points

In any direct examination there will come a time when an essential or key point must be brought out. While an attorney should never move to the next subject area until he has made certain that he has brought out sufficient factual material to present a clear and compelling argument on summation, the failure to emphasize essential points will lessen the chances of success. There is a tendency on direct examination to move the story along too fast by asking the simple questions: What happened next? The problem with using this question and racing through direct is that it fails to emphasize and reinforce the key points that are essential for summation. Put simply, repetition wins cases.

Consider the following example in which a lawyer, in bringing out the nature of the injuries suffered by the plaintiff, moved the testimony along too quickly:

Q: What happened next?

A: As I was crossing the street the bus struck me.

Q: What happened next?

A: I was knocked down and I was taken to the hospital.

Q: What happened at the hospital?

Here, appropriate emphasis on a key point is entirely missing. The better approach is to frame the crucial point in time and emphasize the key points by using those parts of the answer that should be highlighted:

Q: What happened next?

A: As I was crossing the street the bus struck me.

Q: Where were you when the bus struck you?

Q: What part of your body did the bus strike?

Q: Tell us step by step what happened to you as the bus struck you?

Q: How did you feel when you were struck?

Q: How did you feel immediately after the bus struck you?

Q: Describe the pain you felt at that time?

Clearly, this series of questions, focusing on a limited point in time, paints a far more graphic picture for the trier of fact.

Transitions

Another technique to draw the jury's attention to the importance of the next subject area to be discussed is the appropriate use of transitions. Phrases such as "Did there come a time that (something happened)"...work; however, the language is awkward. A portable technique that works in many situations is to use the "day, time and place" formula. Direct the witness' attention to two of the three words in the formula and you are well on your way to clarity:

Q: Let me direct your attention to June 12, 2010 (date) at 3:30 pm (time).

Where were you? Or

Q: Let me direct your attention to Bellevue Hospital (place) June 12, 2010 (date). What time did you arrive?

Transitions do not have to be formulaic. They do, however, have to focus the trier of fact's attention on something of significance. The beauty of using transitions is that they allow for immediate direction and clarification to both the jury and the witness:

Q: Let me direct your attention to the points in time when you were on the ground after being struck by the bus. How did you feel?

Q: What did you see?

Q: Tell us what you did at that time?

Q: Tell us what was done for you at that time?

Transitions are nothing more than directional guidance to both the witness and the trier of fact. Questions that begin with the following words offer such guidance:

Q: Let me direct your attention to (the next subject area)

Q: Calling your attention to....(a point in time)

Q: Focusing your attention on (a specific event, part of a contact, page, line etc.)

Successful use of transitions allows for immediate focus and remove ambiguity from the line of questioning. Conversely, the failure to use transitions serves to create confusion.

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