EFFECTIVE DIRECT EXAMINATION OR KEEPING THE JURY AWAKE

Alf Kwinter
SINGER KWINTER

Introduction

When I was asked by the OBA if I would prepare a paper on the exciting and enthralling topic of Examination in Chief aka Direct Examination, I cheerfully replied (perhaps too quickly) "sure, no problem". Then, having accepted the invitation I began to research (ok, Google) the topic and realized how much had already been written, mostly by minds much more nimble then my own. So what, I thought could I possible add to this subject that hasn't already been said? My own belief was not too much. I have however managed to service practicing as a Plaintiff's counsel for more than four decades and have conducted a fair number of jury trials so perhaps for that reason and maybe for that reason alone, I thought I might be able to add some additional insights based on my own observations and experiences. And if I do repeat what has already been written, all I can say is that great minds obviously think alike.[1]

The Importance of Direct Examination

You may have noticed that during a trial, not too many counsel come back to their office saying "Boy, did I just have a devastating Examination in Chief". No, it's cross examination that gets all the glory yet make no mistake about it – trials are won or lost on the fruits of Direct Examination.[2]

---

[1] My wife didn't think that was funny either
[2] Haresh Parekh – Legal Service India; Gujarat National Law University

It's Your Show

It has often been said that conducting a trial is like telling a story, and like any good story a trial should have a theme, keep the listeners interested and at the end make the listeners want to do what is right. Through effective Direction Examination, if the story is told in a clear, convincing and persuasive manner, that ending will hopefully be a verdict in favour of your client.[3] It is through Direct Examination that you get to tell the story first. You get to set the stage, determine the order of the witnesses and decide how this production will play out. Will it, at the end, result in a standing ovation (a great verdict for your client) or will the audience get up and shuffle out, shake their heads wondering what they have been doing there over these past few days or weeks? If you prefer the gallery to the music hall, consider that you are the artist starting with a blank canvas and what you create will hopefully be a piece of art which the jury will like and say at the end, "we'll take it". Cross-examination may get all the glamour but remember that with Direct Examination you are running the show.

Preparation

We have all heard many times that in a trial, preparation is the key to success. Nowhere is this more important than in the preparation of witnesses. If you are producing a play you wouldn't dream of putting someone on a stage without a rehearsal. So why would you do so in a trial?

[3] Remember, I am a Plaintiff's lawyer so this paper is being written strictly from the Plaintiff's perspective although defence counsel are welcome to read it if they really want to.

Preparing a witness should not mean simply speaking to that witness over the phone to hear what he or she will say. That may be sufficient if the witness is going to give uncontroversial evidence regarding numbers or any other facts that are not in dispute. If the witness is to give evidence which is crucial to your case and which you want the jury to accept, you must take the necessary time and make the necessary effort to properly prepare the witness for trial. You must meet with the witness and explain to him or her why they are being called, the importance of their evidence and ensure that the evidence they will be giving is reliable and does not violate any of the rules of evidence such as the hearsay rule. If the witness is going to give evidence from memory, you must test that witness's memory to ensure that the evidence will be reliable and credible. Has the witness referred to any document to refresh his or her memory? If so, do you have that document? You can expect opposing counsel to ask that question and demand production of the document. If the witness is testifying strictly from memory, determine how it is that the witness's memory is as good as it is. Why does the witness remember this event? If the witness has previously testified, make sure that the witness has read that transcript as you can be sure that opposing counsel will have a copy and will be ready to pounce at the first significant contradiction.

Explain to the witness that you can't ask leading questions and give an example of a leading question. Advise the witness that when you ask a certain question it will be up to the witness to answer without you having to extract the information. At the same time, ensure that the witness answers only the question and does not indulge in speech making or rambling on as some witnesses tend to do. The best way to ensure that this does not

occur, is to conduct a mock Examination in Chief with you asking the questions which will be asked at trial in the manner in which you will be asking them and listening as to how the witness responds. This will also give you an opportunity to determine how the witness presents and if the witness' evidence sounds credible. Of particular importance is whether the witness' evidence is consistent with evidence given by other witnesses and most importantly consistent with documentary or other uncontroversial evidence.

Remember, it isn't just about telling the truth which we assume anyone who is under oath will do.[4] It is also about sounding credible and having a jury ultimately accept what the witness has said particularly where there is evidence which may contradict that witness' testimony.

At a pre-trial, Plaintiff's counsel is often asked by the Judge "How does Mr. or Ms. X present?" What the Judge is really asking is how will that person sound once they are in the witness box? Yes, what a witness says is extremely important however how they say it is also important. I recall once reading a book on trial techniques that said an Englishman reading the dictionary sounds better than and American reading The Gettysburg Address. In a number of personal injury trials I conducted in my earlier years, my clients' family doctor always appeared to be hunched over, stuttering and disorganized while the defence doctors called by the insurer always looked like they had just walked off a TV medical show, tall, greying around the temples, well dressed, usually tanned regardless of the time of year, flashing their white teeth with a big smile to the

[4] I know, it doesn't always happen.

jury.[5] Listening to how the witness answers questions will allow you to determine if he or she is committing some of the usual witness missteps such as answering before the question is asked, speaking too quietly or too quickly, not answering the question that is being asked or talking too much. You can't tell a witness what to say but you can help the witness as to how he or she is going to say it.

In preparing the witness you will of course prepare the witness for what is to come in Cross Examination. My practice has always been to caution the witness to never lose their cool no matter how aggressive, sarcastic or rude the opposing counsel may be. Juries do not like lawyers who attack witnesses.[6] Nor do juries like witnesses who get angry or sarcastic or who lose their temper. I caution the witness to never argue with the cross examiner, to listen carefully to the questions and when a statement is put to the witness that the witness does not agree with, to politely say so and to explain why the witness disagrees. I explain that unlike Direct Examination, the cross examiner can lead and can attempt to put words in the witness's mouth. If the witness is properly prepared, he or she can be ready for such questions and know how to respond. As with Direct Examination, I conduct a mock cross examination. Remember when preparing a witness that most witnesses do not dream of the day when they can finally give evidence in Court in front of six strangers. They are usually unfamiliar with the process, they probably already hate lawyers and they can be frightened and nervous as they have no idea what they are about to go through. The more you can tell the witness about what his or her

[5] I recall a defence doctor once actually showing up in his scrubs giving the impression that he had left someone on the operating table while he just dashed up to the courthouse to give evidence and had to hurry back to finish the operation.
[6] The only exception to this is I believe where the witness has clearly been shown to be untruthful at which point the jury usually sits back and enjoys the show.

role will be and what will occur, the more relaxed the witness will be and hopefully, the more reliable and convincing will that witness's evidence will be. The rest will be up to you.

Preparation of Experts

The preparation of an expert witness can be the subject of an entire paper. I also believe that this area has been dealt with elsewhere in this program. I will therefore only touch upon a few key points which I consider essential when preparing an expert. First and foremost, you must caution the expert not to sound like an advocate. The Judge will caution the jury that the role of the expert is not to assist one side or the other but to assist the Court in ensuring that the trier of fact reaches a just and fair verdict. A Judge will very quickly and seriously discount the evidence of any expert whose evidence is cloaked in advocacy. In the case of a jury, you can be assured that the Judge will caution a jury about how much weight to give to an expert who comes across as an advocate.

The most obvious sign that the expert is an advocate is when he or she refuses to admit even the most obvious fact believing that to do so will somehow hurt the party which called the expert.

Q. "Doctor, I put it to you it's raining outside".

A. "Well counsel, that all depends on what you mean by rain".

Secondly, ensure that your expert has read and seen all the relevant reports, surveillance, documents etc. An expert's evidence can be severely undermined if the expert has to admit that he or she has not seen certain relevant documentation. This often results in

the expert feeling very embarrassed and unprepared and glaring at the counsel who called the expert. The look is usually not one of love and kindness.

Questioning the Witness

a) Introducing the Witness

When you call the witness, rather than saying state your name, say "Would you please introduce yourself to the jury".[7] By so introducing the witness, the jury feels part of the conversation as opposed to feeling like a spectator. I use the same technique when questioning the witness. I often start a question with "Would you please tell the jury..." Here again the jury feels part of the discussion – that they are being let in to the conversation rather than on the outside watching. It is in effect a threesome rather than a twosome. I learned this technique years ago by one of America's outstanding counsel at a conference in Ann Arbour, Michigan and have used it ever since.

b) Humanizing the Plaintiff

When questioning a Plaintiff, I think back to the song some of you who read this may remember. It was by The Teddybears. Allow me to sing a few bars:

"to know know know him, is to love love love him..."

I knew you would remember it.

Yes, I want the Judge, and particularly the jury to know as much about my client as possible. No he or she is not just the Plaintiff, he is John or Jane Smith who was born in ... and grew up in .... I want the jury to hear about my client's upbringing, the client's first

[7] I will admit to having borrowed some of these tips from the Osgoode Hall Trial Advocacy Teaching Manual used in the trial advocacy course I teach at Osgoode.

job, where he or she worked through school, all the hardships he or she faced, all the difficulties he or she had in life to get to the point where they are today. Once the jury has heard about my client's entire life, they have in effect "grown up" with my client. How effective this is will of course depend on the type of life your client has had before stepping into the witness box.[8] In a case I had some years ago in St. Catharines when my client was accused of having torched his mushroom farm for the insurance proceeds, I took the jury through the Plaintiff's entire life. When they returned with their very generous verdict late at night, they waited for my client to exit the courtroom. They fell upon him hugging him and kissing him. One of the jurors said to him "we knew after the first day you never started that fire" then gave him another hug.

While I am not suggesting that every one of your clients will get hugged and kissed when the case is over, I do believe that the more the jury knows about your client the more they are likely to like him or her. A jury that likes your client will more likely want to help your client.

c) Asking the Questions

We know that you are not allowed to lead your own witness. The exception to this is when the evidence is not in dispute such as your witness' age, address, occupation etc. The best course I believe is to follow what has become as the W5 approach.[9] Who, what, when, where, why (and the occasionally how).

[8] Danger – war story coming.
[9] The Art of Examination in Chief and More – Dave Hill – March 28, 2016

Each question should be short and clear. Avoid compound questions and ask questions in an organized chronological manner that paints a clear picture of the case you are presenting. Where the evidence is of crucial importance to your case, slow down and change your voice modulation. This is the vocal equivalent of zooming in with the camera or underlining the comments you want to emphasize. Use silence as an effective tool. When you get a very favourable response, pause for a few seconds to allow the answer to sink in. Make sure the Judge has had some time to write the answer before you go on to the next question. If the Judge picks up a coloured maker, that is usually a good sign. Avoid nervous fillers such as "I see", "ok" or "ah-ha". I notice this is a common tick among students I teach with most of them being unaware that they are doing this. Have someone in your office observe your mock examination to tell you if you are using any fillers or have any of these "ticks". The best Direct Examinations sound like a conversation between the lawyer and the witness. Remember that in Direct Examination the focus is not on you, it is on the witness. It is the witness who is telling what is hopefully a credible and convincing story that will ultimately persuade the trier of fact. Don't move around, don't distract, keep the focus on the witness. Try to maintain eye contact with the witness rather than looking down at your notes. Try not to write out and read the questions but have a checklist of all the important points you must cover and check off all the points as they are covered. Avoid legal ease, keep your language clear and simple. Avoid asking irrelevant questions. Always ask yourself "How will the answer to this question advance or assist my case?" If it won't then drop it. Every counsel can think of a question he or she wishes they hadn't asked. At the end of the day there will be two competing stories being played out and your goal is to persuade the Judge or jury that your version is the

one they should accept. Most important of all will be the client's credibility. You must therefore ensure that the evidence he or she gives sounds and is convincing, persuasive and basically makes sense.

d) Using Headliners

I believe use of headliners assists the witness. Giving the topic before asking the questions allows the witness to direct his or her focus into that area of the evidence ("Let me take you to the events of June 4, 2015").

It is for the same reason I do not recommend the use of headliners or headings in cross examination. I do not want the witness on cross to know where the next question is coming from.

e) Do I Need this Witness?

Before calling a witness, consider how that witness's evidence will assist your case. Is this witness being called to establish a single fact? If so, is there another witness who is being called I can get this fact from? While you may call the witness to prove a single fact, remember that the witness is subject to cross examination on any area of the case that the Court deems relevant. I'm sure every trial lawyer practicing today can think of a witness he or she wishes they hadn't called.

f) Getting the Unexpected Answer

No matter how much time you spend preparing a witness, sometimes the witness' answer will surprise you or even crush you. Nevertheless you must never give the impression

that the answer is one you were not expecting. Quickly move on to the next question. With some luck, the jury may be asleep (a not uncommon occurrence). Under no circumstances should you express any shock, surprise or any visible reaction to an unexpected damaging or surprising answer. Slapping yourself on the forehead is definitely to be discouraged.

g) Order of Witnesses

There is no rule which states in what order you must call your witness. This decision can determine the outcome of the case. In a personal injury case many counsel assume you must call the Plaintiff first. In fact, doing so can in some cases lead to a disastrous result.[10] After all the Plaintiff in a personal injury case is the one party against whom the defence will usually have the most ammunition. There may be surveillance, defence medicals and discovery transcripts just to name a few of the weapons in the defence counsel's arsenal which he or she can and will use to attack the Plaintiff's credibility. If the Plaintiff is your first witness and he or she is seriously wounded on cross, then such a wound can be fatal. I call it the "Humpty Dumpty Effect".[11] No matter how strong your medicals, no matter how convincing your "before and after" witnesses are, neither all the kings horses nor all the kings men will save your case. So what do you do to avoid this potential disaster?[12] I faced this dilemma a number of years ago in what has become known in my office as the "Volvo mechanic case". My client was a mechanic with a large Volvo dealership. He decided to leave the dealership as he believed they were soaking their

[10] Caution – another war story coming.
[11] Yes. I made that up but you're free to use it.
[12] Here comes the war story.

customers. He and a co-worker opened a small two-pit garage. Customers coming to the dealership would ask for my client and were eventually referred to his garage. Approximately two years after opening his garage he was involved in two accidents. It was chronic pain and he claimed it prevented him from returning to any type of work. The surveillance was not that bad but the defence medicals were brutal (surprise). There was no objective evidence of any injury however the client claimed that he was in constant pain. One defence orthopaedic surgeon claimed that he followed my client out onto the street and as soon as my client left the doctor's building, his limp disappeared. The offer before trial was not surprisingly very little. English was not my client's first language. I could tell from reviewing his evidence that he would likely not do well on the stand. What was there to do?

Just a few days before trial, I got the brilliant idea to ask my client whether he had a list of customers whose vehicles he serviced at the dealership. He had such a list. Because he had serviced Volvos, these customers turned out to professionals such as doctors, lawyers and professors. I was allowed to call them. Each person on the list had his or her own story. "Do you know the John the mechanic?" I asked. "Do I know him? Let me tell you about John". Each one had a story about how the dealership was about to charge them for a new engine or other major repair. They found my client's little garage and my client repaired the problem with the turn of a screwdriver. Each one had a different story – all of them saying that he was the most honest mechanic they had every encountered in their entire life. I called all these customers before I called the Plaintiff. When my client took the stand you could virtually see the halo over his head. The jury looked at him in

awe. An honest mechanic! Unbelievable. Needless to say the case settled before verdict for a very substantial sum. Had my client taken the stand first, there is a strong likelihood he would have been a Humpty Dumpty victim.

h) Start Strong, Finish Strong

When presenting your case, always start with a strong witness and finish with a strong witness. You know that juries remember best what they hear first and last. The same applies to evidence. Try finishing on a high note – something that will resonate in the jury's mind long after the witness has left the stand.

Q. "Finally doctor in your expert opinion will Frank ever be able to return to the workforce in any capacity?"

A. "No".

Q. "Thank you for very much doctor. Those are my questions".

What Juries Think

We don't have the luxury in this Country after a trial of asking the jury "Well, how did I do?" Only by the verdict do we get some idea of what the jury thought of our "performance". But our American friends have no such restrictions. We know that in high profile criminal cases (think O.J.) jurors go on to appear on late night talk shows, do interviews and they even write books about their experience as to what happened in the jury room. American juries are also given surveys to complete with respect to their experience and often these questions ask about the lawyers' conduct and what the jury thought of counsel. It is because of this valuable service provided by our American friends

and colleagues that we get some insight into what is in the jury's mind when they watch a trial. So when it comes to asking juries what they think of lawyers, here's what they have to say:

a) jurors don't like lawyers who appear disorganized;
b) jurors don't like lawyers who attack or badger witnesses;
c) jurors don't like lawyers who do distractive things such as click their pens or move around in squeaky chairs, or make faces.
d) jurors have expectations about how lawyers should act and they appreciate someone who is polite, respectful of everyone in the courtroom and take the time to teach them what they need to know.
e) jurors don't like lawyers who force a witness to give a yes or no answer when the witness is trying to explain something to the jury.
f) jurors don't like lawyers who waste their time by repeating facts and dragging out a case.
g) jurors don't like lawyers who appear to lecture them or are condescending to them.[13]

Conclusion

Hopefully this paper has added something to the conventional wisdom. One thing I have learned over the years is that if you want to learn how to do trials you have to do trails. There is no substitute for the experience of being there and doing it. Second best is to assist at a trial or watch senior counsel conduct a trial. In my early days we could only

[13] What Jurors Think About You: mindMatters Jury Consulting; 2018

accomplish this by running down to the courthouse when we heard that one of our leading counsel was trying a case. Today there is a wealth of material available demonstrating trial techniques by some of North America's most outstanding lawyers. Watching such videos and listening to talks by some of these greats is invaluable. The 10 Rules of Cross Examination by the late Irving Younger (who I had the pleasure of hearing every year in Ann Arbor, Michigan) should be watched by everyone who wants to do trials. This type of fantastic material is all out there. Go get it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: May 7, 2018

A. Kwinter per au
Alfred M. Kwinter