What I Learned From Teaching Trial Advocacy: The Direct Examination

Part Three of a five-part series.

TAKEAWAYS >>

- Proper direct examinations require relevant questions resulting in answers that create reality.
- Selecting the right expert witnesses is paramount. Your experts should be knowledgeable; able to connect with the jury using classic elements of persuasion (ethos, logos, and pathos); and an excellent teacher.
- When admitting exhibits: *Mark* the exhibit, *show* it to opposing counsel, *show* it to the witness, *ask* the witness questions to authenticate it, *ask* the judge to admit it, and *use* it.

BY GINO L. DiVITO

ISBA RESOURCES >>

- Gino DiVito, *The Illinois Rules of Evidence: A Color-Coded Guide—2024 Edition* (To be released in January 2024).
- ISBA Free On-Demand CLE, *Eight Things Every Trial Lawyer Should Know* (recorded Apr. 2020), law.isba.org/46DTKnV.
- Keith L. Davidson, *Cross-Examination of Experts: Saving the Best for Trial*, 97 Ill. B.J. 94 (Feb. 2009), law.isba.org/3s9rSbZ.

BECAUSE THEY CARRY THE BURDEN OF PROOF IN BOTH CRIMINAL AND CIVIL CASES, prosecutors and plaintiffs' attorneys are the first to present opening statements and direct examinations. They thus have the initial opportunity to create favorable first impressions.

Direct examinations provide the first opportunity to confirm the truth of everything you told the jury during opening statements—another opportunity to establish ethos. And consistent with logos, you are given another opportunity to establish competence by your actions, and by posing questions to answers that create concrete images leading to reality. Finally, consistent with pathos, you are given another opportunity to display your personal conviction in your case and to elicit answers that provide the emotional responses that lead to desired results.

Of course, defense counsel, even without the advantage of initial opportunity, must also embrace all of Aristotle's admonitions. (For more on ethos, logos, pathos, and other elements of persuasion, see Part Two of this series in the November 2023 Illinois Bar Journal, law.isba.org/3LPmiCe.)

What to do and how and why to do it

Except possibly for adverse-witness testimony, direct examination should simulate a friendly conversation. After introductory information based on "who" the witness is and "when" and "where" events occurred, witness questioning shifts to an open-ended question such as "what happened?" After the witness answers with a general explanation of an event, a series of questions designed to paint detailed images about the event follow. When the answers have exhausted the images that create the intended reality, the same procedure follows: an answer to an open-ended question on a related action or on another topic, followed by questions directed to elicit reality concerning the event. This procedure is followed until the witness's testimony is completed.

As an example for my students, and with an adequate display of sorrow, I used the sad story involving Humpty Dumpty:

Humpty Dumpty sat on a wall.
Humpty Dumpty had a great fall.
All the king's horses and all the king's men
couldn't put Humpty together again.

That nursery rhyme is what the witness says in response to your question about what happened. Your task is to make that answer come alive by asking a series of questions directed at painting the images that create reality.

After the witness answers the "who" question to establish identity, the "when" question about date and time, and the "where" question about the location of the event, the witness responds to your open-ended question of what happened by reciting the nursery rhyme. You then ask the witness to describe Humpty before his fall. The witness's answer may provide an entire description. But if parts of Humpty's appearance are not described, you ask about them. From the answers, the jury learns that Humpty was egg shaped; much larger than a chicken egg; very pale; hairless, with big blue eyes and little ears and large nose and lips; and had short, spindly arms and hands and legs.

After answers to questions about the witness's knowledge of how Humpty got to the top of the wall, questions about the wall provide concrete images about the height and width and length and color and

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the material of the wall's construction, and perhaps the wall's purpose. Questions and answers follow as to how Humpty fell off the wall, about the sight and sound of Humpty's hitting the rocks at the bottom of the wall, and how Humpty looked (and perhaps smelled) after he fell—the terrible cracks in his shell and the oozing of a yolk-like variety of liquid colors. And then the king's horses and the king's men: how many of them; describe them; what sounds did they make; where did they come from; what prompted their arrival; how much time passed from Humpty's fall and the arrival of the horses and men; what did the horses and men do to put Humpty together? Did he survive?

Humpty's nursery rhyme alone provided no images, except for a possible few perceived by some jurors whose abstract images would surely differ from and have little effect on themselves and their fellow jurors. But Humpty's story, derived through questions and answers, exemplifies the creation of reality that occurs through proper direct examinations in real trials. In sum, proper direct examinations require relevant questions resulting in answers that create reality.

In another example I used for my students, after answering introductory questions, the witness answered the question about what happened by testifying: "A man ran into the room, fired two shots at Joe, and ran away." That testimony took a few seconds.

Significantly more time must be taken just to describe the man, the room, the gun, and the victim. We'll address just three sets of questions and answers that provide examples for creating images focusing on the defendant, the gun, and the victim.

The defendant. In response to the question about describing the man with a gun, the witness describes his features, stressing any that are unique. If the witness fails to mention relevant features, questions elicit them. As the man's image is created, the jurors focus on the defendant to determine whether he has the listed features. But far better, if the witness knew the defendant or previously identified him as the shooter, no description is necessary. The witness then identifies the defendant as the shooter as early and as often as possible. All the evidence, from the beginning to the end of trial, is about the defendant and not an amorphous "man" or "the shooter."

The gun. In response to a question, the witness is asked to describe the gun. The answer may be as simple as "a black gun." Or it might be as thorough as "a black .38-caliber revolver with a pearl handle." In response to a question about a gun shown to him, the witness says it looks like the gun, perhaps identifying any unusual features. A question about the sounds made by the gun evokes a loud "bam, bam." A question about what the witness saw when the gun was fired evokes "flashes." Perhaps a question about smell evokes "gunpowder." Those are the concrete images jurors experience concerning the gun.

The victim. In response to questions about Joe and his actions, responses include information about Joe, when he arrived in the room, who was there, and where he was and what he was doing when he was shot. When asked what Joe did after he was shot, the answer may be something like, "He clutched his chest and said, 'Bill has killed me. Tell Mary I love her.'" A question regarding what the witness did when Joe fell to the floor may include that the witness saw a vast amount of blood and felt Joe's pulse and knew he had died. Those are the concrete images jurors experience.

The answers about the shooter, the gun, and the victim achieve the goal of bringing to life some of what took place on that fateful day. Those are the images that jurors experience through their five senses. They illustrate the methods for developing the word-pictures that recreate prior action in direct examination: an open question followed by a series of closed questions.

Handling expert witness testimony

Consistent with common law and codified rules of evidence, a witness "is qualified as an expert by knowledge, skill, experience, training, or education." (See, *e.g.*, Federal Rule of Evidence 702.) An expert witness is allowed to testify on scientific, technical, or other specialized knowledge as an aid for the trier of fact to understand the evidence or to determine a fact in issue. (See again Rule 702.) Cases are often won or lost based on the testimony of an expert witness.

Except for an expert directly involved in the action, selecting the right expert witness is goal number one. This is a rare opportunity to select a witness of your own choosing. You need to select an expert who is both knowledgeable and able to connect with the jury. One committed to Aristotle's modes of persuasion is ideal.

Before experts are retained, they should be interviewed to determine whether they are appropriate for your case. During those and subsequent interviews, you must learn whether the experts have a firm grasp on the issues in the case, and whether they can teach you about their area of expertise and how you should frame questions for answers that teach jurors about their opinions and the conflicting opinions of any relevant opposing counsel's experts. In addition to your independent research, experts, who have deservedly earned their title, must be your teacher for everything about their and the opposing expert's opinions,

their experiences and results in providing testimony, and where the soft underbelly may exist for your experts' own testimony and that of the opposing experts.

Given the expansive discovery available before trial—especially discovery related to expert witness testimony—there are hardly any trial surprises related to testimony. Interrogatories and the deposition of an opposing expert witness and preparation for your own expert are essential. Discovery of an expert witness's opinions describe the parameters of the witness's opinion testimony at trial, and are also sources for impeachment. To ensure you're not surprised, you must exercise your right to discovery and be aware of every bit of furnished and independently obtained discovery, including the discovery you provided opposing counsel.

The greatest differences between an expert witness and any other witness are: 1) the expert's ability to provide expert opinion testimony to the jury; and 2) the attorney's need to learn, pretrial, as much as possible about unfamiliar and complex matters from the expert. In addition to those differences, another major difference includes the likelihood of the expert openly adopting the role of teacher for the jury—for example, by being invited to stand before the jury to graphically discuss and explain photographs, drawings, computer-projected images, and other visual aids, and even to self-create relevant images and to use and manipulate models.

When embarking on examining and cross-examining expert witnesses, you should have confidence in using the same tools you apply to other witnesses. It's true that the testimony of expert witnesses differs from the testimony of most other witnesses, for they possess the right to give opinion testimony and have greater knowledge of difficult subjects than average persons, including typical attorneys. But once experts have shared with you their knowledge on relevant subjects, and once you have prepared for battle—with significant pretrial aid from your own experts—it will be clear that you may address expert witness testimony in the same fashion you handle any other witness testimony. But, when cross-examining an expert witness, always be mindful that you're dealing with an expert.

Handling admission of exhibits

The proper handling of exhibits is important because, as is true for everything you do in court, the handling of exhibits should be flawlessly consistent with Aristotle's modes (ethos, logos, pathos) of persuasion.

The proliferation of email and text messages, police body cameras, surveillance cameras, audio recordings, use of computer technology in courtrooms, and all types of real and demonstrative exhibits results in significant increases in exhibit evidence in trials. Determining the admissibility of exhibits before the start of trial is now commonplace. Parties often stipulate to the admission of exhibits pretrial, thus setting aside foundational requirements. Motions *in limine* are used pretrial to determine whether exhibits are admissible. Hearings on such motions require briefings on the application of various evidence rules and may be similar to a mini bench trial. The good news is that the parties know rulings in advance of trial and even whether typical methods for admission of exhibits may be set aside.

However, where there has been no previous ruling or stipulation on the admission of exhibits, knowing the requirements for their admission is paramount.

What follows is a simplified, abbreviated process for admitting exhibits: *Mark* the exhibit, *show* it to opposing counsel, *show* it to the witness, *ask* the witness questions to authenticate it, *ask* the judge to admit it, and *use* it.

Mark it. The first step is to mark the exhibit. Depending on local custom or the judge's procedure, you personally mark it, or you give it to the court reporter or clerk or anyone else authorized to mark it. The marking should be something like: "Plaintiff's Exhibit No. 1 for Identification."

The first showing. The next step is to bring the marked exhibit to opposing counsel for counsel's review. This step provides an opportunity for opposing counsel to object. If there's an objection (*e.g.*, on the basis of hearsay or relevance or authenticity), the judge should conduct the argument and ruling outside the jurors' hearing. If there's no objection or an objection is overruled, the exhibit is brought to the witness.

THE PURPOSE OF YOUR ARGUMENTS FOR SEEKING OR OPPOSING A MOTION OR ARGUING AGAINST A JUDGE'S RULING IS TO WIN THE ARGUMENT THROUGH EVERY APPROPRIATE METHOD. IN SO DOING, YOU MAY WIN THE ARGUMENT; BUT IF YOU FAIL, YOU WILL HAVE MADE AN APPROPRIATE RECORD FOR APPEAL.

The second showing. The witness is shown the exhibit, after which you ask if they know what it is. When the witness responds in the affirmative, you proceed to the next step, also involving the witness.

The first ask is to pose questions to the witness in order to authenticate the exhibit. This step is necessary to lay a proper foundation for admitting the exhibit by explaining the source of the witness's knowledge concerning it and answering questions that establish its authenticity. When the exhibit has been authenticated, you proceed to the next step.

The second ask is to request the judge's admission of the exhibit into evidence. A valid objection may be overcome by additional questions for clarification purposes. When the judge rules that the exhibit will be admitted, the "for Identification" marking on the exhibit is deleted, so the exhibit's marking reads, and will be referred to, as "Plaintiff's Exhibit No. 1" or "Exhibit No. 1 in Evidence." The exhibit is now available to be published.

Using the exhibit. You've taken all

the preceding steps to make the exhibit available to the jury. Having heard all the lead-up questions and answers, the jury should not be left in the dark. You should make the exhibit(s) available to the jury as soon as the judge allows admission. Some attorneys' habit of showing exhibits to the jury at the end of their case-in-chief deprives jurors of joining with you on the road toward victory. Let the jurors see the writings, the photographs, and all the other exhibits for which you obtained admissibility. You do that by asking the witness to read the exhibit or to show it to the jury; or by asking leave of court for you to read it or show it; or asking leave to allow the jurors to individually review the exhibit and pass it to each of the other jurors (or to review it together in the jury room); or asking leave to project it on a screen.

Note that the above procedure does not address a situation where a witness cannot identify an exhibit because of the need for relevancy based on the fulfillment of a condition of fact or the need to satisfy a chain of evidence. An example of the former is where the witness testifies to having received an exhibit of a relevant handwritten note, but cannot identify the author of the note. A handwriting expert, however, will testify that the handwriting on the note is the defendant's. Under an evidence rule such as Federal Rule of Evidence 104(b), given assurance that the handwriting expert will testify, the judge should allow admission of the note contingent on the expert's later testimony. The same applies to a chain-of-evidence situation, where multiple witnesses may need to testify on such matters as the receipt, storage, and analysis of blood or other material for DNA analysis or of drugs for chemical testing. IBJ

Part Four of this series, concerning cross-examination, will appear in the January 2024 Illinois Bar Journal.

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