
DIRECT AND CROSS-EXAMINATION
OF LAY PLAINTIFF AND DEFENDANT

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PURPOSE OF DIRECT EXAMINATION OF A PLAINTIFF

1. First and foremost, the purpose of direct examination is to establish a gut-level emotional link between the jury and your client.
 - a. You want the jury to like your client, to believe your client is credible, and therefore a truth teller.
 - b. This need to establish a gut-level emotional link with the jury is true for all witnesses, but it is especially true for a plaintiff or defendant -- if they are individuals.

PREPARATION OF A CLIENT FOR TESTIMONY AT TRIAL

1. You and your client witness need to be intensely prepared.
2. Purpose of preparation of a client for testimony at trial:
 - a. To educate your client first and foremost that the case is going to be decided by the jury on a gut-level feel basis. You want to practice so your client gets used to acting, at least while on the stand, on a gut-level basis.
 - b. You want to explain to your client the strong and weak points of your case and, as to the weak points, you want to use mock trial examinations.
 - c. Explain theme of your case -- where your case is headed. You cannot prepare your witness for every question and answer. If they are asked a question they are not prepared for, at least they will give an answer that is headed in the right direction.
 - d. You want to give your witness-client comfort, reassurance and confidence by going over the questions you are going to ask, going over the theme, finally getting them to a point where they can react on a gut-level feeling basis.

- e. Always counsel your client to be truth telling. Although as an advocate you want to vigorously represent your client, you do not want to succumb to the temptation to have your client add facts which seem to make sense in the general framework of your case but which are not actually recalled by the witness.

HOW TO GET YOUR CLIENT/WITNESS TO HIS/HER GUT-LEVEL

1. Explain to your client that a key to their success is how much you as the lawyer and he/she as the witness share the instincts of the average person, common man or woman, that is, the jury. If you share the juror's instincts, you will have the same decision-making process.
2. Get your client to experience the most important/powerful feelings in their life -- whether it is a memory, an experience or a person. Then tell the client that when they are testifying that person is right there next to him/her and/or that that experience is occurring, i.e., a death in the family, feelings toward a loved one, etc.
3. If you can get your client to a gut-level, the jury will like them, believe them and feel for what has happened. Your client cannot exaggerate how he/she feels because you hopefully have them experiencing the most significant emotional feelings they have ever felt. At a gut-level, your client will be virtually undeterrable on cross examination.

PREPARATION LONG BEFORE TRIAL

1. Preparation of your client (if a plaintiff) for trial testimony actually begins in your office at your first interview, not substantively but only in terms of your initial decision as to which kinds of cases/clients to accept. There is a level of obsession a client may have as to what has happened to them that exceeds any value to your accepting them as a client. If he/she is totally obsessed, they will never truly see their case and will not likely have the instincts the average person will as to their claim.

2. Deposition preparation:
 - a. Preparation for deposition testimony is generally the same as the preparation done just before trial, except that it is usually only preparation for cross-examination.
 - b. Explain to your client: 1) that there are only approximately ten important questions for a trial; 2) they should answer only the questions asked; 3) they should answer only the questions they fully understand; 4) they should answer questions shortly and succinctly only qualifying their answer if, considering your preparation, they feel certain it is necessary; 5) never say "I don't remember" with reference to an event such as a conversation; use phrases such as "I don't remember verbatim" or "I can't recall each and every thing that happened"; 6) always tell the truth common sensically, not foolishly.

PRESENTATION OF DIRECT EXAMINATION OF AN INDIVIDUAL PLAINTIFF OR DEFENDANT

1. Questions should be short.
2. Questions should be simple.
3. Never exaggerate or overstate anything in direct examination. Let the case and your client speak for itself/himself/herself.
4. Let the witness be the center of attention. Your role, as attorney, is that of a catalyst.
5. Try to get the client witness down off the witness stand to draw diagrams of the accident scene; get your client/witness involved as the center/focus of attention.
6. As attorney, you want to be soft yet strong, courteous, but a protector, low key but competent.
7. Your presentation should be intensely creative.
 - a. Use a lot of anecdotes. This helps establish for the jury a gut-level feel for your client.

8. Cases are won on direct and preserved on cross-examination. You generally will win your case because it is strong, not because the other side's case is weak.
9. A good direct is like a conversation. You talk back and forth. You can use the answer given for your next question.
10. Direct examination is technically the most difficult part of a trial because the rules of evidence in most states still say you cannot suggest the answers. You generally cannot ask leading questions.
11. When you can ask leading questions:
 - a. preliminary questions;
 - b. issues not really in controversy;
 - c. transitional questions;
 - d. hostile witnesses;
 - e. reluctant witnesses;
 - f. adverse parties;
 - g. simple, young, uneducated witnesses;
 - h. extremely nervous witnesses.
12. Your client should give you a narrative answer on direct and only a yes/no answer on cross-examination.
13. Try to develop the following traits in your client's examination: industriousness, concern for family, courage.
14. Limit your questions to relevant issues; otherwise, you will confuse the jury, lose credibility with the jury and expose your client to wide-ranging cross-examination on matters that can only hurt and are peripheral to your proof.
15. Exhibit your client's injuries to the jury (if a plaintiff).

16. If your client does not recall important information he/she has previously given to you:
 - a. never give up if the information is critical to your case;
 - b. ask if your client "recalls anything else" about the subject matter;
 - c. if that does not work, repeat the question;
 - d. if that does not work, repeat the question slightly differently;
 - e. if that does not work, ask a leading question;
 - f. if that does not work, ask a very leading question;
 - g. if that does not work, ask for a recess.

Obviously you do not want to push too far. The more important the information forgotten, the more you try to get it in.

17. Use demonstrative/real evidence (i.e. photographs, drawings, etc.). It makes the testimony more real. Jurors can take these items with them to the jury room.
18. If your client has previously failed to tell the truth under oath, i.e. answers to interrogatories, and you find out, do not allow the client to continue to misstate the truth on the witness stand.

ORDER OF WITNESSES

1. In a catastrophic case, I almost always put the plaintiff on last. It creates suspense. It gives your plaintiff the opportunity to prepare for examination and cross-examination by hearing all else that have gone on before -- especially since I usually put the defendant on first. It allows the jury to see your client injured after you hopefully have established the defendant's negligence and causation.

VIDEOTAPED DEPOSITIONS

1. The videotaped deposition provides greater accuracy and trustworthiness than a stenographic deposition because the viewer can employ more of his/her senses in interpreting the information from the deposition.
2. Keep the video as short as short as possible so the jury will not become bored; keep pauses caused by trying to formulate questions as short as possible as they appear excruciatingly long on video; and keep questions concise.
3. While taping, think of the camera as the judge and jury:
 - a. keep pace brisk;
 - b. ask short questions;
 - c. use simple words;
 - d. organize direct examination as if telling a story;
 - e. use exhibits.
4. As to specific decisional rules re "matters of staging and photographic techniques", see In Re: Agent Orange Products Liability, 28 Fed.R.Serv. 2d 933 (EDNY 1980) and In the Matter of Daniels, 69 FRD 579 (NDGa. 1975).
5. A party can offer videotaped depositions instead of live testimony. The court does not view it as a "procuring" absence. Farrahmond v. Local Properties, Inc., 88 FRD 80 (NDGa. 1980) and Nash v. Heckler, 108 FRD 376 (WDNY 1985).
6. Technical guidelines are published by the Federal Judicial Center, 1520 8th Street, N.W., Washington, D.C. 20005, publication number FJC 76-3 and by the National Center for State Courts, Publication Department, 300 Newport Avenue, Williamsburg, Virginia 23185, publication number R0034.

DAY IN THE LIFE FILMS

1. Day in the life films have generally been held admissible to show nature and extent of injuries and resulting life styles. Grimes v. Employers Mutual Liability Ins. Co., 73 F.R.D. 607 (D. Ala. 1977); Caprarat v. Chrysler Corp., 423 NYS 2d 694 (1979); Air Shields, Inc. v. Spears, 590 SW 2d 574 (Tex. Appl. 1979); Lawton v. Jewish Hospital of St. Louis, 679 SW 2d 370 (Mo. App. 1984).
2. Defendant representatives have no right to be present at the filming. Cisarik v. Palos Community Hospital, 549 NE 840 (Ill. App. 1989).
3. It has to reflect a typical day. The jury is entitled to know all of what this entails. It is helpful for the jurors to spend at least one full day with the plaintiff in order to understand and appreciate the injuries.
4. Show the positive as well as the negative. You want to show your client is trying to accomplish something and not given up yet.
5. Jurors will give a greater award if they see not only the negative aspects of a plaintiff's life, but also the positive.
 - a. Focus, if possible, on plaintiff's accomplishments and positive actions.
 - b. Jurors will be most impressed with someone who tries to help him/herself out despite injuries.
6. If shot with sound, there is no need for an independent narration. The primary caretaker should introduce the presentation. No mention should be made of the case/lawsuit.
7. If not shot with sound, one must choose whether the primary caretaker, the physician or someone else should narrate or answer questions.
8. Give prior notice to opposing counsel pursuant to the Federal Rules of Evidence (803)(24) or 804(5) since the film is hearsay.

9. Admissibility:
 - a. authenticity (courts may require extrinsic evidence of this);
 - b. relevancy;
 - c. materiality;
 - d. probative value outweighs prejudice.
10. Authenticity (four conditions precedent):
 - a. evidence of the circumstances surrounding making of the film; competency of operator of camera, type of camera used, sensitivity of film, etc.;
 - b. manner and circumstances regarding the development of the film;
 - c. evidence regarding projection of the film, including speed at which the projector is being run and its distance from the screen;
 - d. testimony by a person present when the motion picture was taken that picture accurately depicts events as he/she saw them when they occurred.
11. Objection: Film contains hearsay/verbal and nonverbal (See Grimes case and 803(24))
 - a. Film allowed jury to consider evidence which was more authoritative on issues of pain and suffering and loss of enjoyment of life than any other evidence which plaintiff could produce through reasonable efforts.
 - b. Trustworthiness of film guaranteed by having plaintiff and other witnesses present at trial for cross-examination.
12. Objection: Film is exaggerated and unduly emotional. Film contains atypical events. The film is a needless and cumulative display of evidence.

- a. The film is not cumulative because it is the best evidence of pain and suffering and loss of enjoyment of life which can be obtained through reasonable efforts.
 - b. The film is not cumulative of medical testimony regarding the nature and extent of plaintiff's injuries, but rather will supplement and illustrate such testimony by visually demonstrating extent and impact of the injuries.
13. The goal of the film is jury empathy, not to make them feel uncomfortable so they cannot or do not care to watch.

CROSS-EXAMINATION OF A PLAINTIFF OR DEFENDANT

1. Have a purpose; do not cross-examine simply because it is your turn.
2. Be prepared; cross-examination should not be performed ad lib in the courtroom; it should be prepared in the office.
3. Stop on time; be as brief as possible. A great cross-examination is one which sets up a closing argument.
4. Keep your cool; do not lose your composure.
5. Where to begin: As a general rule, you do not want to begin where the other side has left off. You want to start with a significant point both to shake the witness up and to nullify the witness's testimony on direct.
6. Invade the witness's territory in the courtroom. Where appropriate, approach the witness stand and come between jury and witness.
7. Ask leading questions. This clearly helps you control the witness and the examination.
8. Ask short questions using common, everyday language.
9. Use professor Irving Younger's "The Ten Commandments of Cross-Examination" as a helpful guide. The are:

- a. be brief;
 - b. short questions, plain words;
 - c. always ask leading questions;
 - d. do not ask a question the answer to which you do not know in advance;
 - e. listen to the witness's answer;
 - f. do not quarrel with the witness;
 - g. do not allow the witness to repeat his direct testimony;
 - h. do not permit the witness to explain his answer;
 - i. do not ask to the "one question too many";
 - j. save the ultimate point of your cross-examination for summation.
10. Do not limit cross-examination to the bottom line substantive merits of the case. Peripheral issues such as bias can seriously compromise the witness's believability.
 11. Only cross-examine on your strongest points. To do otherwise will allow the witness to go on and on and will result in your loss of credibility with the jury.
 12. Know what to go after, how much to go after, when to stop and what not to touch at all.
 13. Do not be over dramatic.
 14. Do not cross-examine so as to infer a fact which you have good reason to believe is not so. This is not only unethical but foolish.

PURPOSE OF CROSS-EXAMINATION

1. To disrupt any gut-level emotional link established between opposing party and jury.

2. To discredit the witness by establishing bias, hostility and/or interest in the outcome of the case.
3. To point out error or confusion in a witness's testimony.
4. Generally, you cannot impeach your own witness unless there is surprise or prejudice.
5. Tools of impeachment:
 - a. Prior inconsistent statements. Ask witness if on a given date in the presence of a given person he/she said something different. If statement is in writing, let the witness read it to him/herself and direct witness to time and place it was written and/or signed. If witness admits prior inconsistent statement, ok. If witness denies prior inconsistent statement, you can call in witness who was there.
 - b. Depositions. Go through background of oath, attorneys present, stenographer, read and signed, if done. Then ask witness if he/she remembers being asked question and giving answer in deposition. Then ask was that a true statement in deposition.