

STORYTELLING ON DIRECT EXAMINATION

Chris Arledge
Partner, Ellis George LLP

In most civil cases, the heart of your story comes through your own witness on direct examination. Your goal on direct cannot be to simply dump all of the useful facts into the record and clean them up later. Your goal is to tell a compelling story. It's the story that makes the facts relevant, memorable, and compelling. And a good story will allow the trier-of-fact to fill in the gaps, and there will almost certainly be some gaps in your trial evidence.

Effective storytelling on direct requires at least four things: (1) chapters (or scenes) to tell the story in bite-sized pieces; (2) signposts to guide the listener; (3) proper guidance from the questioner to elicit the critical facts without getting bogged down unnecessarily; and (4) the effective use of visual aids.

A. The use of chapters or scenes

Novels are almost always broken into chapters. Movies and television shows are almost always broken into scenes. This is almost universally true because storytelling needs to be delivered in bite-sized chunks. Your story on direct is no different. Break your direct examination into chapters and scenes. And, like an effective novelist or movie director, make sure that each chapter or scene begins with the necessary setting.

It is the setting that allows the audience (here, your trier-of-fact) to understand where this scene fits in the big picture of the overall story, and it allows you to establish the who, where, when, and other foundational facts that allow your story to make sense. A chapter or scene that does not provide the setting is almost always confusing.

How much setting we require depends on the case and the witness. There is no hard-and-fast rule. But you should always ask yourself, when planning each new module of your direct examination, how much setting the judge or jury needs in order to understand the plot that will follow. In a factually complicated case, part of your setting might be showing where on the timeline this particular witness fits in. You could use the same timeline with a lot of different witnesses, just to help the jury follow the complicated story more easily.

B. Signposts help your audience know where they are

Without signposts, direct examinations are often impossible to follow. And for signposts to be effective, they must tell the audience something useful about the goal of that particular portion of the direct examination. A signpost "Let's talk about December 4th" is not particularly useful if the jury doesn't know the significance of that date. And even if they do, the module of the direct exam dealing with that date has an intended purpose. The signpost must tell the jury that intended purpose.

One way to think about this is to use signposts that establish the thesis for each module of a direct examination. Everything we do in a direct exam has a purpose; why not tell the jury what that purpose is? Ask yourself this: what is the one thing I want the jury to take away from this module of my direct examination? And then make sure the jury gets that information from your signpost. If, for example, you want the jury to understand that your witness never saw the

plaintiff's alleged injuries, maybe you ask the witness at the outset whether they ever saw the injuries the plaintiff claims in your signpost.

Sometimes signposts may play a larger role, including providing the thesis for an entire direct examination. You could, for example, establish the overall thesis for a particular witness's testimony at the beginning of an examination. The jurors can be looking for information relevant to that thesis as the witness testifies. Even if they miss some of the facts—jurors do drift off occasionally—it is critical that you have left all of the jurors with that overall thesis.

Exercise One: Begin a module of your direct examination by establishing the thesis of that module and by providing any necessary setting so the jury can follow what comes next.

C. The Oprah Method of keeping witnesses on track

The examiner walks a fine line of direct examination. If the examiner takes too much control and too carefully directs the examination, it can look like the lawyer is actually doing the testifying. Many direct exams die because the lawyer is doing all the talking, usually with closed-ended questions, and expected the witness to simply nod and supply the expected “yes” or “no.” This is almost always unpersuasive. Juries want to hear from the witness, not the hired-gun lawyer.

Equally troubling, however, is a witness who is all over the place, engaging in unnecessary digressions and adding mind-numbing levels of unnecessary detail, often while also quickly glossing over some of the most critical facts in the case.

The answer is what I call the Oprah Method. Think about what Oprah's job is when she interviews a witness: she wants that witness to tell his or her story—it's not Oprah's story to tell—but she also needs to keep the interview on track to keep the story from getting lost and the audience from getting bored. To do this, Oprah must show extreme curiosity about the interview subject's important story while also being constantly vigilant (and maybe even a little impatient) about the story getting sidetracked. Where the witness is talking about important parts of the story, make sure the witness gives full and fact-filled answers. Questions like “Can you elaborate on that?” or “Can you tell us more about that?” are almost always helpful.

Along those lines, *never let a witness offer a conclusion on a matter important to the case.* Conclusions are not persuasive. If the witness says, “My boss was always rude and inappropriate,” do not let the witness stop there; immediately ask the witness to explain that statement or give some examples.

But if the witness gets off-track with unnecessary digressions or boring, unimportant detail, don't hesitate to jump in and pull the witness back to what's truly important. Questions like “I'd like to focus on the meeting with HR. Can we get back to that?” let the witness know that they're getting off-track, while also letting the audience know that it's time to listen again (if you've been drifting away) because we're going to get back to what matters.

D. Visual aids are critical

Your direct examination must have visuals. The most obvious, at least in business cases, are documents. Often we want to make documents a part of our evidentiary record, and we need to get those documents in evidence through a witness. But we should not end there. If a document is important, show it to the jury. Highlight and callout the important parts. If the witness is testifying about a document, let the jury see it. Jurors get frustrated listening to testimony about a document that they can't see.

And remember that modern people don't want to just listen to talking for hours at a time. We are not used to that. In the day of smart devices, we are used to visual entertainment at all times. Besides, some people are visual learners and will have a hard time understanding and remembering things they hear but don't see.

So show the jurors something. An effective direct examination generally involves some show and tell. We will almost always use exhibits, of course, but it's not just about documents. Almost anything that you can bring into a courtroom and play with will be well received by a jury. The most mundane objects – tools, signs, articles of clothing, and many other things – will be of interest to jurors who are tired of sitting in their uncomfortable seats and listening to lawyers and witnesses drone on for hours. Be creative; think about what your case involves, and what you can show the jury. Don't forget about photographs, charts, and graphs. The jurors need visuals, and it's your job to have some ready.

And when you find a useful visual, make it a centerpiece of the examination, even if it's relatively short. You or the witness should hold it, use it, talk about it.