A few last thoughts on direct examination in American trial practice: Part 4

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In three prior articles we have looked at the basic principles of direct examination in American trial practice, and the ways in which American trial lawyers establish and maintain control over the witness presentation on direct examination. A few miscellaneous topics remain without which no discussion about direct examination could be complete: drawing the sting out of cross-examination, the language of direct examination, the trial lawyer's demeanor, and, lastly, re-direct examination.

Draw the sting out of cross-examination

A difficult question facing the direct examiner is whether to 'draw the sting' out of cross-examination by voluntarily disclosing a weakness before the cross-examiner can use it. I believe the answer, as a general rule, is 'Yes, but carefully!'

The theory of such 'defensive' direct examination is that having the witness offer the harmful information herself will minimise the impact. Volunteering a weakness before it is exposed enhances the credibility of both witness and direct examiner, shows the factfinder that neither the witness nor the trial lawyer has anything to hide, and it affords the witness the opportunity to explain the weakness in her own terms, not in the opposing counsel's words.

Consider the alternative: it will be all the more damning if the witness is seen as having tried to hide the harmful facts. If the harmful facts are first elicited on cross-examination, it will require the factfinder to revise negatively an image that she has already formed, and, consequently, doubt will settle in her mind as to the reliability of the image initially presented.

As with virtually every other facet of trial advocacy, it is the intelligent application of this general rule to any given witness that is often difficult. How damaging is the harmful fact? Does the other side even know about it? Will opposing counsel be able to expose the weakness on cross-examination? The indiscriminate disclosure of harmful facts on direct examination is a mistake. The trial lawyer should conduct a 'defensive' direct examination only when the harmful facts cannot be excluded by the rules of evidence, and opposing counsel is expected to expose the weakness on cross.

If the trial lawyer decides to volunteer a harmful fact, she should work with the witness in pretrial preparation to find the best explanation that exists ethically and truthfully, and to present it in a positive and forceful way. There is certainly no need to dwell on harmful facts on direct; they should be mentioned in a matter-of fact way.

Another important consideration in volunteering weaknesses is primacy and recency. By definition, harmful facts cannot be strong points of the client's case, so the trial lawyer should bury the harmful facts in the middle of the direct examination. It is always best to start the direct examination with strong positive points that produce a favorable mindset with the factfinder, then to disclose the unfavorable information, and to end with strong positive points.

The language of direct examination

Words are the stock and trade of the lawyer's profession. Effective communication is at the heart of what we do for a living. Why then, when you walk into any American courtroom, will you hear lawyers asking questions such as:

Q: Did you, subsequent to your oral conversation with the professional investigator, affix or otherwise impress your distinctive signature to a testimonial document satisfying the statute of frauds?

instead of:

Q: Did you sign the piece of paper Mike Hammer gave you?

Avoid stilted, complex language and jargon

In American courtrooms you are likely to hear questions that are convoluted and obtuse through the use of words rarely found in normal conversation. In short, they will sound as though asked by a lawyer. American trial advocacy scholar, James McElhaney, ascribes this phenomenon to the 'herd instinct that makes us want to blend in with all the other lawyers roaming through the judicial countryside' (*McElhaney's Trial Notebook* (4th Ed, American Bar Association, Section of Litigation, 2005, page 411). Another reason may be the formality trap – a court of law is a formal and foreboding place which seemingly turns plain speaking men and women into stiff parodies of lawyers the moment they walk through the courtroom door. Inexperienced trial lawyers also often unwittingly adopt the stilted jargon of professional witnesses. Police officers, for example, 'respond to scenes,' 'exit their vehicles' and then 'give pursuit; 'they do not 'go places,' 'get out of their cars' and then 'chase' the suspect.

Moreover, many lawyers, in an attempt to avoid an anticipated objection on the grounds of leading, add the phrase 'if anything' or ' if any' to their questions. For example:

Q: Subsequent to your arrest, what, if anything, happened?

Questions such as these do not sound conversational as a good direct examination should. The trial lawyer's fear of drawing an objection is unfounded. Of course something happened – the laws of physics demand it. Obviously, the information that the trial lawyer wants to elicit in our example is the vicious beating his client received in police custody. However, she is not suggesting that answer to the witness. The witness is perfectly free to respond: 'The police officers

made me a sandwich and then I took a nap.' Therefore, a preferable (and perfectly unobjectionable) formulation of the question is:

Q: What happened after the police officers arrested you?

Consider the following:

What, if anything, unusual happened on that occasion?	vs	What happened next? Or better yet, What did you see / hear / taste / feel?
How long have you been so employed?	vs	How long have you worked for Mr. Jenson? Or How long have you worked as a bricklayer?
Would you relate to the court, what occurred subsequent to your seeing the vehicle in question?	vs	What happened after you saw the yellow Ford Mustang?
Would you indicate, please, at what distance the plaintiff's motor vehicle was from yours when you first observed it?	vs	How far away (or near) was the other car when you first saw it?
Did the victim ever attempt to initiate a conversation with the defendant?	vs	Did Mr. Morgan ever try to talk to Mrs. Bailey?
For what period of time did you maintain surveillance over the subject in question?	vs	How long did you watch him?
Did you have occasion to . . .?	vs	Did you . . .?
Did there come a time when you occasioned to observe the defendant depart from the building?	vs	Did you see Mr. Archer leave the building?

The latter formulations are preferable. They are clear and understandable. Communications research has found that factfinders view simple but grammatically correct language as more persuasive than unnecessarily complex speech, both from trial lawyers and witnesses.

Use sensory language

Trial lawyers should use sensory language - graphic, vividly descriptive words - so that the presentation becomes memorable. Experienced trial lawyers understand that developing a 'trial vocabulary' with their witnesses is an essential part of effective direct examinations. Psychological studies have repeatedly demonstrated that the way in which a question is phrased has a significant impact on how it is answered.

Instead of using a neutral phrasing such as 'What was your *speed*?' the trial lawyer should use an impact word in the question instead (depending on the theory of the client's case), such as 'How *slowly* were you driving?' or 'How *fast* were you driving?' Instead of asking, 'What was the *distance* between you and the other woman?' the trial lawyer should rather ask, 'How *close* were you to the other woman?' or 'How *far* away were you from her?' Effective trial lawyers are acutely aware of the different impressions conveyed by, for example, the word 'accident' as opposed to 'collision,' or 'collide' as opposed to ' smash.'

The trial lawyer must therefore decide in advance what words and phrases she wants to employ at trial to create favorable impressions, and then use them consistently during direct examination and other phases of the trial. The trial lawyer should train the witnesses to use sensory language. Witnesses should thoroughly understand that vivid words have more impact, and are therefore remembered better. A crucial part of witness preparation is helping the witness find her own sensory vocabulary. For example, when asked, 'What happened to you after the crash?' most witnesses will say, 'I hurt my arm.' When preparing the witness to testify, the trial lawyer should ask sensory questions, such as: 'How did you know your arm was hurt?'; 'What did your arm look like after the accident?'; 'What did your arm feel like?'; 'What were you thinking at the time?' If the trial lawyer asks sensory questions, the witness will naturally respond with sensory answers, which will paint for the factfinder a clearer picture of the events.

The trial lawyer's demeanor during direct examination

The trial lawyer should give each witness her undivided attention. The trial lawyer should show genuine interest in the witness's story, although she has heard it a dozen times during trial preparation. After all, the trial lawyer can hardly expect the factfinder to hang on the witness's every word if the trial lawyer herself looks and sounds bored. The trial lawyer signals disinterest by fussing with elaborate notes, by checking off questions as she asks them - in short, by any mannerism other than complete and undivided focus on the witness.

Appearing interested has other consequences. It carries over to and infects the witness, eliminates any suggestion that the direct examination has been scripted in advance and it helps the trial lawyer to avoid making mistakes, and alerts the trial lawyer to the unexpected answers that invariably appear in any direct examination.

A good technique to demonstrate interest is to maintain eye contact with the witness. When the factfinder's attention strays to the trial lawyer, the trial lawyer's attentive attitude will direct the factfinder's mind back to the witness.

A written outline that contains the major topics about which the witness will testify provides an organized and structured approach to a direct examination. As I discovered during my first trial, however, a detailed script, containing every question and answer, is an impediment. Firstly, a good direct examination looks and sounds like a spontaneous, informal conversation between trial lawyer and witness. A direct examination conducted head down, with the trial lawyer's nose buried in a legal pad, cannot ever seem anything but rehearsed. Secondly, nobody writes exactly as they speak. Therefore, when the trial lawyer reads scripted questions, they do not sound natural and are easily perceived as contrived. Thirdly, when the witness, who does not have the ' script' on the stand, gives an unexpected answer, it leaves the trial lawyer in complete disarray, as she desperately attempts to re-formulate the question in her mind while simultaneously struggling to keep her place in the 'script.'

Re-direct examination

In American trial practice, the proper purpose of re-direct examination is to rebut, explain, or further develop matters raised during cross-examination. It is not the place to repeat or rehash the direct examination. It is certainly not the place to raise an important point for the first time. Some lawyers frequently engage in the latter - so-called 'sandbagging.' They often withhold an important point from the direct examination in the hope that the cross-examiner will ask about it and then choke on it, so that it can then be further elaborated upon on re-direct. This strategy is disastrous when it fails. The cross-examiner, either through design or luck, may decide not to cross-examine at all, or to probe areas totally divorced from the withheld topic, thereby preventing the trial lawyer from eliciting the testimony on re-direct examination.

The first question is, of course, whether the trial lawyer should re-direct at all? Every re-direct examination necessarily implies that something was either forgotten, or needs fixing. Texas trial lawyer, David Berg, offers the following simple advice to trial lawyers faced with the strategic decision whether to re-direct: 'If it ain't broken, don't fix it. If you can't fix it, don't try.'

Re-direct examination in American trial practice can serve three useful purposes. Firstly, the trial lawyer may rehabilitate a witness who has been impeached with a prior inconsistent statement by asking the witness to explain why the inconsistency happened. Secondly, the trial lawyer can ask the witness to correct cross-examination testimony that was wrong or misleading. Thirdly, the trial lawyer can use re-direct examination to develop new matters brought out during cross-examination.

Re-direct should focus on key points that make a difference, not minor matters that the factfinder will soon forget. Therefore, the trial lawyer should immediately start with an important point, make it forcefully and efficiently, and then move on to the next important point. The re-direct examiner should end on a high note, then immediately stop. Because the re-direct examination usually touches on only a few points and the structure of a continuous narrative is absent, the re-direct examiner is generally given more leeway to ask leading questions than during the direct examination proper.

The trial lawyer should never re-direct merely because she has the opportunity. If there is nothing substantial to develop, the trial lawyer should not re-direct or re-cross solely to rehash already existing testimony. The trial lawyer should simply tell the court that she has no further questions from the witness and sit down. The factfinder will appreciate both her professionalism and brevity. a

Attacks on the judiciary

Press statement issued by Patric Mtshaulana SC, chairman, GCB, Johannesburg, on 28 July 2008.

In the edition of the *Mail & Guardian* published on 21 July 2008 Professor Pierre de Vos wrote:

'Judges are not (and should not be) above criticism. The judiciary is one of the three branches of government and in a vibrant democracy the decisions and actions of judges must be scrutinised, debated and criticised - even harshly if need be.

But the judicial branch of government has a special place in our constitutional democracy because it acts as referee and - in the case of the Constitutional Court - as final interpreter and enforcer of the Constitution.

This means that the independence and integrity of judges must be jealously guarded to ensure that their decisions command wide respect and legitimacy - even when a decision is unpopular, inconvenient or damn well infuriating to some.

Criticism of judicial decisions or the actions of judges should therefore be honest and principled and should not be based on petty self-interest or expediency.

While the independence of our judiciary is partly safeguarded by the institutional mechanisms contained in the Constitution, the judiciary can be said to be truly independent only if all important role players in society respect and protect the freedom of judges to do their job "without fear, favour or prejudice".

The independence of the judiciary - one of the three pillars of our democracy - is therefore threatened not only when its institutional independence is under attack through proposed constitutional amendment, but also when politicians and lawyers attack the integrity of individual judges in an unprincipled way to gain a short-term political advantage. Over time such attacks will erode confidence in the courts and in the judicial system.'

The recent attacks on the judiciary, oral, in print and by threat of action, examples of which include those by Mr Gwede Mantashe, Mr Julius Malema and Mr RW Johnson, are of great concern to the General Council of the Bar of South Africa. Such attacks not only 'erode confidence in the courts and in the judicial system,' but also threaten the very foundation of the rule of Law.

In endorsing Professor de Vos' sentiments the General Council of the Bar of South Africa calls upon all South Africans to deal with the judiciary, its conduct and its decisions in an "honest and principled" manner and, in the spirit of the Constitution, unreservedly and jealously to uphold and protect the rule of law. a

South African Law Deans Association

Professor Francois Venter, president of the South African Law Deans Association issued the following press statement on 1 August 2008:

The South African Law Deans Association (SALDA) wishes to add its voice to those who have expressed concern over the unwarranted and in some cases irresponsible public attacks that have been launched in recent weeks against the integrity of the judiciary.

Although judges are not beyond criticism, and individual judges have indeed been accused of misconduct which, if proven and countenanced without censure, would seriously discredit the institution, much of the public disparagement of the judiciary is not aimed at the alleged transgressions of individuals, but at those who have a consistent record of honest and just adjudication.

For the sound education of the next generation of lawyers for the management of which the members of SALDA are responsible, it is essential that the stature of judges as role models be preserved. Similarly law students should be convinced that they are preparing to work in a constitutional state in which the judiciary is cogently entrusted with the calling to provide justice and maintain social order, also in challenging social circumstances.

Political attempts at controlling the judiciary, be it by statute or by means of mob conduct, amount to an assault on an essential instrument and guarantee of democracy. We therefore call upon the political leaders of our country to set an example to the citizenry in upholding and defending the Constitution by honouring its provision in section 165(2) that the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

Enquiries: Francois.Venter@nwu.ac.za. This statement is also subscribed to by the Council of the Society of Law Teachers of Southern Africa (Enquiries: Professor Evance Kalula, SLTSA President Evance.Kalula@uct.ac.za). a