

The Art of Direct Examination: Creating a Masterpiece



[Nuts&Bolts]

By Gerald Klein, Esq.

Popular culture, movies, and television overemphasize the importance of cross-examination in the courtroom and minimize direct examination. While cross-examination is important in attacking witness credibility, the foundation of a trial presentation is usually direct examination. A monkey with a razor blade can destroy the *Mona Lisa*. It takes the tal-

ent of Leonardo Da Vinci to create such a masterpiece. Regrettably, there are not that many courtroom artists who can create direct examination masterpieces. So, for the rest of us, the following is a “paint by numbers” approach to telling your client’s story in direct examination.

Determine the Story You Want to Tell

Lawyers can learn much from art regarding the art of storytelling. In every case there can be many stories. The master painters in our profession look at the subject matter of a case and then determine

what they are going to put on the blank canvas. Trial lawyers can also learn much from Hollywood. There too, the writer and director determine what story the audience wants to hear before shooting a script. Accordingly, the first step in creating compelling direct examination is to decide what story to tell.

Choosing Themes and Stories Jurors Will Not Only Believe But Will *Want to Believe*

Too many trial lawyers decide what the story of the case should be early in the

case and refuse to move from the initial story selection. That is a big mistake. A compelling story the trial lawyer identified at the outset of the case may have to change as discovery unfolds. What may have been a beautiful and compelling story when the case was filed may no longer be credible as conflicting evidence emerges or key witnesses break down. Lawyers who try to tell a story that no longer has evidentiary support will be putting a square peg into a round hole – the effort is doomed to fail. Accordingly, good trial lawyers are constantly reassessing the story of the case throughout the discovery process, although it is unlikely a lawyer can change the story once trial begins.

It is not enough to develop a story that makes sense and has evidentiary support. A trial lawyer should also build a story people *want* to believe. Telling a story that makes sense and is logically consistent is not enough. If people do not want to believe what they are hearing and seeing, they are more likely to reject the story you are telling and accept the story opposing counsel is telling.

Emphasize Your Themes and Stories throughout the Case

Too many lawyers dwell on minutiae. However, if a story is about everything, then it is about nothing. Great trial lawyers focus on the key themes and tell a consistent story throughout the case. Each witness in direct examination will touch upon the case theme and move the story forward. A case that is plagued by too many subplots and case themes will only confuse the jury about what the true issues are in the case. Endless details will put the jury to sleep. In contrast, a well-thought-out story with compelling themes, addressed in part by each witness under direct examination, will be more persuasive and will stick in the minds of the jurors.

Choose Your Storytellers Carefully and Present Them in the Right Order

One of the big decisions a trial attor-

ney must make is who will tell what part of the story. There may be many witnesses to the same event. Even if a court allowed you to put on cumulative evidence, a jury will not forgive you for prolonging the trial if you present the same evidence over and over.

Where multiple witnesses can testify to a certain event or other aspect of the case, decide which witness would present the most compelling testimony on that point. For example, even though the injured plaintiff might have the best knowledge about how the accident impacted



While few of us are Leonardo Da Vinci, if we follow the rules set forth above, all of us can create great art. Figure out what your story is and be willing to change it as the case proceeds. Choose your storytellers carefully and understand which parts of the story they have to tell.



her life, that testimony could come off as whining, moaning, and self-serving. Such testimony might be better received from the plaintiff's husband, children or close friends.

The order of witnesses is also important. While it is not always possible to schedule the order of witnesses, especially in the defense case, witnesses should be scheduled in logical order. For example,

putting on a damages expert who opines on large damage figures makes no sense until the jury has heard about liability and is ready to start thinking about how much to award in damages. That is not to say that experts must be at the end of a case (some lawyers believe this is a rule of law). Experts can be presented early in the case to discuss how things should have happened with subsequent storytellers showing what actually happened in contravention of what the expert said.

After deciding what story should be told at trial and which themes you want to emphasize, the identification of your storytellers and scheduling the order of presentation is the next most important factor in painting your masterpiece.

The Only Difference between a Stick Figure and the *Mona Lisa* is the Detail

In very simple cases a stick figure presentation proving the elements of a case may be enough to win at trial. For example, in a straightforward breach of promissory note case, the lawyer may not need to present evidence other than: (1) the defendant signed the note; (2) the money is due; and (3) the money has not been paid.

But in the overwhelming majority of cases that go to trial, details are important. In providing that detail, there are two dangers: (1) not providing enough detail; and (2) providing too much detail. The trial lawyer should provide enough detail in direct examination to identify the following: (1) the credibility and potentially lack of bias of the storyteller; (2) the reliability of the witness as to his or her ability to perceive and recount events that occurred; and (3) the details that bring the case to life, rather than using so many details that the jurors fall asleep or start resenting the attorney presenting the case.

Regrettably, some lawyers believe there can never be too much detail. They not only focus on every tree in the forest, but also on every twig and leaf hanging from the twig. Ten out of ten trial judges will tell attorneys: lawyers spend way too

much time repeating facts jurors already understand. Besides boring the jurors, presenting evidence with too many details can confuse a jury about which details are important. Accordingly, good trial lawyers decide which details to present and present no more than what is necessary to create a masterpiece.

Never Forget That Direct Examination Can Be Dramatic

Too many trial lawyers have one word to describe direct examination: boring. They believe direct examination is a necessity they are obligated to present but would prefer not to present it at all. They often do not recognize they have an opportunity to be a director and present A-list talent through a script of questions and answers that provide not only background but drama as well. Often – and maybe the majority of the time – the most dramatic moments at trial occur during direct examination, not cross-examination.

The key to successful direct examination is to meet with the witness as soon as possible to develop compelling testimony that will support case themes and propel the story. After questioning a witness about events, it is not uncommon to stumble upon a story or a perception the trial lawyer never before recognized was important. Lawyers who rush through direct examination, pretending to be Joe Friday from the 1960's television series *Dragnet*, asking just the facts, will miss an opportunity to present truly dramatic direct examination.

Prepare Your Witness

There are few things more painful to watch than a lawyer questioning an unprepared witness during trial. Like dancers tripping over each other's feet or two ships passing in the night, off the cuff direct



examination is usually painful to watch. A witness will provide a non-responsive answer – or a horrible answer that hurts the case – in response to the attorney's "surprise" question. The lawyer will then ask a follow-up question and garner only a puzzled stare from the witness as to what she was supposed to say. This type of disjointed testimony will certainly come off as raw, unscripted, and genuine but will not generally result in a favorable impression of either the witness or the lawyer.

That is not to say that good testimony only comes from detailed scripting and practice, practice, practice. Unless you happen to be trying an entertainment case and representing Meryl Streep, your witness is not going to be Meryl Streep. Do not expect your witnesses to memorize scripted lines. It will not work. Instead, go over testimony multiple times and em-

phasize the key points in the testimony. Make sure your witness understands the substance of his testimony but not memorizing a script word for word. There is no substitute for a dress rehearsal.

Conclusion

While few of us are Leonardo Da Vinci, if we follow the rules set forth above, all of us can create great art. Figure out what your story is and be willing to change it as the case proceeds. Choose your storytellers carefully and understand which parts of the story they have to tell. Present your storytellers in an order that makes sense and will not lead to confusion. Finally, rehearse with your storytellers to make sure they are not surprised by your questions and you are not surprised by their answers. If you follow these simple rules, you will have a beautiful picture to present to the jury at closing argument.



Gerald Klein has tried approximately 40 cases through verdict and is a member of the American College of Trial Lawyers and the American Board of Trial Advocacy. Mr. Klein practices business litigation and professional negligence at his firm Klein & Wilson in Newport Beach, CA. He can be reached at (949) 633-3100.