

**WACDL**  
**WI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS**  
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**TAKE A WALK ON THE WILD SIDE: HOW TO PUT  
YOUR CLIENT ON THE WITNESS STAND AND  
MAINTAIN CONTROL**

**Direct Examination of our clients:  
Losing control of our case (or seizing it!)**

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**WHY WE DON'T LIKE TO PUT OUR CLIENT ON THE STAND (A SHORT LIST):  
PERSONAL REASONS:**

- A. We are not good at direct, it's not what we do, and it's what prosecutors do: "and then what happened...".
- B. We are trained to avoid asking questions we don't know the answer to. And our clients can be unpredictable, no matter how much we prepare them.
- C. Risk losing control when control is our best friend in trial. But, we can control during direct examination by using language to edit and direct what our client is talking about.
- D. We have so few opportunities to do direct examinations (motion and revocation hearings are all cross) that we fail to develop this as a trial skill.
- E. Our training and CLE programs rarely focus on direct examinations. (How many of you ever heard of a program headlined by Johnny Cochrane speaking on "The Ten Greatest Direct Examinations of My Career?").

**STRATEGIC REASONS**

- A. Client, or his/her story, will not withstand cross-examination or contradiction by pre-existing statements, physical evidence or a significantly more credible witness.
- B. Client has prior convictions. A real concern, but not dispositive. Plus move in limine to keep it out: Wis. Stat. § 906.09(3).
- C. Client's version makes no logical sense. Even to you...

- D. Client tells you he plans to perjure himself during testimony. Potential client perjury leads to numerous problems/complications. *See, Nix v. Whiteside*, 475 U.S. 157, 106 S.Ct. 988 (1986).

### **WHY DEFENSE ATTORNEYS MUST LEARN HOW TO DO A DIRECT EXAM OF OUR CLIENTS:**

Effective preparation and presentation of your client's testimony can address the vast majority of the excuses why your client can't testify in a criminal case. Effective preparation and presentation of your client's testimony can turn a terrible case into a minor work of art that yields results that will shock you and impress everyone who hears about it. And, because in some cases, your client is all you've got.

### **A FEW BASIC RULES FOR DIRECT EXAMINATION IN GENERAL:**

- A. Direct examination is a partnership where we want all of the attention to be on one partner while the other fades into the background.
- B. Organize your direct in a way that most effectively conveys your client's story.
- C. Develop emotional consistency with what your client is saying (act like a human being).
- D. Develop linguistic consistency with what your client is saying (talk like a human being).
- E. LISTEN to what your client is saying.
- F. Be and act genuinely interested in what your client is saying.
- G. Remember your audience at all times.
- H. Organize your direct in a way that allows your story to make logical sense. (Remember, the jury doesn't know the case like you do.)
- I. Setting the scene first will create context for the story and helps they jury follow along with you as you fill in the details and tell your story.
- J. If you are board, so is the jury.

### **PREPARING TO PREPARE YOUR CLIENT'S TESTIMONY:**

- A. The preparation/presentation ratio for direct examination of your client is even more skewed than other facets of trial work. Done correctly, direct client examination is at least 95% preparation and 5% presentation.
- B. You must have a complete and thorough understanding of all the facts in your case before beginning your direct preparation. You can't isolate the important facts before you know all the facts.
- C. Factual investigation should be essentially complete, including witness interviews, collection and review of all prior testimony and statements by client.
- D. Legal evaluation/analysis should also be largely complete so that you have a well-informed understanding of the prosecution's legal basis, how you can cast doubt on specific elements, and your available defenses.
- E. Have a well-thought-out and tested one-sentence theory of your case. This allows you to isolate the facts that are essential to that theory, and determine which of those facts must be developed through your client's testimony.

- F. Identify themes you want to explore (or just mention) in opening and closing arguments that will come from your client's testimony.

### **PREPARING CLIENT (AND YOU) FOR DIRECT TESTIMONY:**

A thorough understanding of all the details of your entire case and a well-developed theory and set of themes of your case are essential before meaningful preparation can occur. Meetings with client are essential to help you get to that point.

#### **1. BROAD CONTENT OF DIRECT EXAMINATION**

- A. Implement your strategy for getting out through your client the facts essential to your theme of the case.
- B. Developing empathy for your client's situation is vital, although sometimes difficult. You will not be able to prepare and present compelling client testimony if it's not built upon a foundation of mutual respect and trust. This allows your client to open up to you and divulge the personal information that will allow you to humanize him/her during trial. Also allows you to develop an understanding for your client's motivations and awareness of their emotional make up. Speaking with client's close family members is also extremely helpful to achieving a full understanding of your client.
- C. Help your client understand the purpose of this stage of your work together:
  - 1. Learn all of the raw factual information within your client's knowledge.
  - 2. Determine what relevant information may be established through other witnesses, e.g. character witnesses.
  - 3. Obtain detailed information about client, biographical and/or psychological.
  - 4. Emphasize the importance of candor and trust.
- D. Stage at which to develop a way to deal with the bad stuff, whether that is your client's negative character traits/habits or bad facts. Don't be afraid to use the former to your advantage. We all have annoying habits or traits. Have your client explain theirs (or do it for them in argument) in a way that allows the jury to set these aside when listening to your client.
- E. Begin practicing eye contact.
- F. Anticipate and be prepared for objections. Address through motions in limine where possible.
- G. Anticipate that practice sessions will reveal new problem areas you must address, in addition to revealing undiscovered strengths. Be open to both.
- H. Following practice sessions, list all of the facts and events that are essential to your theory of the case and will be told as part of your client's testimony. Distill this list down to the most important and simplify each area as much as possible.
- I. Assess exactly how each of these facts and events impact on and conform to your theory of the case.
- J. List the themes that will be contained within your client's testimony.
- K. Identify all the evidence or exhibits that will be used during your direct examination, and when you will use them.

- L. Identify what possible demonstrative evidence or visuals you can use to make the direct more interesting or how to get the client on his/her feet and closer to the jury.
  - M. Anticipate the negative. If bad facts are going to come out, it is almost always preferable to bring this out yourself. Your client receives credit for the candor; and you can control the narrative and take the sting out of the prosecution's use of the information. *Be careful here*: do not bring up harmful topics unless you are certain they will come out in cross-examination.
2. STRUCTURE OF DIRECT EXAMINATION
- A. Come up with a list of all the topics you want to cover in your direct examination.
  - B. Organize these topics into chapters by related areas. E.g. relationship with complaining witness before incident.
  - C. Give each chapter a working title.
  - D. Determine the sequence in which you will present each chapter.  
E.g., Chronological: clear and simple to follow but can lack impact/drama;  
Topical: allows for enhanced impact, but can be confusing for jury;  
Primacy and recency: your client's testimony right at the beginning and end of examination will be best remembered by jury. Use this to your advantage.
3. LANGUAGE and QUESTIONING
- A. Determine what vocabulary you and your client will use in direct examination. Make sure this is consistent with the theme of your case.
  - B. Use simple, less lawyerly words to enhance your communication link with the jury (car instead of vehicle).
  - C. Same goes with phrasing, avoid clunky phrases like: "on the day in question..." or "did you have occasion to observe...".
  - D. Determine what type of questions you will use to most effectively convey the point you (and your client) are trying to make with each question. E.g. leading, narrative, open ended and close ended.
  - E. Looping: we are all familiar with this technique in cross-examination, but it can also be very useful in direct examination.
4. EVIDENTIARY OBJECTIONS
- A. Objections on content of testimony. Carefully review the content of your direct examination for proper foundation and any evidentiary objections the prosecutor might raise. Prepare to effectively meet those objections. If you don't feel you can overcome an objection, determine whether there is another way to get the information before the jury.
  - B. Objections to form questions: Wis. Stat. § 906.11.
  - C. Determine whether there are objections you anticipate that can be addressed through a motion in limine.
5. PREPARING YOUR CLIENT TO PERFORM
- A. Practice, Practice, Practice (Alan Iverson was wrong!)

- B. Bring in other people to watch you practice, especially non-lawyers, and your client's family/friends. Make revisions based on their feedback.
  - C. Put your client on the spot.
  - D. Explain to your client how a trial proceeds. Walk through the order of evidence presentation, particularly when they will be testifying, and process of re-direct. Clients often relax a little when they realize they will not be on stage on the first day, but will have time to get used to their surroundings before testifying.
  - E. Explain the importance of demeanor and presentation on the stand: their speech, mannerisms, body language, eye contact, clothing, etc.
  - F. Even though practice is crucial, talk with your client about the importance of not sounding scripted. Train him/her on the importance of listening to your questions by not sticking to a script during practice. Vary the way you phrase your questions and vary the order of your questions within a topic. This allows you to preserve the spontaneity that is crucial to holding jurors' attention.
6. PRACTICE CROSS-EXAMINATION:
- A. Have co-worker cross examine your client in a setting that makes him/her feel vulnerable/on the spot.
  - B. Tell the truth.
  - C. Do not volunteer information.
  - D. Do not speculate.
  - E. Do not exaggerate.
  - F. Do not be cute with or get into an argument with the prosecutor.
  - G. But, they have a right to explain their answers.
  - H. Do not answer a question you do not understand.
  - I. Do not answer a question when an objection is interposed. Practice with client on allowing 1-2 seconds between question and their answer.
  - J. It's okay to say "I don't know." Or "I don't remember." SOMETIMES
  - K. Talk about your prosecutor's style with your client. Use that style during prep.

### **IN COURT – THE DAY OF RECKONING:**

- 1. DIRECT EXAMINATION
  - A. LISTEN
  - B. Primacy: did you shoot Bob Jones?
  - C. Use transitions
  - D. Ask short questions: what, where, why, when and how did you see, hear, smell, taste, feel?
  - E. Open-ended questions better than simple questions: "what did it mean to you when?" Rather than "what happened next?"
  - F. Narrative answers are fine, but avoid boring details.
  - G. Avoid convoluted, complex and obtuse questions.
  - H. Eye contact with your client
  - I. Loop to repeat important parts
  - J. Be mindful of the jury and their attention span. Adjust your pacing where necessary. Be economical with time.

- K. Listen for missteps from your client and help client correct them with additional questions.
- 2. CROSS-EXAMINATION  
Only object if necessary. Have confidence in your preparation with client.
- 3. RE-DIRECT  
Only if truly necessary, and if so, keep it short and to the point. End on a dramatic note, not on a meaningless or repetitive question.
- 4. DEALING WITH DIFFICULT JUDGES OR PROSECUTORS
  - A. Do not allow prosecutor's objections, especially about relevancy and too much detail, distract you from your planned examination.
  - B. Do not allow a hostile or impatient judge dilute or harm your client's testimony in any credible or meaningful way. Be prepared to ask for a sidebar if necessary to get the judge to back down and let your client tell his/her story. A defendant's right to testify is constitutionally protected, and may not be arbitrarily restricted. *See, Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704 (1987).
  - C. Be prepared to handle objections aggressively and confidently. If you can, make your point in front of the jury: "This is my client's only day in court and this is his only chance to tell the world why he's innocent, and he should not be cut off."

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