

8 Simple Rules For A Successful Direct Exam

Law360, New York (May 14, 2009) -- When it comes to defending depositions of the company witness, the old rules no longer apply.

At one time, defense counsel told witnesses: "Answer only the question posed" and, my favorite, "Whatever you do, don't volunteer information."

Then we began an age of worker mobility, buy-outs and reductions in force, and the notion that employees spent their entire careers at one company went the way of the dodo bird. Defense counsel were left defending company stories with no storytellers and, needless to say, second-guessing, and sometimes significant verdicts followed.

Today, most defense counsel have a different view. Conducting a direct exam of the company witness at the conclusion of the cross-exam is the rule, not the exception — particularly in this era of multidistrict litigation that can extend for years and involve multiple trials.

Direct exams also give outside experts (and courts in the face of dispositive motions) important background on such things as product design, testing and development.

In my 24 years of defending many company witnesses, I've developed eight simple rules for every direct exam. Boiled down to the bare essentials, they are: plan ahead, educate the witness on big picture goals, ask open-ended questions, explain their role, defend their actions, address specifically the assertions of malfeasance, respond to specific documents used on cross, and do it all succinctly.

1) Plan Ahead

Obvious, but be sure the witness understands how your questions will be different. They should appreciate that this may be played in a crowded courtroom with a jury that may be looking for some connection with the company. The jury may be angry. They may be bored. They may be angry and bored. The direct needs to be to the point, move quickly and yet be substantive.

To keep the witness tethered to a few specific themes, I like to use a couple of graphics that serve as guideposts for the major points. Ideally, my witnesses often create their own graphics, which is easy to do. And with each question, I want to accomplish a specific goal.

It's obvious but worth repeating that a good direct can only follow a witness who has maintained credibility on cross-exam. Jurors may already be familiar with your witness, having seen clips in plaintiff's case in chief.

Something I've learned is that witnesses must know a few basic things about the nature of the claims and the seriousness of the assertions.

If, for example, there are deaths reported by a credible agency such as the U.S. Food and Drug Administration, I want them to have at least a basic sense for the number and also have a sense for the range of injuries. Nothing can impact a witnesses' credibility more than appearing to be tone deaf to a serious injury to a particular plaintiff.

After all, if the company is in the business of making products to improve the health and well-being of its users, then it's not too much for them to understand that there may be cases where that did not occur.

2) Educate the Witness on the Big Picture Goals

If witnesses understand the primary goals — three or four — to be accomplished on the direct exam, then they become empowered to convey the themes, and it will stay lively and fresh. If the topics are complicated, they need a sense for how to simplify things. I tell them: "Keep it simple, but interesting, yet also realize this is a serious exercise where we can't be cute or demeaning. You make life or death products, and the jury will be watching you to see your dedication and commitment to your craft."

3) Ask Open-Ended Questions

I tell many of my witnesses: "The jury wants to find a connection with you. You are a mother and also a daughter to someone. Knowing a bit about your background from the outset may extend the attention span another 10 minutes that we can use."

I always start with two questions: "State your name," then, "tell the jury a little bit about yourself."

My experience is that witnesses tend to find something that defines them — maybe it's something about their work, a hobby, something about why they picked this part of the country to live. It's natural, interesting and refreshing because it has nothing to do with the product at issue, nothing to do with the plaintiff's injuries.

Typically this takes less than a minute, but it can be the most important part of the exam because it can extend the attention span of the jury another 15-20 minutes.

4) Explain His or Her Role in the Company: Where do They Fit in the Mix?

We defend large corporations with many employees. In my practice, I tend to deal with the four horsemen of pharmaceuticals: preclinical, clinical, regulatory and postmarketing monitoring. Giving the jury a quick sense for where this witness fits into the overall organization of the company — that can explain why he or she knows a little or a lot about key issues. Graphics here can be very useful to show a chain of command.

If they are a member of a "team," I like to create something that shows where they fit; often these can be groups with many distinct specialties. For example, showing that someone's experience is chemistry, not microbiology, puts in context why they can't interpret detailed microbiologic testing.

5) Defend

This is the flip side of explaining. By the defense case, jurors want to know the witness cares about product safety and has a passion for doing what's right for the consumer, for the user. That may include explaining actions or inactions.

If your case is one of compliance with all the applicable regulatory standards, you may want your witness to defend without being defensive. Questions I like are: "What was your thought process at that time?" "Why did you take that approach?" "Was the FDA informed? Did you seek guidance from experts outside the company? Clinicians? The CDC?"

6) Address Those on the Jury Who may be Angry, or Skeptical

What the witness says is just as important as how he or she says it. "What would you say to the men and women of the jury who might be hearing this case and wondering if the testing was thorough?" "What would you point to as evidence the scientists were tracking developments in the field?"

7) Respond to Specific Documents

Reserve time to explain certain documents that may receive inordinate attention. Some jurisdictions forbid you from talking to a witness at breaks while the deposition is in progress, so this may need to be done on the fly. Again, prepare for contingencies in advance so the witness knows where you are heading.

Examples could include revisiting a particular e-mail and putting it in historical context — messages immediately before and after the one receiving so much attention. E-mails often are sent to many recipients. Explain the role of the other recipients. Use a timeline to make sense of what happened, when, and then, why.

8) Be Brief: Get to the Point and Move On

For most witnesses who have been sitting for a day or day-and-a-half cross-exam, you can accomplish many goals with a two-hour direct exam, marking a dozen or so exhibits. Any direct played in open court would not likely be any longer than that. And while you can "cut and paste" a longer direct, sometimes that can break up the flow. Get the witness talking, keep the jury interested and score your primary points. Be bold, be brief and be gone.

And then, no matter what the course of the litigation, you will have prepared your client and its witnesses for a variety of contingencies and taken a significant step toward being trial-ready no matter the court date or venue.

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