RAMEY LAW P.C.

# GOING TO TRIAL VOL. 2

# Direct Examination 101

by CHRISTA HAGGAI RAMEY

Direct examination is one of the most important parts of the trial. Although, I could argue everything is equally important, direct examination is how you tell your client's story throughout trial. Sure, the jury has some idea. They have heard and participated in voir dire and opening statement. However, this is where the facts unfold. This is where you let the jury hear who did what and how that has impacted your client's life. This is where you will either solidify or lose credibility with the jury. This is credibility you will need for your cross examinations during the Defense case-in- chief. This is also credibility that you will need during closing.

How you decide to present this evidence may change in each case. Inevitably, obstacles will get in your way. But, like any good story – you need a beginning, a middle and an end. This is true for your case-in-chief in general and for each direct examination individually. I have seen and heard a lot of great story tellers in our profession in action. They all have something in common. They are authentically themselves as they elicit information from their clients. They all keep in mind their goal throughout the trial. How do we get justice for our clients? How do I let this story unfold so that the jury understands everything?

## WITNESS PREPARATION

***YOUR CLIENT*** - Something bad happened to your client. That is why you are in trial! They are scared, hurt, and want help. You must spend time with them, to guide them through this process. Throughout the life of the case, you need to really get to know your client. Go to their home. Meet their family, friends, and employer if necessary. The more you know about your client, the better position you are to prepare him or her for testimony. What is more, the closer you are to your client, the better they will do in trial answering your questions. The direct exam can just become another of the many conversations you have had.

Have your client review their depositions several times before testifying. You do not want them to be impeached even on a minor thing. Their deposition may have been taken a year or more before trial. Some things might have changed and you need to address any changes in your client's condition throughout litigation. This is not inconsistent testimony, it is a progression of an injury or illness (either better or worse).

Testifying can be a very scary thing! As attorneys, we are used to being in court, and used to speaking in front of people we do not know. They are not. Their nerves can overwhelm them. I have had clients clam up on the stand to the point where it is very difficult to get them to communicate. You need to make sure that your client is as comfortable as possible while testifying. Preparation is the only way to make this happen.

***LAY WITNESSES*** - You should have a purpose for each witness you are calling, including your lay witnesses. Are they necessary to prove your case? Some people are better at speaking and communicating than others. You should keep this in mind when determining what lay witnesses you will call and why.

I made the mistake early in my career of putting a lay witness on the stand when I only met with her one time – 30 minutes before she took the stand. I immediately told my client that I thought she was reluctant and would not be that good. The client assured me that it would be fine. It was not fine. I had a reluctant witness that had mixed loyalties on the stand. I looked terrible.

***PROFESSIONAL WITNESSES*** - When I was a young lawyer, I feared expert witnesses – I did not want to appear young or inexperienced. I embrace this now. They actually know more about their field than I do. I need to learn from them during the course of litigation. In this regard, you should be preparing your expert witness and your expert witness should be preparing you from the beginning of your case; that is long before expert discovery. Resist the temptation to believe that expert witnesses have been in more trials than you so they need little or no preparation. You need to know what they are going to say. You also need to make sure that they say everything that you need them to say. Having said this, I think expert witnesses are the easiest to direct during trial. But, they are the hardest to prepare.

There are times, for instance, when an expert will want to tell you what you need to prove your case. Knowing the science and knowing the legal burden of proof is two entirely different things. So, I always meet in person with my expert witnesses well in advance of trial to outline their testimony with them. Essentially, you are preparing your expert and your expert is preparing you.

## WITNESS ORDER

When you can take control of order, it can play a critical role in how the case is processed by the jury. As a trial lawyer, like it or not, you have zero credibility with the jury. Accordingly, when thinking about order – first do no harm! The first witness you put on the stand should be as close to unimpeachable as possible. And, this is not your client. They also have little credibility (you have even less). For instance, in an auto accident case, I like to put on the police officer who investigated the accident.

Your next witnesses should follow with the story of the case. What happened! Then, begin to move to the liability phase. Some of these witnesses will overlap. You conclude with your damages witnesses. You client is best right in the middle of it all. Bottom line, arrange your witnesses to tell the story of the case. What happened when. This is the timeline of the events – it must have a beginning, middle and end.

Having said that, the best laid plans do not always work. You have to work around your witnesses' schedules. This is even more difficult if you are in the PI Hub. You don't know what day you will actually get sent out. You don't know when you will start with witnesses once you are sent out. And, you don't know what courthouse in Los Angeles County you might end up. This is a huge issue. Make sure you have all of your witnesses' schedules, particularly your professional witnesses, like doctors who have clinical and surgical practices. These folks need as much lead time as possible to make things work.

When planning your witnesses, keep in mind the problems or challenges Defense counsel will encounter. Most judges will require you work with opposing counsel in accommodating witnesses with scheduling conflicts – taking witnesses out of order. We all hate it, but it happens. I will contact defense counsel and, point blank, ask them – "do you have witnesses that have to go on any particular day that we might need to take out of order?" If the answer is yes, accommodate them. But, you might need to re-work your own order based upon what Defense expert will be doing right in the middle of your case-in-chief, always keeping in mind your persuasive story telling.

Finally, when looking at witness order, you must always tell Defense counsel what witnesses you will have going the next day. Again, there is not a specific rule on this point, but it is common courtesy that the court will impose on you if you don't have the common sense to afford it yourself. Manners, civility and propriety are society's redeemers. This will help things along the way.

## TECHNIQUE

Now it is time to go! What is your role in direct examination? In law school, we learn to simply ask open-ended questions and fade into the background. That is not always the case. It truly depends upon the witness. One thing to go over with each witness is the "no-no's" at trial. Did you have any motions in limine granted? You better tell them not to blurt out inadmissible evidence. This could result in the judge granting a mistrial. It is a big deal. You should also make sure that they don't talk about the usual inadmissible things like insurance.

For the most part, never lead an expert witness. It appears as if you are telling your expert what to say. Your expert will lose some credibility. If you have prepared your case and your expert, this should be one of the easiest aspects of trial. Let your expert witness shine. They are there because of their expertise and know things that the common juror does not know. You should always begin with qualifying your expert witness. You cannot miss a step on this. This is the foundation for all of the professional opinions he or she will give. After your expert gives each opinion, take care to cover the basis for each opinion. Pay close attention and listen to what your expert is telling the jury and make sure that they are covering everything. When I am qualifying my expert, I deal with bias up front. I am building up him or her as someone who is remarkable in their profession, so much so that they often get called to court to testify. Naturally, they are compensated for their time. I talk about their compensation for their time for having to cancel or reschedule surgeries to be in court. Bottom line, jurors know these folks are getting paid. Don't hide it. At times an expert witness' role can overlap. For instance, an orthopedic surgeon will not only have opinions about injury causation, they will also be a nice witness to discuss damages. Be careful to skip over this. You are discussing all the treatment, surgeries and rehab with this expert. This is good for helping you with describing damages. Likewise, an accident reconstruction & biomechanic expert will be talking about the crash itself and the way the human body moves within a car or on a motorcycle. All of this is part of damages, not just liability. Damage experts play one of the most important roles in your case. But economist and life care planners are hard to get through in terms of testimony. It is not exciting testimony. You are talking about needs and numbers. But, this is some of the most critical testimony in your case. I try to get through this as fast as possible without boring the jury, but emphasizing the numbers.

Every witness you put on the stand should have a clear purpose. If a lay witness is there as a fact witness about how an accident happened, this is all you need to discuss with them. Cover everything, including their vantage point, exactly what they saw, and who they told, but do not keep them on the stand too long. If the lay witness is there to discuss damages, then the tactic is different. You can spend some time discussing how they know your client – what is the relationship and it duration. Establish the basis for their testimony about the ways in which your client's injuries have impacted their live.

I always prefer that my client tell the jury the answers to my questions, not me. In other words, I want my client to feel comfortable making eye contact with the jury from time to time. Your tactic will change if your client has a fear of speaking in public. There is no wrong way to do this. Your client's comfort is your guide. Don't use notes while questioning your client. Just talk to them. Approach your client's testimony as a conversation. The jury is just listening to this conversation. You are asking what happened to them. This is there only chance to tell their story. The rules about not leading are important for credibility reasons. However, from time to time you may need to lead a timid client. Some people freeze while testifying. They might give shorter answers than you want or even may forget things. Make sure you cover all bases – the incident, including what they experienced during it and the aftermath. The jury needs to fully understand what happened and its impact.

As trial lawyers, we are all story tellers. We are the conduit through which our client tells his or her story. Each witness should have purpose. And, you should not be the star of the direct examination – you should fade into the background.


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