

PERSUASIVE STORYTELLING USING DIRECT EXAMINATION

INTRODUCTION

Storytelling is an art. Being an art, no one storyteller will present his or her story the same. Every person's experiences are different and those experiences will impact on how the story is told. But the common threads of storytelling: the sharing of experience, information, emotions and motivations, are the same. To bridge the gap between varying experiences, one must create universal images that are easy to understand and relate to, thus creating a persuasive story.

Storytelling depends upon presentation, including organization, choice of language, sentence structure, voice modulation, facial expression and eye contact. The right words will create that universal image or paint a picture that creates the story and captures the listener's attention. The story must be interesting, easy to follow, pleasing to listen to and clear and simple, in order to have the greatest persuasive impact. The story must convey a theory and a theme that is simple and straightforward, and that also connects all elements of the story into a cohesive persuasive drama.

This is not a simple task. It takes much practice, experimentation, and critical self-analysis.

Here, we attempt to provide some methods, strategies and ideas to assist in the creation and presentation of a persuasive story using the direct examination of a witness at trial. Because the story is being told in a trial, the story must not only be persuasive, it must also convince the trier of fact of the justice of your client's case. Some of these methods, strategies and ideas are also useful in creating and presenting opening statements and closing arguments and for motion and appeal submissions as they all require the same techniques for the formulation and presentation of a persuasive story. However, the challenge of direct examination is that it must be a dialogue with the witness, where the witness is, with your guidance, the storyteller. This

may be the most important thing to remember: it is the witness not the lawyer, who should be the real storyteller. As such, careful thought and analysis is required in order to ensure that the witness is telling the story through your guidance. This includes focusing on the theme and theory of the case, the organization of key facts, language, facial expressions, and voice modulation, all of which set the scene and tone and help create the atmosphere in which your witness can persuasively tell the story you want the trier of fact to hear.

The Court has commented upon the importance of hearing the evidence of the witness orally, and as a logical extension, the importance of a persuasive direct examination. In *Masciangelo v. Spensieri*, Mr. Justice Doherty stated:

"Where the outcome of a lawsuit hinges on the assessment of credibility, a trial in which evidence is called and the competing stories are told and challenged before a trier of fact has traditionally been viewed as the ideal forum. This is so, not only because the trier of fact has the advantage of hearing and seeing the witnesses, but also because the parties are given their day in court during which they have the opportunity to present their entire case, face the judge, and tell their story. The quality of justice is measured not only by the accuracy of the result reached but by the way that result is reached. That quality may suffer if litigants are judged unworthy of belief by someone who has never seen them or heard them, but instead has examined only written material."¹

THE ELEMENTS OF A PERSUASIVE STORY

Cicero outlined five principals of rhetoric that have continued to influence future storytelling. These were:

1. The storyteller must discover what should be said (invention).
2. The storyteller arranges the story in a particular order (arrangement).
3. The storyteller chooses the thoughts with language (style).
4. The storyteller secures the speech (memory).
5. The storyteller effectively delivers the story (presentation).

Centuries later, persuasive storytelling is still defined using the same basic principals. In an essential text for any trial lawyer, Modern Trial Advocacy Canada,

¹ *Masciangelo v. Spensieri* (1990) 1 C.P.C. (3d) 124 at page 130

Steven Lubet, defined persuasive storytelling as involving five substantive elements and one non-substantive element²:

1. The story explains all of the known facts;
2. The story is told about people who have reasons for their actions;
3. The story is told by credible witnesses;
4. The story is supported by details;
5. The story accords with common sense;
6. The story is well organized

Attention to these elements will assist you in developing a persuasive story in any situation.

THE CONTEXT OF THE DIRECT EXAMINATION

The Purpose of the Direct Examination

A direct examination is just one element in the trial presentation. Its importance lies in the fact that it is the first opportunity for the trier of fact to observe the witness and hear that witness' story. Especially when acting for the plaintiff there is the opportunity to capture the language of the trial, to set the stage and establish the theory and theme of your client's case first.

The direct examination is the best opportunity you have to put in the evidence that will support your client's case in a controlled and organized fashion. Cross-examinations, both of your own client's witnesses and opposing witnesses, can be unpredictable and not necessarily relied upon to provide the evidence you need to

² Modern Trial Advocacy Canada, Steven Lubet, Canadian Adaptation by Shelia Block and Cynthia Tape, 2nd Ed. (2000: National Institute for Trial Advocacy), page 414. All future references to this text will be

prove your client's case. For this reason, direct examinations require significant planning, organization and effort. A strong direct examination with a prepared witness telling a persuasive story can result in a winning case.

There are other methods that can be used to introduce the trier of fact to the story prior to the trial so that the direct examination will be more persuasive. For example, a Request to Admit³ can be used to create a first impression, to introduce the theory and theme of the case and to capture the language. Admissions in pleadings, examinations for discovery, and documents, and admissions contained in affidavits used in interlocutory proceedings can have the same effect. The opening statement should also introduce the theme, the theory and the language that will be used in the witnesses' stories. In each instance, the trier of fact reads or hears the Request to Admit, admissions, documents or the opening statement before the direct examination. Reinforcing the story in each of these will ensure that the story is more understandable and that the trier of fact is focused upon the theme and theory of the story as he or she listens to the direct examination.⁴

Developing the Theme and Theory in the Direct Examination

The first step is to, as Cicero said, "discover what should be said" by the witness. In doing so, it is essential to have already developed the theme and theory of your case, which will be tracked throughout the direct examination.

The ultimate test of any good story, especially in the litigation, is its plausibility. A story will not be accepted if it does not make sense. For your story to have that underlying common sense, your legal theory must be realistic and consistent with every day experience.

referred to as "Modern Trial Advocacy"

³ Rule 51 of the Rules of Civil Procedure

⁴ As discussed below, repetition is an effective and persuasive tool. By repeating the story in pleadings, then the Request to Admit and finally the opening statement before the first direct examination ensures that the trier of fact has already heard the story and will be focused upon the important evidence in the direct examination. Use repetition sparingly and carefully.

The theory is the expression of your story with reference to the legal issues in the case. The theory should be capable of being expressed in a single paragraph that combines an account of the facts and the law in such a way as to lead to the conclusion that your client must win.⁵ The theory of the case explains why your client is entitled to a judgment in its favour. This involves more than a summary of the facts. The theory provides a brief statement that is logical, credible and legally sound for your client to be successful. The following questions can be asked to assist you in determining your legal theory:

1. What happened?
2. Why did it happen?
3. How did it affect your client?
4. Why does that mean your client should win?

The legal theory tells the trier of fact the reason why your client must be legally successful. The theme shows why your client should be successful.⁶ The theme is important because it is the theme that is the moral persuader. It hopefully provides the reason for the trier of fact to give judgment in favour of your client. It also must be logical and credible, while invoking shared beliefs and common precepts.

The moral theme should reflect shared values, civic virtues, or common motivations based on every day experience. The goal is to bring these elements forth in the direct examination. It is unlikely you will be able to present the entire moral theme in any one question, but you should be able to have at least one element of the moral theme and perhaps more developed in the direct examinations.

There are a number of methods of ensuring that the direct examinations are focused on the theme and theory of your client's case:

⁵ Modern Trial Advocacy, page 8

⁶ Modern Trial Advocacy, page 9

1. Prepare your closing argument first and use this to determine what evidence is needed to support the closing argument. The questions should elicit that evidence.
2. Do a good fact-bad fact analysis. For a complex case, consider doing this in a brainstorming session with others in your firm. Once you have reviewed and listed, in separate columns, the “good facts” and “bad facts”, a detailed analysis of each of those good facts and bad facts can be performed to determine how they fit into the theme and theory, what issues they relate to, and, if they are bad facts whether they can be neutralized. This will allow you to focus on the good facts in the direct examination while at the same time acknowledging the bad facts and working them into the story so as to minimize their negative effect. The good fact-bad fact analysis is also very useful in preparing your witness.
3. Usually there are at least two different stories that are to be told at a trial: One is your client’s and one is the adverse party’s. You should ask yourself the question “why are your facts more reliable?” Try to develop the other side’s story too, and then ask what facts do not fit the other side’s story. Test every fact in dispute with your story and the adverse party’s story to determine what is relevant and how the fact should be used or explained.
4. Do not forget to carefully review the pleadings. The pleadings are the formal statement of your client’s case. All of your witnesses’ stories in direct examination should be consistent with the allegations and the theme and theory presented in the pleadings.

The Content of the Direct Examination

When preparing the direct examination, answering the following questions may assist:

1. What do you want to tell the trier of fact about each issue?
2. What do you want to tell the trier of fact about each witness?
3. What do you want to tell the trier of fact about each document or exhibit?
4. What do you want to tell the trier of fact about each fact?
5. How does this fact contribute to the persuasiveness of the story?
6. Is your client's story believable?
7. For each question you should ask yourself the question, "How will I use the information contained in that answer to assist in proving your client's case?" If the answer does not fit into your closing argument, and it is not needed to provide the context, then do not ask the question. Those questions that do not enhance either the theory or the moral theme are irrelevant and referred to as "clutter".
8. In certain situations, it may be appropriate to ask yourself why your client is proceeding to trial. The answer may assist you to convince the trier of fact to help your client and may be the question that allows you to develop the moral theme in the direct examination.

Determining the Witnesses

The following questions should be asked before making the final decision to call a particular witness:

1. Why are you calling this witness?

2. Which parts of the claim or defence will the witness be able to comment upon in a material way?
3. How can a witness be used to contradict any facts, the theory or theme relied upon by the adverse party?
4. What exhibits can be introduced through the witness?
5. How can a witness bolster or detract from the credibility of others that will testify?
6. How can a witness add to the moral theme or add to the moral strength to the presentation of the case or appeal to the jury's sense of justice?

A template of what to include in a witness' testimony should be the following⁷:

1. What is the single most important thing that this witness can tell the trier of fact?⁸
2. What other witness' experience or knowledge of other facts will help make the important information you intend to obtain from this witness more plausible?
3. Ask yourself "What is the most important part of the testimony and what facts will make it more believable?"

Every part of the direct examination should ensure that the story is persuasive because the witness is believable. Believable people are neutral and disinterested. They have

⁷ Modern Trial Advocacy, page 49

⁸ Depending upon the witness, there may be material evidence from that witness for several issues.

an adequate opportunity to observe. They have the necessary background experience or knowledge or learning to comment on some experience in life.

THE ORGANIZATION AND ARRANGEMENT OF THE DIRECT EXAMINATION

Once you have determined what evidence your witness needs to give, the next step is to determine whether the story should be presented in chronological fashion, whether there should be specific focus on one issue or one person or one “thing”, or whether the story should be presented in mini-chronologies based on specific issues or events. For example, in a criminal trial, it may be easier to start with the arrest of the accused by the police officer rather than start with what the officer did when he first began the investigation. Your direct examination can then easily focus on the accused. The essential requirement is that the story as conveyed in the direct examination is organized in a cohesive fashion that is easy to follow and understand.

A direct examination that is based purely on chronology would attempt to present the entire story of the case in a single, factual order. If this is used as a primary organizational tool, the persuasive effect may fail. It is best to think of the case as a series of separate sub-chronologies or sub-stories which can be set out in chronological order under a topical organizational format.⁹

Sequencing is a form of organization. It is the arranging of separate items of information within the direct examination in a persuasive format.¹⁰ There are four uses of sequencing: foundation, clarity, impact and commitment.

Make sure that the foundation is laid i.e. all necessary facts have been established, before moving to the point to be sold.¹¹ For example, before testimony that a mother saw the pitch hit her son, bring out the testimony that she was hit by a baseball once and has a propensity therefore to watch every pitch carefully.¹²

⁹ Modern Trial Advocacy, page 408

¹⁰ Modern Trial Advocacy, page 17

¹¹ Modern Trial Advocacy, page 18

¹² Modern Trial Advocacy, page 17

Clarity requires that the context for the facts to follow is laid.¹³

Facts in the correct order can increase the impact of the information on the trier of fact. Impact takes facts relevant to a specific part of your case, puts them together (either chronologically or non-chronologically) in order to build to a crescendo of persuasion.¹⁴

Likewise, the effect of primacy and recency can impact on the organization of the client's examination. Primacy and recency provides that people tend to best remember those things they hear first and last. The first substantive question may be the most important. For example, in an accident case, you may want to start, after introducing the witness, with "When was the last time you were able to sleep through the night?" With this question, you are focusing on an everyday experience that everyone takes for granted; and making it known that this witness is not able to enjoy that experience. The "last time" are two words that portray a feeling of finality. The question will create anticipation or suspense in the answer and while the picture from that question is different for each of us, we have all experienced an occasional sleepless night, and can therefore relate to the answer.

Witness order may also affect how the story is organized. Witnesses must be presented in an order that allows their individual stories to flow and connect one with the other, if at all possible. This does not necessarily mean that they must be presented chronologically; rather, it may be that principles of primacy and recency should be followed. In other words, put your most important witnesses at the beginning and the end, as it is in this placement that their respective stories are likely to be the most persuasive.

¹³ Modern Trial Advocacy, page 18

¹⁴ Modern Trial Advocacy, page 18

The key is to know the case; the more familiar you are with the facts, the more easily you can put them into an organized framework and the more easily you can put the witness back on track should she stray or should there be an objection or question from the trier of fact.

THE PRESENTATION OF THE STORY – EXAMINATION TECHNIQUES

Once you have determined how to present the story in the direct examination, there are various techniques that can be used to optimize the persuasiveness of the story:

1. **Language:** Cicero identified this as an essential part of rhetoric and by corollary, storytelling. In a direct examination use simple and common language. Do not have your witness use legal terms that are foreign to her. A witness to a car accident would not conclude a statement with *res ipsa loquitur*. Likewise, use "before" and "after", not "prior" and "subsequent". If the story is becoming too complex, pretend you are telling the story to a 5-year-old. This technique of attempting to present the story in the simplest language with the short sentences and thoughts that are not complex, is an excellent way to test your story from both an organizational point of view and to test the ease of understanding. Another litmus test is to force yourself to try and tell your story in a hundred words. Then figure out five open-ended questions that elicit those hundred words. Adjectives convey some form of judgment, are potentially vague and subject to misunderstanding by the witness, trier of fact or opposing counsel, and therefore can be argumentative. Nouns and verbs do not provide a belief or a judgment but rather describe the "thing" itself.
2. **Short Open-ended Questions:** These types of questions ensure that the witness is at the centre of the stage. You want the witness to be listened to, liked or appreciated, if at all possible, and most importantly believed. This cannot happen if the lawyer is doing all the talking. Remember, let the witness tell the story. As a result use short questions and questions that are

open-ended so that the witness has the opportunity to tell the story in a credible way. Questions that invite the witness to describe or explain are the best. Use questions such as: "Where did you go that day?"; "Please describe what you saw"; "What happened after you arrived?"; "Please tell us who else was there". Try to finish with a clincher.¹⁵ Every direct examination should end with a single fact that takes into account the theory or theme. A clincher is a fact that must be 1) absolutely admissible; 2) reasonably dramatic; 3) simple and memorable; and 4) stated with certainty.

3. **Diagrams and demonstrations:** There is no easier way to present evidence, where appropriate, than with pictures, diagrams or demonstrative aids. In a direct examination, pictures are worth more than a thousand words. They enable the trier of fact to both hear and see the case. In addition, the diagram or picture focuses the trier of fact on, what you say, is important. Such an aid can often be essential in cases like a complicated car accident. The use of demonstrative aids like PowerPoint should also be considered.¹⁶ It is also persuasive to leave the demonstrative aid in the courtroom, so that it is a constant reminder to the trier of fact of the witness' evidence and will build pattern recognition, repetition and focus.
4. **Looping:** Repetition in a direct examination is essential, but must not be so overused that the direct examination becomes boring and the trier of fact's interest is lost. To control repetition, while still telling a persuasive story that flows easily, a useful technique is to use or repeat the key theme or answer in a series of questions during the important part of the story. For example, in a

¹⁵ Modern Trial Advocacy, page 61

¹⁶ In *To v. Toronto Board of Education* [1998], Unreported, the plaintiff's use of PowerPoint was a factor in the trial judge's decision to award solicitor and client costs. However, on appeal, speaking for the court, Associate Chief Justice Osbourne stated "Finally, in the circumstances of this case, the fact that the plaintiff's counsel was able to use modern technology to advance his client's interests at trial is commendable. However, in my opinion, it is not a basis upon which to make a defendant pay solicitor-and-client costs of the trial". *To v. Toronto Board of Education* (2001) 55 O.R. (3d) 641 at page 656. Notwithstanding, the use of such aids does have an impact on the trier of fact and could be the key to making something complex simple and concise.

case involving misappropriation of money, it may be that each question would focus on the money itself: “When did you first discover that the money was missing from the account?” “After you discovered that the money was missing, who did you contact?” “What did you tell them about the money?” “What did they do to help you recover the money?” All of these questions restate the theme without using leading questions thereby keeping both the witness and trier of fact focused. This also makes it very easy for the witness to follow your lead and the trier of fact to take notes.

5. **Announcements or headlines:** Use announcements or headlines in your direct examination. These are known as transition questions. They are essential, especially in a long direct examination. They have a number of purposes including organizing the evidence, keeping the witness and trier of fact focused, assisting the witness in knowing what evidence will be covered next and reinforcing your theme and theory. Examples include, “I now turn to the evening of November 14 when you first discovered the money was missing”, or, “I would like to ask you about what effect the loss of the money has had on your life”, or, in a personal injury action, “Please turn now to your condition before the accident.”, or “When was the last time you were able to walk?” All of these transition questions tell the witness and trier of fact what evidence is to be addressed next, while at the same time reinforcing the theme i.e., that the money was taken without consent or that the witness was irreparably injured.

6. **Humanize the Witness:** The credibility of your witness will be enhanced if empathy between the trier of fact and the witness is created. Questions that are designed to create that empathy are essential in a direct examination. Language can assist in teaching the trier of fact about important aspects of the witness’ character. If experience is important, then the experience the witness has had in the past with matters that are in issue in the litigation are important and should be brought out at the beginning, so that when the

witness later describes these events, the trier of fact will understand why those events were more meaningful to the witness: remember the mother who has herself been hit by a baseball in the past. If experience and common sense dictates certain things will happen, make sure that your story takes advantage of those things and are part of the direct examination. This is essential to build the witness' credibility.

7. **Be Prepared:** Physically prepare your direct examination – write out notes.¹⁷ Do not leave it all to memory no matter how well you know the case. At some point, something will distract you from the flow of the story, whether that distraction is from the witness forgetting an important point or an objection. A skeletal outline by topic will assist in organizing the direct examination. One method is to use three columns: topic headings in one column, keywords down the middle and exhibit reference or demonstrative aids etc. in the left-hand column. This will allow you to ensure that the exhibits are properly organized and available for the specific piece of evidence being elicited. It is worthwhile to write out important questions. If you read these questions during the examination, remember to do so slowly.
8. **Conversations and Meetings:** While important, they are also often subject to hearsay objections (discussed more below). Consequently, you must first set the scene by indicating the date, place and time, who was present, what the witness said and what the other person said. The last question is often asked, “What did you do as a result of that conversation (or meeting)?”
9. **Hearsay:** Determining what evidence is excluded as hearsay is a never-ending task that arises in the presentation of evidence in direct examination. The simple test to determine whether the evidence about to be elicited is hearsay is “What are you using the evidence for?” If it is for the truth of what

¹⁷ There are computer programs, such as “Notemap (www.casesoft.com)” that allow you to organize and move blocks of information easily.

was said, and the person who said it is not testifying, then it is likely hearsay, and inadmissible unless there is an exception to the hearsay rule. If you are using the evidence only to prove that the witness' conduct or behavior was influenced or to explain the conduct and sequence of events, but not for the truth of what was said, then it will likely be admitted. The goal is to minimize objections, which can only interrupt your witness from telling her story. Each piece of evidence you intend to put before the court should be critically analyzed for admissibility. Ask yourself "If I were the adverse party, how would I try and keep this information out of evidence?" Use this test to determine what evidence of the adverse party you wish to exclude.

10. Positioning in the courtroom: For some witnesses, you will want to create a more intimate atmosphere, thus you position yourself close to the witness. For other witnesses, you may wish to be positioned far away to disassociate yourself or client from some witness whose evidence might be necessary. Positioning yourself away from the witness can also help the soft spoken witness to ensure that the witness keeps their voice up in the courtroom. For other witnesses you may wish to vary it, depending on the topic being covered.

11. Silence as an effective tool: In storytelling, a dramatic moment may be created when, after the evidence is given, the evidence is allowed to sink in by the use silence. The silence emphasizes the importance of what has been said. Letting the trier of fact think about the answer is an effective way to persuade. In addition, if it is an important point, the break allows the trier of fact to complete her notes.

12. Script Theory:¹⁸ A script is a person's mental image or understanding of a certain concept or set of events. Script theory is based on the supposition the people do not evaluate facts in isolation but tend to attempt to make

¹⁸ For a detailed discussion of script theory, see Modern Trial Advocacy, pages 32-38

sense of new information by fitting each new piece of information into a pre-existing picture or image. People tend to dislike uncertainty and want to eliminate it as soon as possible.

13. **Contrast and Apposition:** These are related concepts that refer to doing a comparison of pieces of information. Apposition shows the relationship of facts, underlines factual differences.¹⁹

14. **Repetition and Duration:** Repetition is self-explanatory. The key is to not repeat so that you lose both the focus and the interest of the trier of fact. Duration refers to the length of time spent on each issue. More time should be spent on important issues than on those that are less important.

15. **Attitude:** There is no doubt that a confident, comfortable approach that is positive, candid and fair, will be the most persuasive.

WITNESS PREPARATION²⁰

Know your witness. Some witnesses are good storytellers and some cannot organize or express their thoughts well. A good storyteller can be given a freer reign to tell the story while other witnesses need more direction with short and focused questions. Some experts are excellent teachers. Other experts have to be focused to properly present the material evidence.²¹ The simpler the organizational structure and the simpler the language, the easier it is for any witness and the trier of fact to follow.

Prepare, prepare, prepare your witness. You do not want to hear something “new” in direct examination. In addition, since you are not actually the one telling the story, you have to ensure that your witness is able to do so. You should review the following elements of a direct examination with your witness:

¹⁹ Modern Trial Advocacy, page 18

²⁰

²¹ For a text on expert witnesses, see The Litigators Guide to Expert Witnesses, Mark J. Freiman and Mark L. Berensky, Canadian Law Book Inc., 1997

1. Ensure the witness understands the reason why the witness is testifying (what the case is all about).
2. Ensure the witness knows:
 - (a) the topics to be covered;
 - (b) the theme and theory of the case; and,
 - (c) the organization you are using and why.
3. Find the language that the witness is most comfortable with.
4. Run through the exhibits with the witness, how you intend to introduce each exhibit and how you wish to use it to assist in telling the story.
5. Discuss the pace with the witness. You want to ensure that you slow down the action when you get to the important sequence of events. This requires shorter questions and taking small steps through the story. An analogy is that of a movie camera where you control the focus of the camera by the questions you ask and the language you use. When you have to focus on detail, then your questions become more direct. Slowing down the pace, pausing, expressing astonishment by repeating answers or by facial expressions (not too dramatic),²² tone of voice or silence, all assist in emphasizing and focusing the trier of fact on the important points. When key facts are presented, wait for the trier of fact to digest that evidence before moving on. Tell the witness this will happen during the examination and when, in all likelihood.
6. Often a witness will give a very long answer to a question. You will want to concentrate on getting further details of the important points. You have to then breakdown the answer into your own organization using the proper

²² More appropriate for juries than judge alone.

questioning. This is not an easy task unless you know your case well and are prepared for that kind of answer. Discuss this with your witness.

7. Have the witness introduce the people to whom she is referring using complete names. A statement that “Freddy did it” without first introducing “Freddy” is confusing.
8. Explain to the witness that the trier of fact is taking notes and that the testimony is transcribed. In this way the witness will, hopefully, not speak too quickly and will not make gestures that cannot be transcribed, both of which can lessen the persuasiveness of the story.

DISTRACTIONS FROM YOUR PERSUASIVE STORY – WHAT TO AVOID

1. Avoid and omit the irrelevant. Ask yourself why you are asking the questions and if the answer has no purpose, do not ask it.
2. Avoid anticipating an attack on the witness. This is a general rule. You will lose the energy and the flow of the direct examination and its focus if you do this. However, neutralization of a bad fact may be necessary. Do not leave the impression that you are trying to sneak one by the trier of fact.
3. Avoid objections. Try and deal with all evidentiary issues before the direct examination and out of the presence of your witness. Once these evidentiary issues have been addressed, the direct examination should proceed smoothly. With case management, these evidentiary issues can usually be dealt with prior to the commencement of the presentation of evidence.
4. Avoid objectionable questions that are leading or suggest conclusions without laying the foundation or which will likely result in hearsay evidence. These questions will only interrupt the flow of the story.

5. Avoid questions such as "What happened next?" The answer could lead the witness anywhere such that the story and focus may be lost.
6. Avoid compound questions as they can be confusing and you may not know which part of the question your witness is answering.
7. Avoid vague questions, as the answer is usually of no assistance.
8. Avoid unfocused questions. Again, the answer may lose the story and the focus.
9. Avoid adjectives unless the witness has used them or it flows from the answer given. Let the witness paint the picture, if at all possible, in his own words.
10. Avoid leading questions on material matters.
11. Avoid not laying the foundation for admissibility such as the use of notes, introduction of business records and qualification of an expert.
12. Avoid questions such as "did you recall" or "do you recall" or "do you remember", unless the memory of the witness is an issue.
13. Avoid adjectives. You cannot ask a witness a specific adjective, such as, was the plaintiff angry. However, you can establish through the use of discreet facts building one upon the other that the individual was angry. These include questions such as: "What did the plaintiff say in reaction to what you said?"; "What was the tone of voice?"; "What was his facial expression?"; "Were there any other physical movements that he made?"

CRITICAL SELF-ANALYSIS

Analyzing your own performance is never easy, but it is necessary if you are to become effective in the art of storytelling. For this, there can be no better way to learn

than going through a motion to compel answers to questions you asked, that were refused on examination for discovery or cross-examination. Examine what kind of questions you asked that you now wish to compel the witness to answer. Review the questions you asked on discovery. What did you do wrong? What did you do right? What words did you use that were of no assistance? Did you lose your focus? What could you improve upon? This kind of critical analysis is not easy to do because it takes time and requires self-motivation, but in the end you can only improve by doing this.

CONCLUSION

When telling your story, if you are confident in your facts and comfortable with your case, then you should come across as a competent professional who is likable, interesting, committed, deeply concerned on behalf of your client and enjoying every moment as you put the case before the court.

An honest lawyer does not overstate the case, does not promise evidence that cannot be provided, does not try to sneak by inadmissible evidence, is courteous, well organized and well prepared. All of this assists in the persuasive atmosphere in which the direct examination should be presented. The end result is a sincere presentation of the theory and theme of your client's case.

Telling a persuasive story is rewarding. The old adage of “practice makes perfect” is particularly applicable. The more direct examinations you do the better the storyteller you will become. Again, a strong, direct examination can often win the case. It is the evidence you rely upon to prove the facts you need, to tell your client's story. Our hope is that some of these ideas will be of assistance to you and make it easier for you to formulate a persuasive story using direct examination.