
TRIAL NOTEBOOK: A GOOD DIRECT

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A casual conversation between a judge and an attorney produced some great advice for trial attorneys. McElhaney teaches us how to paint a picture with words during direct examination.

Trial Notebook

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by James W. McElhaney
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Friday we were eating lunch at the back table in La Cantina when Federal District Judge Horatio Standwell came up and said, "Mind if I join you? I need a little help."

"My rates are reasonable," said Myra Hebert, the bar association politician who occasionally gets to court. "What's the problem?"

Flash Magruder, the plaintiffs lawyer, rolled his eyes and Beth Golden looked at the floor. But Judge Standwell chuckled and said, "Actually I need everybody's help. I got dragooned into giving a talk on direct examination at the law school next week and I'm trying to come up with a little more to say than just, 'Keep it short and simple.'"

"I'm no expert," said Dick Mudger, the insurance defense lawyer, "but I think direct examination is one of the most difficult set of skills in trial practice. For my money, direct is even harder than cross."

"Then why is everybody so scared of cross?" said Myra Hebert.

"Because if you do a poor job on direct, the witness looks bad, but if you do a poor job on cross, you look bad," said Beth Golden.

"I think most lawyers' direct examinations are hard to follow," said Sandy Ramirez.

"Why do you think that is?" said Judge Standwell, who was already taking notes.

"It's the way they talk," said Sandy. "Like law professors. The real effect of a legal education is to teach people to talk like their mentors, which is virtually incomprehensible."

"It's also the way they organize everything in a trial," said Beth Golden. "Strictly according to the list of legal elements they have to establish in the case."

"And then there are those jackleg corner cutters who keep trying to sneak argumentative, prejudicial material into

the middle of their direct examinations," said Flash Magruder.

"It hurts them more than it helps them," said Regis McCormick. "You don't even need to object—the judge will do it for you."

"This is really useful," said Judge Standwell. "Now in addition to the 'don'ts,' does anybody have any 'do's'—techniques that make a powerful direct examination?"

Angus was starting to pull a legal pad out of his briefcase when Judge Standwell's clerk came running up.

"Sorry to interrupt, Judge," he said, "but Judge Rudolfo from the court of appeals is on the phone and says it's urgent. I told him I'd try to find you."

Judge Standwell grinned and stood up. "With Julio Rudolfo it's always urgent, especially when it's about a round of golf. Thanks, everybody, I'll be back in touch."

That afternoon Judge Standwell walked into the office and asked to speak to Angus.

"Judge Standwell," Angus said, "why didn't you call? I'd have been happy to go over to your chambers."

"It's only two blocks away, and I needed the walk," said the judge. "Besides, it's good for your mental health to get out of the office now and then."

"Anyway, didn't I see you start to pull one of your famous lists out of your

briefcase right before my clerk came into La Cantina?"

"It's just a few ideas I've been thinking about," said Angus.

"Come on," said Judge Standwell. "I even brought the price of admission," picking up a bag from The Mountain Bean he had set on the secretary's desk. "The word on the street is three cups of dark mountain roast and half a dozen fresh oatmeal raisin cookies would open the door to the inner sanctum."

Angus laughed, and we went into the conference room.

A Story Told with Verbal Pictures

"A good direct is a story told with a series of verbal pictures," said Angus. "That's because you want the judge and the jury to actually see what you and the witness are talking about."

"It sounds like a good idea," said the judge, "but is there any scientific basis behind the claim that the right words can actually make people 'see what you're saying'?"

The Language of Visualization

"Absolutely," said Angus. "First, 70 percent of the neurons in the normally sighted person's brain are devoted to interpreting visual images. That leaves 30 percent for remembering your children's names, thousands of legal rules, telephone numbers, where you left your car, who you voted for in the last election, how much money you've got in the bank, and where you went on your last vacation."

"A number of researchers have wondered whether it's possible to tap into the visual part of the brain with just words."

"And you can. One researcher, Gordon Bowers, wrote a simple little book with no story line (stories are mnemonic devices among other things). The book was just hundreds of unconnected statements like 'Horse kicks ball.

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Cow eats banana. Pig strikes match.' Bowers paid people to read his book. He told half the people just to read it, that they would be tested on its contents. He told the other half to read the book, and when they read it to try to visualize—see in their mind's eyes—what they read. They would be tested.

"The results were stunning. The people who were just told to read the book scored 42 percent on Bowers's test. But the people who were told to visualize what they read scored 62 percent. That's an increase of comprehension and retention of nearly 50 percent."

Judge Standwell looked up from the notes he was taking. "That's impressive," he said.

It's Happening Now

"And that's not all," said Angus. "One of the unspoken rules of conversation—at least in English—is that the person asking a question picks the verb tense to use in the answer.

"Say you're talking to a friend about an exhibit she saw last month in an art museum. First everything you say is in the past tense. Then you switch to the present tense: 'Okay, you're looking at this painting by Renoir. Tell me what you see.'

"Chances are her answer will be in the present tense, too: 'I'm seeing a beautiful peasant girl—Gabrielle—looking like she's alive—with a rose.'

"When you start asking questions in the present tense," Angus said, "don't be disappointed if the witness doesn't join you right away. It often takes two or three questions before the witness starts answering in the present tense. And even if the witness stays in the past tense, your present-tense questions add a subliminal sense of 'nowness' to the testimony.

"Then, when you put the two together," Angus said, "when you use both the language of perception and the present tense in a direct examination, it virtually makes the judge and jury see what the witness is talking about."

Judge Standwell looked up from his pad. "These ideas are obviously not limited to direct examinations in lawsuits," he said. "They could be effective in all kinds of settings."

The Picture Method

Angus smiled. "Once you consciously start to think in pictures," he said, "persuasive organization of a direct examination becomes simple. What you see together goes together. And what

doesn't belong in the picture becomes obvious.

"First you pull the individual snapshots together, giving each picture a title.

"Then you start shuffling the titles around, planning the order in which you want the jury to 'see' the pictures.

"Then, using the titles of those pictures when you conduct your direct examination becomes the easiest way imaginable to keep everyone—judge, jury, witness, and you—on track:

Q: Officer Gordon, I want you to take us with you to the corner of 17th and Hyatt when you responded to the dispatcher's emergency call. What's the first thing you see when you get there?

A: Two vehicles are upside down in the middle of the intersection. And there's a young man standing behind one of the cars—a black SUV—he's pointing a pistol at the other vehicle—a yellow pickup truck.

Stop Trying to Sound Like a Lawyer

"When you're in court, it's only natural to try to sound like you belong there. But questions like 'What next, if anything, did you do with respect to the operation and control of the motor vehicle in question?' are simply unforgivable. If every question you ask sends the message, 'I'm a lawyer and I've been trained to talk differently than you ordinary people,' you create an impassable gulf between you and the jury.

"So if you want them to think of you as an honest, open, down-to-earth guide they can trust, stop talking like an insufferable twit."

Ask Short Questions

"Why is it lawyers ask such excruciatingly long questions?" said Judge Standwell.

"Because it's easier than asking short questions," said Angus. "All you have to do is start talking before you've thought through how you're going to put your next question. And then—when you're in the middle of the question—you start adding so many qualifiers that no one can figure out what you want."

"So what's the cure?" said the judge.

"First, start your questions with *who*, *where*, *what*, *when*, *why*, or *how*," said Angus.

"Second, understand that most of the

qualifiers lawyers throw in their questions are unnecessary. They've already been established by the surrounding context, and you don't need to repeat them.

"Third, when you find yourself in a tangled question out from which you cannot extricate yourself, don't try to fix it on the fly. Just throw it away and start all over: 'I'm sorry, Ms. Watkins, I've stuffed too many words in that question. Let me put it this way: What did you do when you saw all those bowling balls coming toward you down the street?'"

Ask the Follow-Up Questions the Jury Would Like to Ask

"It's frustrating to listen to other people ask all the questions about something you have to judge," said Angus.

"Absolutely," said Judge Standwell. "Despite the lawyers' tiresome repetitiveness, there are always things that I want to know and that the lawyers have ignored. So in a judge trial I ask those questions myself, even when they're not strictly relevant to the issues in the case."

"Of course, you've got to be careful," said Angus. "You don't want to commit prejudicial error or open the door to something that might hurt your case. But if it's a natural follow-up question, asking for something the jury probably wants to know, ask it. It starts the jury thinking of you as one of them—which is one of the best foundations for building trust."

Challenge Your Own Witness

"This next technique takes the follow-up question rule even further," Angus said.

"Whenever your own witness—client, expert, lay witness, it doesn't matter which—says anything that doesn't instantly ring true or make sense, stop and clear it up.

"Say your witness testifies that her glasses got knocked off when a group of teenagers jostled her in a crowd and stole her purse. A few minutes later she says she saw the license plate a block away on the car they rode off in: J LG-7693.

"'Wait a minute,' you say. 'Didn't you just tell us your glasses got knocked off by those teenagers? How could you see a license plate on a car that was a block away?'"

"'I'm farsighted,' she says. 'I just had my glasses on for reading the screen on the automatic teller machine.'

"Do the challenge right away—that's when at least half the jurors have

already started wondering how the witness could have seen the license plate and they won't be able to focus on anything else until it gets cleared up.

"Besides, the quicker you challenge the witness, the more you impress the jury with how careful you are. It adds to the Diogenes effect."

"The Diogenes effect?" said Judge Standwell.

"It refers to the ancient Greek who went wandering through the streets of Athens, carrying a lantern at midday, looking for an honest man," said Angus. "That's how you come across when you are quick to challenge your own witness."

Don't Write Out Your Questions

"One of the most effective ways to sound insincere is to read your questions out loud to the witness," said Angus.

"I agree," said the judge, "but why do you think it's so?"

"First, unless you are a professional script writer, you don't write the way you talk," said Angus. "So when you read what you have written, the word choice, word order, and inflection don't ring true. "Second, when you read the ques-

tions, you're locked into what's on the page unless you're comfortable correcting your text as you go."

"But most lawyers need some kind of Linus blanket when they're standing up in court, conducting a direct examination," said the judge.

"Of course," said Angus. "But the best prompter is not the text of your questions, or even an outline. Instead, it's the answers you expect. A quick glance at the next answer you want, and you can easily create an extemporaneous question that tells the witness what you're after."

The Witness Needs Help

"But what do you do when the witness doesn't understand what you want?" said Judge Standwell. "I see a lot of that in my court."

"The most common response is probably the worst thing you can do," said Angus. "The lawyer asks an incomprehensible question, and the witness has no idea what he's after. So instead of accepting responsibility for what happened, the lawyer blames the witness. 'You didn't understand my question,' he says.

"And the jury thinks, 'Of course the witness didn't understand the question.

Neither did I. And here is this lawyer, blaming someone else for the problem he created. But I guess I shouldn't be surprised. Lawyers are professional blamers. It's what they do for a living.'"

"No wonder jurors are suspicious of lawyers," said Judge Standwell. "So is there a better way to handle the problem of the witness who doesn't understand your question?"

"Of course," said Angus. "But it doesn't come naturally to many lawyers. It's to take responsibility for the confusion yourself. Instead of blaming the witness, say 'I'm sorry, Doctor, I didn't put that question very well. What I should have asked was, 'What causes this condition in adults?'"

"It's the paradox of responsibility," said Judge Standwell. "People tend to respect those who take responsibility when things go wrong."

You Can't Teach Pigs to Sing

"One final point," said Angus. "Every witness has his or her own limits. It's the lawyer's responsibility to understand what those limits are and not try to go past them. As the late Bob Hanley used to say, 'Never try to teach a pig to sing. It not only doesn't work, it annoys the hell out of the pig.'" □

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