

DIRECT EXAMINATION TECHNIQUES

The challenge of direct examination is to make the case sound interesting. Too often, everyone in the hearing room including the arbitrator is bored because the direct examination is boring, repetitive, and disorganized. When the arbitrator or your own side breathes a sigh of relief when you have completed a direct examination, you know how boring it was.

Trial lawyers are trained to treat direct examination as if it were a conversation. This is because juries appreciate the ease with which they can digest a lot of information. Arbitrators are not as susceptible to boredom, but they are human and want their work life to be interesting.

Foremost, arbitrators want the advocate to guide their witnesses on direct examination without putting words in the witness's mouth. The cardinal rule that you cannot use leading questions (questions which suggest the answer) on direct examination is there to protect your own credibility and the witness's credibility. But you can send signals to the witness about what you will ask and why their answer will be of interest to the arbitrator.

There are a couple of techniques for guiding your witness on direct examination. People, including arbitrators, believe what they see. So if you use action words, the arbitrator's attention will be enhanced.

For example, when asking the witness what happened, ask the witness to paint a picture of what happened, or demonstrate what happened, or describe in detail what you saw. These words are more captivating than simply asking, Who, What, When and Where.

Another technique is to place the testimony in the present tense, even though it is a past event. Testimony is more alive if the witness is talking about it as if it were happening right then and there.

The advocate may want to follow his or her own list of do's and don't's:

1. Leading questions are permitted (but not recommended) on direct examination. For example, when the testimony is non-controversial or undisputed by the other side, suggesting the answer is okay and usually helps keep the case moving along. Arbitrators, however, judge a witness's credibility based on the witness's testimony that is in

the witness's own words, and not through the words suggested by the advocate.

2. A leading question may be appropriate when the witness has a memory lapse and you can jog the witness's memory.
3. Asking the witness to just start talking, and provide the arbitrator with a narrative is not recommended. Few witnesses can do this effectively. It is an invitation to the arbitrator to interfere with your case and for opposing counsel to object (because they cannot anticipate objectionable evidence).
4. Simple questions are the only ones to use, and actually demonstrate your general intelligence and grasp of the case.
5. Questions which sound repetitive are to be avoided. If you wish to draw attention to some aspect of the case, rephrase the question so that it clarifies or adds to prior testimony.
6. Multiple or compound questions confuse everyone in the room. If the question has more than one independent phrase, it is probably too long. Everyone knows the joke of using multiple negatives (Did you not do what you were not to do, because the supervisor asked you not to?) And everyone is bewildered when they are asked a question that can be answered either way, and still be right.
7. Arbitrators love foundation because it makes their job easier. Some things can be left to the arbitrator's imagination, but testimony is the best way to elicit facts in your case.
8. Avoid legalese. Law school professors/arbitrators are especially not impressed because in the last 15 years, law schools have been teaching against legalese and promoting "plain English."
9. Plan out the words you will use for those parts of the case that will go to the heart of the arbitrator's opinion and award.

10. Explain any industry-specific or shop term to the ad-hoc arbitrator. A permanent umpire might be insulted, but always inquire whether additional explanation would be helpful.
11. Consider using the last part of a witness's answer in your next question. In this way, the arbitrator hears the testimony twice. Listen closely, as even the brightest witness will change their testimony. If you can occasionally incorporate their last words into your next question, you can be sure to listen to everything the witness says.
12. Get the weaknesses in the witness's testimony out during direct exam. If you leave them for cross exam, the weaknesses will appear stronger to the arbitrator.
13. If the witness misspeaks or rambles, stop and correct the witness. You are expected to control your witness.