Preparing your Client for Direct Examination in Sexual Assault and Child Abuse Cases

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To testify or not to testify that is the question:

While it is technically the client's decision as to whether to testify or not, in the great majority of cases, the client will look with great deference to his or her attorney for advice. There are probably as many opinions about when a client should testify as there are criminal defense attorneys. Some attorneys believe that a client should not take the stand under any circumstance. Other attorneys take the position that the client should always testify if at all possible.[1]

There are many benefits to having a client testify. The most obvious is that most juries really do want to hear a defendant say they are innocent. Who doesn't want to see the defendant testify in a high profile case? Many jurors will want to hear the defendant testify because they will assume that he or she is hiding something if they do not want to testify. While the jury's desire can be neutralized and should not be controlling, it should at the very least be considered.

Just as significantly, a testifying client most easily allows the demonstration of a relationship between attorney and client. It is important to remember that jurors tend to believe that criminal defense attorneys have inside information as to whether their client committed a crime or not. A close attorney client relationship can help establish a true belief in the defendant's innocence in the jury's mind.

While the strength of an attorney client relationship can significantly alter the way in which a jury looks at a case, the opposite is also true. A toxic attorney-client relationship will convey a lack of belief in the client's innocence. While it is true that criminal defense attorneys might on the rare occasion work with a challenging client, very few clients have absolutely no qualities that an attorney can connect with.

One legitimate concern in determining whether to have a client testify is the client's relative intellectual abilities in relation to the cross examination that they will most assuredly face. Jurors tend to be more forgiving about intellectual capabilities than attorneys though. Particularly in a jurisdiction where this topic can be addressed in voir dire, jurors will often feel sympathy toward a client who is seemingly overmatched or attacked by an overzealous prosecutor.

[1] While I am not aware of any studies about what attorneys put their clients on the witness stand, there seems to be a stronger inclination to do so among attorneys more recently graduated from law school.

Similar to mental capacity is the client's ability to recall events. It is certainly possible that a jury will misinterpret confusion as to the order of events as deceit but this can also be handled during jury selection or at the very least during the context of the direct examination.

Finally, there is the questions of whether putting on a defense in some way neutralizes the burden of proof that is on the prosecutor. When no defense is put on by the defense attorney, the jury has only the prosecutor's case to judge reasonable doubt by. When there is a competing story there is the risk that the jury will now compare the two stories rather then hold the prosecutor to his or her burden. This concern can be addressed quite effectively in voir dire and closing argument and should not be a reason in itself to keep the client off the stand.

Testifying in Sexual Assault and Child Abuse Cases.

Sexual assault and child abuse cases, whether sexual or merely physical abuse, fall under a category of special cases wherein the question of whether to testify or not requires very careful analysis and preparation. As stated previously, in all cases jurors show up wanting to know who did what to whom and why did they do it? Cases won by arguing reasonable doubt, a presumption of innocence and a prosecutorial burden of proof are difficult at best and nearly impossible in sexual assault/child abuse cases. While a genuine belief in a presumption of innocence on behalf of the jurors is rare in all cases, it is non-existent in sexual assault/child abuse cases. It is true that the defense never has to prove motivation for someone lying about such an allegation. However, jurors start off believing that someone would generally not make up this type of accusation if it were not true. This burden shifting that occurs among jurors on these cases is probably unavoidable. Given that, it puts even more importance on the question of whether a client should testify in these cases. Many lawyers are of the opinion that jurors always want to hear defendants say they are innocent but in particular want to hear defendants accused of a sexual assault of an adult testify. The desire among jurors to hear a defendant testify that they are innocent in a child abuse case is even more acute. Most jurors believe that if it were they who were accused of abusing a child they would absolutely want to tell everyone they could that they did not commit the crime.

Attorney Preparation.

Perhaps more than in other types of cases, it can sometimes become difficult for criminal defense attorneys to get into a proper mind set in sexual assault and child abuse cases. There has been an extraordinary mount of information, education and even propaganda surrounding the victimization of individuals in these cases. One of the main targets of vitriol in these cases are criminal defense attorneys who re-victimize legitimate victims. As a result of this public backlash against attorneys who are zealously advocating for criminal defendants, it is possible to walk into court feeling some empathy towards a perceived victim of assault or abuse. At the very least it is not uncommon to feel that the whole world will be watching to see if this is one of those attorneys who blames the victim. It is absolutely imperative in these special cases for the defense attorney to get to

a place of a true belief in innocence. Without that necessary mind set the attorney will disbelief in their cause in a thousand different ways.

Traditional Direct Examination.

All too often, direct examination of a criminal defense client consists of a pathetically wooden attempt at humanizing the client followed by a soporific examination that sounds something like this:

Q: Calling your attention to the evening of December 5th, 1966, what if anything happened?
A: I was at home reading the newspaper.
Q: What if anything happened next?
A: I finished reading the newspaper.
Q: Alright . . . after you finished reading the newspaper . . . what if anything happened next?
A: I read a magazine.

This type of direct examination is ineffective at best and insultingly boring at worst. The background information is presented in a way that is self serving and usually seems out of place given the gravity of the case. The questioning style is wooden, completely unnatural and resembles an absurdist comedy. This style, or actually lack of style, of conducting direct examination is probably attributed to two main sources. Some of the blame should probably be centered on law school evidence professors who are not also active practitioners. The second model of death by direct examination is of course prosecutors. There are probably countless reasons to explain why this is so but that is a subject for another time.

Telling Our Client's Story through Direct Examination.

As children we learn about the world through storytelling. We learn about family, religious practices and history. We have all heard stories by professional storytellers or particularly talented family members that leave us spellbound and transformed. An effective presentation by a prepared client has that same effect on a jury.

Plaintiff attorneys either learn to put on a compelling, effective direct examination or they soon learn to look for other work. A personal injury law suit starts with the story of the client's injury. There is no better way to tell the jury about the facts of the case while also creating a visceral reaction to the subject matter. A personal injury case that starts with a wooden background recitation and graduates to a tedious round of "and then what, if anything, happened," may, on a good day create liability, but will very seldom bring back a damages verdict worth mentioning.

The Client's Story Starts with the Theory of Defense.

It may be obvious, but every aspect of a trial begins with the theory of defense. One of reasons that criminal defense attorneys of long ago did not put their client on the stand was because they had no theory of innocence. Rather, the approach was more likely that of being a counter puncher which was typically accomplished through a vigorous, if not always entirely focused, cross examination. Telling the client's story through direct examination must evolve out of the theory of innocence combined with specific themes and motifs that demonstrate the errors in the State's case.

As with any theory of defense, our client's story must also be coherent, consistent and account for all facts beyond change. The story must not only account for all evidence that is likely to be introduced but also those jury questions that are likely to be inspired by the client's version of events. Many stories of innocence raise questions in a jury's mind that may not appear to be relevant in a strictly legal sense of the term but are most definitely relevant in the jury's discernment of whether our client's story makes sense.

The Direct Examination Must be Dynamic.

The presentation of the client's story should be dynamic. It is not enough to simply recite the barest of facts in a chronological order. There should be enough detail to bring the jury into the story in a way that is meaningful. Testifying that: "I was scared so I hit him" lacks detail and credibility. What were the fear symptoms? What did it feel like in your stomach, what did it smell like, what did it taste like, etc. What did you think would happen if you did not go back into the house to get the gun? What were you thinking when you actually saw the gun in the drawer? What did the gun feel like? Testifying that "I acted in self defense" is a legal conclusion without basis. Describing the terror inducing event that led to a fight for survival requires telling the full story of what actually happened.

On the other hand we do not want to paint every brick on every house. We have all heard people tell stories who are challenged when it comes to editing. Too many details can be boring and insulting. Most witnesses and lawyers error on the side of too few details though. Stories do not tell themselves, whether it is a short story, a play or the story of a client's false accusation. The courtroom story needs a writer, a director and an editor.

Dynamic Organization.

Like cross examination, direct examination should be divided into chapters. Also like cross examination, the direct examination does not have to be conducted in chronological order starting with background information. Let me repeat – <u>direct examination does not have to be organized in a chronological order starting with the birth of the defendant and then moving at a glacier pace until the point of his arrest.</u> For a jury that *is* death by direct examination. Flashbacks, flash forwards and parallel storylines are just a few examples of storytelling techniques that can be used during a direct examination. The concepts of primacy (the first thing talked about) and recency (the last thing talked about) should also be employed in direct examination.

While it is not particularly dynamic, all "bad stuff" from a client should come out during direct examination. It is less damaging when the direct examiner has control over the timing and presentation of unhelpful information. While there is no set rule, generally speaking the bad stuff should come somewhere in the middle of the examination so as not to muddy up the important points made with primacy and recency. Examples of "bad stuff" include prior inconsistent statements, bad acts or a criminal record and an explanation of what appear (only on the surface) to be inculpatory statements.

Keep it Real.

There are few things worse in a courtroom then presenting something to a jury that appears to be fake. While the very process of asking a person to tell their story in front of an audience is not real, there are techniques and practices that we can employ to make it seem as genuine as possible.[2]

One of the most challenging skills for many litigating attorneys is the ability to listen. With serial multitasking personalities, it is sometimes difficult for trial attorneys to focus in on one particular stimulus. A "live" direct examination requires exactly that, though. The ability of the attorney to be in the moment with a client to the exclusion of all else. This level of intense listening is compelling to watch and creates an electrical charge between the client and attorney that is palpable. Active listening requires that the story come out as a conversation with each answer providing the impetus to the next question rather then a preordained outline that is not fluid. Every retelling of the story should be nuanced with unique wording and varying avenues that arrive at the same destination. Direct examination is jazz music not classical music.[3] A direct examination that plays notes on a theme is a real direct examination . . . an interesting direct examination . . . a winning direct examination.

While the examination should be fluid and appear unrehearsed, the general choice of words is important. Using lawyerese, or even worse, copspeak is alienating to a jury and confusing to a client. When used too often the client will pick up this bizarre form of almost speech and will sound as confusing to the jury as the lawyer. The story as told through direct examination should be told using simple words and phrases. Generally speaking, the simpler the question asked, the simpler the answer will be. When answers seem confused it is often because the question was confused to begin with.

Proper eye contact with the jury should not be left to chance. Eye contact between client and attorney is appropriate and demonstrates a positive relationship. Eye contact between the defendant and the jury should be used in a more sparing fashion. We have all seen police officers, experts and FBI agents who address all of their answers to the jury. This looks rehearsed and silly. When this behavior is mimicked by a client it looks manipulative and practiced. This is not to say that a client should never look at the jury.

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[2] As a very wise judge once explained. "The most important quality that an attorney can possess is the ability to be sincere. The attorney who can fake that has got it made."

[3] This is of course a reference to style not content. As we all know, direct examination can also sing the blues.

Rather, the attorney can specifically direct the client to address a specific answer or answers to the jury. "Mr. Judson, please tell the jury why you went back to your house to get a gun." When the question is asked in this matter it will prompt the defendant to look directly at the jury at the request of the attorney rather then as some sort of Stepford Witness who is programmed to turn and answer every question posed.

Client Preparation.

There are few things more terror inducing then the prospect of testifying when your life is on the line. There is the fear of public speaking, the thought of answering questions from a professional cross examiner and the realization that a mistake on the witness stand may have a lifetime consequence.

Preparing a client to testify starts with the very first client interview. In that first interview, issues of respect and trust are established. From that moment on it is important to not only gather information from our clients but also to establish a bond that is obvious in the courtroom. A noticeable connection between the attorney and the client will go a long way toward convincing the jury of the attorney's true belief in the client's innocence. There is no doubt that the connection between an attorney and a close family member would be readily apparent in the midst of a trial and direct examination. This same sort of relationship can be approximated with a client through time and careful consideration.

In addition to the time and effort required to establish a relationship between the attorney and client, the actual examination must also be prepared. On the one hand, it would be a dire mistake to put a client on the stand without having practiced their testimony. Questions will be confusing to the client and the answers are prone to being even more confusing to the attorney. On the other hand, too much "rehearsal" can seem precisely that – rehearsed. Testimony that looks rehearsed has obvious drawbacks. It seems contrived, regurgitated and uninteresting. Much like the telling of a story by a practiced storyteller, each telling of the client's story should be slightly different and in the moment of the telling. Rather then rehearsing a prepared, carefully worded version of events, the emphasis should be on practicing telling the story in a way that helps the story continue to grow in content and style. Ideally the story as told to the attorney on the witness stand will be as if being told for the first time again.

Client Appearance and Demeanor.

Most lawyers only forget to discuss clothing options with their client once. Consideration should be given to what type of clothing would be appropriate for this client in this circumstance. Not everyone will feel comfortable in a suit. It does the client no good to show up in a suit and then give off the impression that it is a costume. If a client is going to wear a suit talk about choices. A jury trial is not the best time to try out a shiny new gold suit.

Client demeanor is worthy of attention as well. Many clients have not spent a lot of time in court and do not realize that they are within the jury's gaze at all times. Clients may also be unaware that there may be individuals testifying that the defendant has committed some particularly unsavory acts. There is nothing quite as comforting and joyful in the courtroom as having a domestic abuse defendant call his ex-wife a bitch in a stage whisper that can be heard all the way down the courtroom hallways as she is describing what he has done to her.

Practice Cross Examination.

It is helpful to have an associate conduct a mock cross examination in conjunction with a practice direct examination. This gives the client practice at playing it "straight" instead of feeling the comfortableness that can accompany a close attorney-client relationship. A mock direct and cross examination will also elicit and highlight verbal and nonverbal behaviors that require attention. A vigorous practice cross examination can also bring out more obvious reactions to confrontation that must be remedied.

One aspect of a practice cross examination that should not be overlooked, is the tendency on the part of many clients to attempt to answer questions when they are unsure of the question being asked or they do not know the answer. Clients must be cautioned against guessing at answers they either do not know or do not recall. Likewise, questions should not be answered when the information being sought is ambiguous.

Presentation and style.

Even attorneys who are excellent at bringing excitement and style to cross examinations, opening statements and closing arguments are capable of boring the stuffing out of jurors when conducting a direct examination. The same basic theories about making the trial interesting apply to direct examination.

Looping – the act of taking a statement already given by the witness and incorporating it into the next question works extremely well.

Repetition – while similar to looping is not the same. Repetition can be used internally within a chapter and then repeated from chapter to chapter.

Pacing – which seems natural to cross examination is often times neglected in a direct examination. Direct examination is not a monotonic presentation that leaves jurors wishing they were at the dentist. Direct examination, when done in the movies is quite exciting and drives the story. The use of pacing and vocal nuance on the part of the attorney will go a long way toward making the direct examination interesting. Of course this requires giving thought to the presentation of the direct examination rather then just getting up and asking questions.

Transitions - As is the case in cross examination, transitional phrases and statements help the witness and just as importantly, the jury know where they have been and where they are going.

Demonstrative evidence and client demonstrations – are both extremely effective in keeping both the client and the jury interested in what is going on. Much as a good storyteller will act or demonstrate various aspects of a story in order to help the story come alive, a witness can demonstrate significant parts of direct testimony. An example might be showing how a person was about to hit them or demonstrating the tone of voice of an officer who is coercing a false confession.

Specific Substance in Sexual Assault and Child Abuse Cases.

One of the most effective areas of direct examination in these cases is the moment of accusation or arrest. Being accused of sexually assaulting your daughter has a fundamentally different feel to it then being accused of drunk driving or padding your expense account. The innocent person will have a very different visceral experience then the guilty person at the moment of accusation. This is a moment in time, if direct examination is conducted with finesse and artistry, that can virtually win the case. This is a moment where bringing the client back in time to re-experience the accusation in the moment can be particularly effective. "Mr. Lawson, you are back at that moment in time when Officer Johnson told you that Cindy said you touched her. What are you thinking?" "What are you feeling?"

It is also vitally important to examine how the defendant feels about the false accusation. Often times it is more powerful to have the defendant express an understanding about how a false report could have come about rather then simply indicating anger at the false accusation. For example, in child sexual assault accusation, it is much easier then most people would ever imagine to implant a false memory in a young child. Rather then the client expressing anger at his lying child, an expression of concern for what has happened to the child to create the false memory and resultant false accusation may be much more effective.

Lay Witnesses.

While this article is primarily about the direct examination of a defendant in a sexual assault or child abuse case, it is important to give some thought to the direct examination of non-defendant lay witnesses. In addition to being dynamic and authentic, it is important that jurors perceive lay witnesses as having accurate knowledge and an unbiased motivation. Primary focus should be on these areas while incorporating the various strategies already described as applicable to client examinations.

Caveats.

We do not want direct examination performances. While it is important to direct examine witnesses in a manner that tells the story of innocence, it is disastrous when a

client overacts or fakes emotion. We are not trying to create actors; we are trying to help each witness tell their story in the most effective way possible using their genuine voice.

Direct Examination of Experts.

While this article is about preparing your client to testify, it is worthwhile to take a moment to talk about the direct examination of expert witnesses. Expert criminal defense witnesses can be extremely valuable throughout the litigation of a criminal trial. However, an ineffective expert or the ineffective use of an expert can seriously damage a defense. A poorly prepared or incapable expert can be worse for the defense then no expert at all.

There are essentially three purposes for expert testimony at trial:

1. Neutralizing the Government's expert. Sometimes it is absolutely essential to hire an expert with the intention of neutralizing an expert for the government.[4] In these situations the prosecution's case may rest exclusively or almost exclusively on expert testimony. The defense must help the jury come to the realization that the government's expert is not strong enough standing alone to obtain a conviction. In that situation the defense expert need not win the case outright, but must cast doubt upon the expert for the prosecution.

2. Educating the jury. Often times a defense expert is testifying to facts or to analysis rather then presenting a persuasive opinion in favor of the defense.[5] In these situations the expert is not offering an opinion so much as they are teaching the jury about scientific principles or factual analysis.

3. Offering a persuasive opinion to the jury.[6] Generally this is the most helpful type of expert. In these cases the expert is actually testifying with an opinion that advocates for acquittal based on one or more elements in the charge or charges.

When selecting an expert, it is important to identify which of these purposes the expert is being hired for. In many case the expert may in fact be asked to engage in all three purposes.

Like all aspects of trial preparation, preparing the direct examination of an expert requires significant preparation. If the expert is in an area unfamiliar to the attorney, the first step that must be taken is to gain an understanding of the area of expertise that is required. While the retained expert can help educate the lawyer once they are retained, the very

[4]Examples might include a D.N.A. expert, a battered woman syndrome expert or an expert in accident reconstruction.

[5] Examples of this type of expert might include educating a jury on the rate of alcohol absorption into blood, teaching the jury about how memory works with regard to the creation of false memories or mistaken identification, or explaining in general terms what a mental illness is.

[6] Examples of this type of expert include testifying that an interview of a child was in fact improperly suggestive, testifying that a defendant meets the requirement for an insanity defense or testifying to a cause of death contrary to the prosecutor's theory of prosecution.

decision about who to hire cannot made in any meaningful way without at least a working knowledge of the area of expertise. Fortunately, the internet provides elementary information on just about any area necessary for criminal defense work.

Once an expert has been retained, the preparation has really just begun. It is a major mistake to sit back and wait for the expert to put everything together. At this point it is imperative for the attorney to learn as much about the expert's area of expertise as possible. In the same way that putting a client on the stand requires hours and hours of preparation for every hour of testimony, the trial testimony of an expert demands the same care and attention. All too often attorneys make the mistake of thinking the expert can just be thrown up on the stand and their testimony will speak for itself.

One of the most important responsibilities of the attorney in pretrial preparation is too make sure that the expert's testimony is not lost in translation. Most experts, like lawyers, have a language all their own. It is imperative for the attorney to help the expert testify in a manner that allows the jury to understand what is being testified to. This is particularly important in white collar and D.N.A. cases. Any information that the jury does not understand will typically be ignored. As stated previously, this requires the attorney to develop a very good working knowledge to the expert's area of testimony. Lawyers should not be receiving an education from their expert in the middle of the direct examination. While this does tend to make the examination feel very alive for the jury, it is fraught with all kinds of danger and unpredictability. It is imperative for the attorney to help the expert use language that is understandable to the jury. It is equally important for the attorney to make sure that neither the attorney nor the expert is condescending to the jury.

It can be challenging to retain control of the process and presentation when directing and expert's testimony. Often, expert witnesses, especially those that have testified often will attempt to take over litigation strategy and trial preparation. While the advice of an expert can be invaluable, the trial attorney is the person in charge and must remain so. Likewise, it is imperative that the expert knows who is in control in the courtroom. An expert witness who is too long winded or advocates too strongly during cross examination can cast doubt on the entire defense while frustrating the jury and incensing the trial judge. The attorney must be responsible for the presentation of the witness. An expert who comes off as arrogant or insulting will hurt the defense more then help it. The expert's presence is only to help advance the theory of defense.

Just like that of a defendant, it is imperative to find ways to make an expert's testimony interesting. Many times the testimony of an expert is put on in a way that is uninspired at best and coma inducing at worst. There is absolutely no reason that the testimony of an expert has to be mind-numbing. It is incumbent upon the attorney to find ways to bring an expert's testimony to life. Demonstrative exhibits, models and physical demonstrations are easy ways to make the testimony more interactive and interesting. While PowerPoint can have the effect of creating distance between an attorney and the jury, it can be used very effectively by or with an expert. In the hands of the right expert the use of PowerPoint can result in the jury feeling like they are begin taught by a very

helpful professor. However, the attorney must go over the presentation with the expert to make sure that it is understandable and attention-grabbing. If the expert is not interesting, it is the attorney's fault - not the expert's. The biggest mistake that attorney's make with experts is not spending the time necessary to make the testimony accessible to the jury.

Most expert's have examples, anecdotes or stories that are much more interesting then dry lecturing about an area of expertise. These metaphoric teaching tools are much more appealing, helpful and persuasive then a dry recitation of scientific principles and can be subtly slipped into the testimony through creative organization and planning. Experts, particularly those that are not use to testifying, may not think to try to incorporate these avenues of persuasion. As interesting persuaders, we must find way to make an expert's testimony not only interesting but also meaningful. Asking an expert to give an example or story of a particular scientific principal in practice is usually much more interesting and informative then the principal standing alone.

It is important to have an expert personally present his credentials. Eschew any offer by the prosecution to stipulate to his expertise. It is not however, necessary to present an expert's credentials in a manner that is boring and seemingly unconnected to the case at hand. In the same way that it is necessary to bring a client's background information to the jury in a way that is meaningful and lifelike, it is possible to use the expert's curriculum vitae in a manner that is interesting and persuasive. All too often, an attorney will either have the expert talk about their background and experience in a narrative format or will go through the C.V. in a step by step process that is uninspired and tedious. An expert should never be asked to go through their background and experience in the narrative. In addition to being dull, the expert will be perceived as a braggart and arrogant. The expert's background should be of interest to the direct examiner in such a way as to elicit a dialogue between the expert and the attorney that shows respect and admiration. The direct examination of a lay witness or client can be made more interesting by integrating the witness's background into the body of a direct examination. Likewise, an expert's background information can be creatively intertwined in the same way. For example – in most cases an attorney will talk about an expert's published materials as a part of the initial background materials. In the appropriate case it would be much more interesting to the jury to bring up prior authorship in the context of a particular area of examination. An expert on tainted child interviewing techniques could be asked, in the context of reviewing a video tape, if they have ever published any articles on the suggestibility of children. In this way the testimony seems much more relevant to the issue at hand rather then artificial and introduced for the sole purpose of promoting the expert in the eyes of the jury.

General areas of examination regarding the C.V. should include:

1. Personal background.
2. Education.
3. Honors and awards.
4. Employment history.
5. Publications.

6. Prior recognition as an expert in general or specific area.

Expert witnesses can be extremely helpful in educating and persuading a jury. In some cases they are absolutely necessary to at the very least neutralize the prosecutor's expert. All cases in which an expert is retained require a lot of preparation on the part of the attorney. This preparation must include acquiring a working knowledge of the expert's area of expertise. Additionally, the preparation should include time spent considering methods of presentation that are interesting and meaningful to the jury. It is the attorney's responsibility to select and present expert testimony that is interesting and meaningful as well as relevant.

Conclusion.

Direct examination is the method by which most of the basic information in a case is presented to the jury. While direct examination is a necessity to the prosecution of a criminal case it is seldom done in a way that is particularly dynamic or authentic. Defense attorneys have been anesthetized into conducting the same sort of "what, if anything, happened next," approach to direct examination. Because direct examination is seldom conducted in a way that actually alters the outcome of a prosecutor's case, defense attorneys have become reluctant to put on much of a case much less their client. Cases can be won by the powerful presentation of a client. Powerful direct examination comes from paying more attention to dynamic storytelling, thoughtful presentation ideas and in-depth client preparation.