

CLARENCE DARROW VIGNETTES

"The Constitution is a delusion and a snare if the weakest and humblest man in the land cannot be defended in his right to speak and his right to think as much as the strongest in the land." Clarence Darrow

In *The Chambers* - - The Orphan of Trial Tactics

By: Ray Kelly, Esq.

En masse, the young lawyers descended on Atticus. Wolff and his significant other, Sienna, began with "Last month you suggested that direct examination can be more dangerous than cross examination - - why?"

Atticus responded, "In law school, our trial advocacy professor constantly reminded us that direct examination is far more dangerous because of your lack of control. The good professor liked to quote Oscar Wilde who stated 'Questions are never indiscreet - answers sometimes are.' Since we are only permitted to use non-leading, open-ended questions on direct examination, we do not have the luxury and the security afforded when we are permitted to use leading questions on cross. If you try enough cases, you will eventually have the horrifying experience of watching your most powerful witness become absolutely surly toward the cross examiner, completely freeze on the witness stand or, as in "***A Time to Kill***," watching your witness ruined on cross due to prior indiscretions in life. While sometimes a case can be won due to the weakness in your adversary's case, most cases have to be won due to the strength of your case-in-chief. Your case-in-chief is directly dependent upon the art of presenting an interesting storyline in a persuasive yet simple fashion. Direct examination is critical to persuasion. Most unfortunately, direct examination is the virtual orphan in trial tactics whether in law school or in continuing legal education seminars. Direct examination is the most difficult aspect of trial due to your lack of control over the witness and what comes out of the witness' mouth."

Wolff asked, "What suggestions do you have for maintaining control?" which was accompanied by Sienna's question, "How do I properly prepare both myself and my witnesses for direct examination?"

"Let's take Sienna's question first - - there are several things about testifying that are important to remember. Testifying is frightening. The #1 fear in the world is public speaking. Many law school graduates refuse to become trial lawyers because of stage fright resulting from being stuck in the perfection trap, i.e., measuring themselves against a mythical, perfect performance which creates an anxiety of not attaining their own expectations. A nagging inner-voice says 'Why didn't I become an accountant or a plumber?' A witness, experienced or not, has similar anxieties. The remedy for the stage-fright is for both the lawyer and the witness to think about ***what*** you are doing, not ***how*** you are doing. It is up to the trial lawyer to calm that fear by orienting the witness to the place, the people, and the simplicity of testifying."

"For example, when an actor prepares for a role, s/he must be able to answer certain questions in order to be properly oriented with the performance. These are: Who are you? What are you? When do you appear? How do you affect the storyline? Why are you here?"

"Similarly, the witness should understand your theory of the case, the themes of the storyline and where s/he fits in the overall process of persuading the jury. Your preparation of the witness must address:

1. Who are you?

This means placing the witness in his or her "position" through demographic information (age, education, occupation, etc.), as well as his or her involvement in the case (eyewitness? circumstantial? character? alibi?).

2. What are you?

Does the witness have some special expertise to bring to the trial? This question overlaps question #1, i.e., eyewitness? circumstantial? opinion? expert?, etc.

3. Why do you appear at this moment in the trial?

The witness must know what has happened thus far in the trial before he or she testifies. What has your adversary presented (or what is your best estimation of what s/he will present)? "When did you appear?" refers to when chronologically the witness appears in the storyline. To gain maximum impact from this witness, you must plan the order of your witnesses during the case-in-chief to gain the maximum persuasion edge.

4. How do you affect the critical facts of the storyline in the trial?

What is the potential impact of this witness? If important or crucial, share this with your witness. The trial of a lawsuit is a study in applied psychology. This is especially true when applied to your case-in-chief. Making the witness comfortable in his/her skin pays untold dividends and helps the witness understand the amount of time spent in horse-shedding the witness. When your witness understands the theory of the case, the storyline themes and the critical facts, a comfort develops due to the acquaintance with the entire picture."

"Rely upon your witness' pedigree, demeanor and content. Effective direct is clear, logical and creatively presents the critical facts which determine the outcome of a trial. When you have a witness who commands respect, let that witness be the center of attention. Conduct your examination so that you do not interfere with the line of communication between your witness and the jury. Credibility is congruent with who the witness is, what s/he says (content) and the demeanor of the witness' presentation. Successful direct examination occurs when the jurors are impressed by the totality of the witness' presentation. You have done your job well when the jury remembers the witness but has trouble recalling who asked the questions on direct."

"Regarding Wolff's question as to how to maintain control, let's share a few thoughts next month."