

# Meeting the enemy: 10 tips for interesting direct examinations

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"We have met the enemy, and he is us." -- Pogo, Walt Kelly

What does a great direct examination have to do with Elizabeth Taylor, Marcus Aurelius, Moby Dick, Tony Robbins, Leo Tolstoy, Monty Python, Wolf Blitzer, Rudyard Kipling, Pablo Picasso and "The Mikado"? Keep reading.

"Entertainment Tonight" announced on April 10, 2010, that Elizabeth Taylor, great Hollywood actress and legendary beauty, now age 79, was engaged to be married for the *ninth time* to a 49-year-old man.

"I know what to do," quipped husband-to-be Jason Winters, "I'm just not sure how to make it interesting."

OK, that's an old line, and Jason probably didn't really say that, but it is a perfect summation of the lawyer's challenge on direct examination -- how to make it interesting.

A truism of trial practice is that good witnesses, not good lawyers, win lawsuits.

Witnesses give evidence, but can only do so through the artifice of direct examination. They do not get to stand up and give a 30-minute lecture accompanied by a PowerPoint presentation. The jury can't raise its hand and say, "Please explain," or "What you talkin' about, Willis?"

The lawyer has to ask the questions, and the witness has to tell the story.

This can be compelling, instructive, even mesmerizing, if done properly. Or, it can be tedious and dull. All experienced trial lawyers know that boredom is the *enemy* of a great direct examination.

So, how does the advocate make his or her directs more interesting? More like an interview than a lecture? How do you teach your witness to be an effective communicator? How do you help them tell their story in a memorable way?

This is the goal of a good direct examination.

To help you attain the proper amount of "corroborative detail, designed to lend an air of artistic verisimilitude to an otherwise bald and unconvincing narrative" --that's from Gilbert and Sullivan's "The Mikado" -- below are a few tips, from a lawyer who has learned the hard way.

**1. "Variety is the spice of life."** A misquotation of William Cowper (English poet pronounced "Cooper" -- an interesting fellow -- look him up.) You will see what sort of "variety" he was talking about. As for your direct exams, make them more interesting by variation in tone, subject, rhythm and teaching method.

**2. "The secret of all victories lies in the organization of the non-obvious."** Marcus Aurelius (the Roman emperor -- also an interesting fellow -- wrongly credited with inventing Stoicism -- had a bit part in "The Gladiator"). Your direct should have a beginning, middle and end. Use transitional questions to signal the end of a topic and the start of a new one.

**3. "To produce a mighty work, you must choose a mighty theme. No great and enduring volume has ever been written on the flea, though many there be that have tried it."** Herman Melville (author of *Moby Dick* containing the best first paragraph of any American novel then it all goes downhill for the next 2,000 pages). Make sure your directs serve your trial themes and have specific themes for direct.

**4. "Any idea, plan, or purpose may be placed in the mind through repetition of thought."** Napoleon Hill (the Tony Robbins of his day -- but even a nut can come up with a good thought now and then). A good organizational structure for a direct tell them what you are going to tell them, then tell them, then tell them what you told them.

**5. "A picture is worth a thousand words."** Attributed to Ivan Turgenev, the Russian novelist, "A picture shows me at a glance what it takes dozens of pages of a book to expound." (Turgenev was once challenged to a duel by rival novelist Leo Tolstoy. Tolstoy chickened out, which was too bad -- Turgenev was a crack shot. We would never have had to read *War and Peace*.) Use pictures real ones and word pictures; demonstrations, charts, exhibits; get the witness out of the witness chair if possible.

**6. "Bring out your dead."** Monty Python meaning of course, bring out the bad stuff on direct and put your spin on it, rather than leave it for your opponent on cross (but what if you "aren't dead yet?"). Do this by anticipating the cross-exam topics, and asking about them on direct. It will sound better coming from you, and will take some sting out of your opponent's cross.

**7. "I had six honest serving men they taught me all I knew: their names were Where and What and When and Why and How and Who."** "The Elephant's Child" by Rudyard Kipling. (Kipling died in 1936. His death had previously been (incorrectly) reported in a magazine, to which he wrote, "I've just read that I am dead. Please delete me from your list of subscribers.") When in doubt, any question that begins with one of these words is probably not a leading question. If you get an objection to a leading question, you can usually convert it to a non-leading one by beginning with one of these six words.

**8. Know when you can lead.** Wolf Blitzer to Hillary Clinton: "Are you for or against issuing driver's licenses to illegal aliens." Answer: "Yes." (laughter from audience.) You can lead on matters admitted, preliminary matters not in dispute, to introduce a new topic, or to lay a foundation. Judicious use of the leading question on direct moves the narrative along and adds rhythm and variety (and hence, interest) to the testimony.

**9. "Everything you can imagine is real."** Pablo Picasso -- meaning in this context, of course, that if you can get the jury's imagination invoked, they will retain what your witness is saying.

**10. Listen to your witness be curious although curiosity may be bad for cats.** Various attributed to Ben Johnson, William Shakespeare, O. Henry and Eugene O'Neill. If you feign curiosity about what your witness is saying, it is contagious and will spread to the jury. Sometimes, feigned incredulity works too it puts you in the jury box.

So, how do you invoke the jury's imagination? Use variety; show, don't tell; paint word pictures; use detail; teach in different ways; use your interviewing skills and remember ... witnesses win cases.