

Direct Examination

Advocates begin the presentation of evidence by calling witnesses. The questions they ask of the witnesses they call are *direct examination*. Direct examination of a witness should be the easiest part of an arbitration hearing. You have a friendly witness on the stand who generally wants to be helpful to your case. All you need do is ask the witness some simple questions and let them tell the arbitrator their story. Nothing could be easier, right? And nothing could be more perilous. Unlike cross-examination, you do not have complete control over the witness. Rather than stating facts and merely having the witness agree or disagree with those facts, as on cross, during direct it is the witness who narrates the facts. A misstatement, momentary lapse of memory or even an inappropriate emotional response and your case has suddenly become that much more difficult.

Like any skill, questioning a witness is something that can be improved with practice and study. Practice not only by conducting direct examinations during your assigned arbitration hearings but also by offering to assist your fellow advocates as they prepare witnesses for arbitration. Help them conduct mock examinations of the witnesses that will testify during their assigned arbitrations. In addition, I recommend watching other advocates in action. If they're better than you are, you'll discover new skills or techniques you can apply to your cases. If they're worse than you are, you'll be reminded about mistakes that you shouldn't repeat. Regardless of what happens, you're almost guaranteed to learn something.

During direct examination advocates may elicit both direct and circumstantial evidence. Witnesses may testify to matters of fact, and to identify documents, pictures or other items introduced into evidence.

Generally, witnesses cannot state opinions or give conclusions unless they are experts or are especially qualified to do so. Witnesses qualified in a particular field as expert witnesses may give their opinion based on the facts in evidence and may give the reason for that opinion.

Advocates generally may not ask leading questions of their own witnesses. Leading questions are questions that suggest the desired answers, or contain the information that you're looking for, such as, "And you next saw the grievant in the break room at 2:15 pm?"

You can usually avoid asking leading questions during direct examination by beginning your questions with one of Rudyard Kipling's "honest serving men:"

I keep six honest serving men,
(they taught me all I knew)
their names are **What** and **Why** and **When**,
and **How** and **Where** and **Who**.

- Rudyard Kipling
The Elephant's Child, (1902)

You can also begin your questions with the words Explain or Describe to largely avoid leading your witness. Remember, your goal on direct examination is to make the witness the star of the show. Start each of your questions with any of these words, and you'll avoid nearly all "Leading" objections.

Preparing Your Witnesses to Testify.

Postal advocates know that while it is improper to tell witnesses *what* to say, you can help them prepare *how* they will say it.

There are generally several steps necessary in preparing your witnesses to testify. Among these steps are:

1. Review the entire case file and re-read everything that pertains to your witness.
 - a. Be sure to jot down any thoughts and ideas that occur to you regarding the witness as you review the material.
2. Determine your objectives with this witness.
 - a. What do you want the arbitrator to believe when the witness has finished testifying?
 - b. Ask yourself is the witness necessary to establish a needed element of your case?
3. Review the facts in light of your objective with this witness.
 - a. Identify the facts that cause you to believe the objective is true.
4. Prepare the witness to tell a story.
 - a. Be sure to use words for the best effect – “I was terrified” sounds a lot different than “I was scared.”
5. Organize your direct to meet the rule of Primacy and Recency.
 - a. Begin and end with your strongest points.
 - b. If you decide to highlight weaknesses in your case, bring them out in the middle of your direct, sandwiched between the two strong points.
6. Prepare any exhibits that will be used with the witness.
7. Prepare your questions.
 - a. Whether to write out the questions or utilize an outline format is generally a matter of personal style.
8. Practice / Rehearse.
 - a. Conduct mock direct examinations of each of your witnesses.

- b. Explain why you are asking those questions.
- c. Ensure that the witness answers are clear and complete.
- d. Help the witness to effectively communicate their answers.

During your pre-hearing witness preparation with each witness, consider:

Wait to see how the witness initially performs. What would you think of a dentist who reached for their drill before determining if there was any problem with your teeth? Yet we do much the same thing with our witnesses. We start by telling them how to act on the stand before we have actually seen what they will do when being questioned. Before making any suggestions, put them on the witness stand and start firing away with your questions. Ask short questions, long questions, open-ended questions, leading questions, and have a colleague cross-examine, and watch how the witness performs. Once you have had a chance to observe the witness's performance, then you may be in position to make your recommendations.

As you watch the witness testify evaluate:

How does the witness sound? Do they need to speak up or tone it down? Do they speak too quickly or too slowly? Are they using incomprehensible buzzwords or Postal jargon to explain what happened? Do they articulate their words, or do they mumble? Do they fade away at the end of sentences? Does the witness say "uh" or "um" or "you know" too often?

How does the witness look? Do they slouch in their seat, lean forward or sit up too straight? Are they too comfortable or too stressed? Do they speak animatedly with their hands or put their hands in front of their face? When they respond to

questions, will they look at the arbitrator or avoid eye contact? Are they talking to their shirt or towards the floor? Do they play with their hair, rub their chin or tug on an earlobe? What does their facial expression say as they answer a question? Are they scowling or smiling unnecessarily?

How does the witness act? Do they become confrontational when you prepare them for cross-examination? Does their body language change based on the questioning style? Do they get defensive when you switch to certain topic areas (do they cross their arms)? Does the tempo of their answers change (sometimes pausing for an extended period before answering, and other times answering immediately) depending on topic areas or questioning style? Do they interrupt before the question is completed? Do they look at you for help during cross-examination?

Only after you have had the opportunity to evaluate the witness's performance should you make recommendations for improvement. Any recommendations you make should follow these guidelines:

Limit your initial comments – do not try to do too much. Make only one or two specific comments for improvement. Too many comments will have the witness feeling as if they did nothing right and the witness may just give up. Most witnesses can easily handle the few, limited areas of improvement you highlight. At your next meeting with that witness, you can give them one or two more things to improve upon.

Be honest. Do not give false praise just to say something nice. Only a witness you would not want on the stand will be unable to recognize false praise. If possible, tell

them something positive about their performance, but if the witness is sincerely interested in improving their performance, they'll appreciate your candor.

If you are going to ask a witness to work with a chart, or some other demonstrative aid, be sure to show the chart or model to the witness before the hearing so that the witness appears comfortable with the exhibit at arbitration. Make sure you show the witness any exhibits that you will introduce into the record through the witness well before the witness takes the stand.

Anticipate evidentiary objections to your direct examination and be prepared to present solid arguments to defeat them. In the alternative, be prepared to proffer the excluded testimony on the record if the objection is sustained.

You should prepare to present the direct examination through the use of conversational language. Avoid reading questions to the witness so as not to bore the arbitrator and leave them with the feeling that the presentation was rehearsed. Remember to guide the witness through the testimony so that they do not ramble.

Try not to play with your pen, curl your hair or create any other physical distractions that will take the arbitrator's attention away from the witness. Stay focused on the questions, listen to the answers and appear very interested. Do not use a monotone. Instead, change the tone of your voice based upon the importance of the testimony. Highlight the key points of the testimony with the use of voice inflection. Avoid legalese; speak clearly and to the point. Use action words and "word pictures," adjectives and adverbs in presenting your questions. Attempt to establish a rhythm with the witness and vary your pace so that the testimony is interesting to the arbitrator. This will make your presentation powerful.

Who Should Testify

In order to decide on the witnesses you will need to call to testify you must consider how the potential witness is involved with the “primary” aspects of the case. If they were involved you must then decide if they will add value to your case presentation in chief. Does the potential witness have actual knowledge of the circumstances giving rise to the grievance before the Arbitrator and can they communicate that knowledge to the arbitrator? What will you establish with this potential witness? What element of your case is this potential witness needed to prove? How does this potential witness fit into your story of what happened? Is this potential witness needed for the introduction of exhibits and, if so, can they handle that task on the stand?

In deciding who will testify in your case, you also should consider that the arbitrator will make credibility determinations for each witness that testifies during the hearing. Is your potential witness credible and do they appear credible when testifying? The arbitrator will consider several factors in making credibility determinations and you should use these same criteria in deciding whether or not to call that witness:

- Demeanor while testifying;
- The character of the testimony;
- The witness’s capacity to perceive, recollect and communicate regarding the matter about which they are to testify;
- The witness’s opportunity to perceive the matter about which they are to testify;
- The witness’s character for honesty and truthfulness, or lack thereof;
- The existence or absence of bias, interest or other such motive;
- The existence of any prior consistent or inconsistent statement;
- The witness’s attitude toward testifying or toward the matter at issue; and
- Any admission of untruthfulness by the witness.

In addition, be aware that often not calling an obvious witness may adversely influence the arbitrator's decision. If an obvious witness is somehow unavailable, be prepared to fully explain why that witness is unavailable to testify and all of the steps you took trying to have the witness appear at the hearing.

The Order of Witnesses

The order of witnesses generally depends on the nature of the case. For example, in a discipline case it is usually to your advantage to tell the story in a chronological order that is easy for the arbitrator to follow. In a contract case you may wish to initially present an expert on the particular contract provision at issue so as to explain to the arbitrator the meaning of the provision. Having provided that testimony you may then move on to other witnesses who will testify to the facts of the case.

Whichever order you choose for your witnesses, always open and close the direct examination with the strongest testimony. People tend to remember best what is heard first and last. By anticipating and isolating troubling testimony in the middle of your presentation you make it less likely that it will be among the most remembered aspects of your case. Placing the difficult part of the testimony in the middle also permits you to diffuse the union advocate's anticipated cross-examination.

Next you must consider choosing the exhibits and other demonstrative evidence that you will use during the examination. We all know that people learn much more effectively when they hear and see information simultaneously. Apply this principle in your hearing. Use documents, investigative reports, statistics, and other such

exhibits to tell the story of your case. This will add interest to the testimony, help hold the arbitrator's attention, and assist them in remembering the story.

The timing of testimony may require a combination of long-range planning and seat-of-the-pants decision-making. Happy witnesses tend to make better witnesses. Remember that being called to testify in arbitration is not something to which most people look forward. With good planning, you can avoid having a key fact witness stand by their phone in the facility all day long and then calling them to the stand when their mind is on who is meeting their child at the bus rather than telling their part of management's case.

TIP: Consider mentally placing yourself in the shoes of a news reporter or investigator at the scene of a breaking story. Wipe out the knowledge that you have of the case and attempt to become educated on the issues through the witness on the stand. Ask the types of questions that a reporter or investigator would ask to become fully informed of what happened in the case. This technique will allow you to view the case from the arbitrator's perspective. Remember, while you may know everything about the case, the arbitrator is hearing the testimony for the first time at hearing.

At the end of your witness examinations, remember to thank the witness and then attempt to appear confident during the entire cross-examination.

Preparing witnesses to testify is one of the most important pre-hearing functions a postal advocate can perform. Get the most out of the limited time you'll be able to spend with each witness. Use these guidelines in your pre-hearing preparations and your witnesses hearing room presentations will show improvement.

Problems

Things were going great. You delivered an opening statement that got the arbitrator's rapt attention, and your first three direct examinations had gone better than you could have hoped. Now, halfway through the direct examination of your fourth witness, things are still going exactly as planned. Your witness is completely prepared, easily answering all of your questions without hesitation, and the arbitrator is hanging on his every word. But then, midway through your examination, something unexpected happens when you ask this crucial question:

Q. "To your knowledge was the grievant aware of the requirement to be regular in attendance?"

A. "Well that would be hard to say."

Every other time that you've asked this question during your pre-hearing preparations with this witness, he's been quick to say that the grievant was aware of attendance requirements. But now, his brain seems to have gone blank.

What do you do?"

First: ***DO NOT PANIC!*** Far too often, advocates (especially newer advocates) lose their composure when they get unexpectedly bad responses from their witnesses. The worst thing you can do at this point is to give the arbitrator the impression that you've just lost the case. Chances are the witness's answer isn't nearly as fatal as you think it is, so stay clam. Your negative reaction will only amplify the importance of the negative answer. Just stay calm — *you can fix this.*

The next step, before you do anything else, is to ensure that your witness really doesn't remember.

Often, witnesses know the correct information, but the reason they don't answer correctly is that we ask them lousy questions. Before you attempt to refresh his recollection, take responsibility for asking a lousy question, and then try asking your question a different way to see if that jogs his memory. For example, set some parameters for your question, and make it easier for the witness to answer:

Q. "Based on your earlier testimony that you personally reviewed the attendance requirements in stand-up talks and that the grievant was present during those talks, did you make the grievant aware of attendance requirements?"

A. "Oh, yes of course."

Sometimes, that's all you'll need to do to get the right answer. However, if rephrasing the question doesn't work, you can also try asking for the information in a different manner.

Regardless of how you rephrase the question, your witness still can't remember. What do you do then? When you've exhausted rephrasing techniques, the next step is to refresh the witness's recollection.

Arbitrators understand that witnesses sometimes need help remembering details. Few of us, if asked, could remember what we were doing on August 15th of last year. If, however, we were given the chance to look at our calendars, we could probably tell exactly where we were and what we did that day. It's for just this reason that the rules of evidence allow witnesses to refresh their recollection. The process needed to refresh your witness's memory is not complicated.

First, you must show that the witness cannot remember. You do this by asking the witness question designed to elicit the information you want to place in the record and having the witness respond "I can't remember." For example:

Q. "Was the grievant present when you gave the stand-up talk concerning the requirement to be regular in attendance?"

A. "I can't remember."

Until you demonstrate that your witness doesn't remember, you will not be allowed to refresh his recollection.

Second, once you demonstrate that the witness does not currently remember, show that the witness previously remembered the information:

Q. "Did you previously remember whether or not the grievant was present for that stand-up talk?"

A. "Yes."

Third, ask the witness if there's anything that would help refresh his memory.

Q. "Is there anything that would help you remember?"

A. "Yes, if I could review my personal notes that would help me remember."

While you typically use written documents to refresh witnesses' memories, you are not limited to paper exhibits. If there's *anything* that helps the witness remember, you should be permitted to use it to refresh their memory.

Have the witness explain to the arbitrator why the item will refresh his memory and why he needs some help to remember. For example, the supervisor gives a stand-up talk to their subordinate craft employees in a group each week. By the time the grievance reaches arbitration, the supervisor has literally delivered 100's of stand-up talks and it is understandable that they might need some help remembering whether or not the grievant was present for a particular talk. Before the supervisor refers to their personal notes to refresh their memory, you should ask them about the notes. "When were they made? Why were they made? What did you include in your notes? Such questions help show the arbitrator that your witness's refreshed memory will be accurate.

Fourth, show the refreshing item to the union advocate.

Fifth, show the refreshing item to the witness and ask them to examine the item.

Sixth, ask the witness if their memory has been refreshed.

Q. “Having reviewed your personal notes, does that refresh your memory?”

Finally, once the witness has refreshed their memory, re-ask your original question.

Q. “Now that you’ve refreshed your memory, please tell us, was the grievant present when you gave the stand-up talk concerning the requirement to be regular in attendance?”

A. “Yes, he was.”

TIP: During your pre-hearing preparation with each witness, review the process for refreshing memory. Instruct each witness that if it is necessary to refresh their memory while on the stand through use of a document, they are to turn the document over before answering so the arbitrator can see that they are testifying from their refreshed memory, and not simply reading aloud from the document they just reviewed.

Hopefully, you’ll never run into the problem of having a witness forget what to say.

However, if you present cases in arbitration, sooner or later, you will run into a witness who forgets. When it happens, use the steps above to help refresh your witness’s memory, and get your case back on track.

Finally

Successful direct examination can be achieved only through thoroughly preparing for the questioning of each witness you will present at hearing. *Review* the essential elements that must be proven through each witness and list the facts and elements that will be established through every witness. *Outline* the key points you must bring out through each witness. *Maintain a file* for each witness containing your outline, copies of exhibits, any relevant prior statements by the witness and your notes relating to the witness. *Meet* with each multiple times to fully prepare them to testify.

Remember too, that with thorough preparation of your direct examinations, and with practice, the level of stress associated with arbitration can be greatly reduced.