

Direct Examination: Controlling the Narrative with your Client

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The Decision

There are a number of considerations when determining whether and how a defendant testifies. The American Bar Association (ABA) and the Ohio Bar Association (OBA) rules govern some of these considerations.

1. ABA Rules

a. Rule 1.3 **Duty of Diligence** [ABA and OBA rules are the same]

This rule requires a lawyer to act with diligence and promptness in representing a client. In the context of direct examination, I read this to mean the lawyer must take action early in the case regarding direct testimony, including communicating with the client as required by Rule 1.4, determining whether the client's capacity is diminished as required by Rule 1.14 and advising the client as required by rule 2.1.

Rule 1.4 **Communication** [ABA and OBA rules are except for time requirement]

This rule requires, inter alia that "(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." ABA Rule 1.4 (b)

The implication here is that the client makes decisions regarding representation after the lawyer has explained the matter to the client. The Constitutional considerations discussed below provide that it is the client's right to make the choice to testify.

Rule 1.14 Diminished capacity [ABA and OBA rules are the same] When a client's capacity to adequately make considered decisions is diminished, a lawyer may take reasonable steps to protect the client. This rule implies that the lawyer must first discern whether the client has diminished capacity. A lawyer must seek to discern whether the client—when capacity diminished, the lawyer may take reasonably necessary protective action. This protective action may implicate the client's decision to testify.

Rule 2.1 Advisor [ABA and OBA rules are the same] As an advisor, the lawyer renders candid advice and can refer to considerations other than the law in advising the client. This advice may impact a client's decision to testify. A lawyer may reflect on how the client presents, or maybe perceived during testimony and candidly advise client in this regard.

2. Ohio Rules of Evidence

Although leading questions are generally not allowed during direct testimony, Rule 611(C) of the Ohio Rules of Evidence allow leading on direct

“as may be necessary to develop the witness’ testimony. A client who has difficulty remembering or organizing thoughts may benefit from this rule during direct. A lawyer must be careful not to ask too many leading questions since excessive leading questions are not allowed. See *State v. Laveck*, Lake App. Nos. 2003-L-189, 2003-L-122, [2004-Ohio-7218](#) –

A client’s direct testimony opens the client to attack on cross but with respect to character for truthfulness, Rule 608 of the Ohio Rules of Evidence provides that the client’s 5th Amendment privilege remains in tact on the limited subject of character for truthfulness.

A client’s grand jury testimony given without Miranda warnings is protected by the privilege against self-incrimination in a subsequent prosecution. See *State v. Cook* (1983), 11 Ohio App. 3d 237 -- When a potential defendant is called to testify before a grand jury, *Miranda* type warnings must be given. If during questioning the witness asserts his privilege against self-incrimination, that decision must be honored unless immunity is granted or an effective waiver is obtained. Grand jury testimony received from a putative defendant without such warning may not be used against him in a subsequent prosecution.

A client’s confession to law enforcement is protected during direct examination as well. *State v. Taylor* (1992), 80 Ohio App. 3d 601 -- At initial

appearance defendant was told counsel would be appointed. Subsequently, he mistook a detective for appointed counsel and made admissions. Held that regardless of the defendant's or detective's claims concerning this contact, any interrogation once the right to counsel had been invoked was improper unless initiated by the defendant. *Minnick v. Mississippi* (1990), 498 U.S. 146, applied.

The Constitution governs the clients right to testify. Courts have interpreted the right to testify as inherently personal, which can only be waived by a competent client. A client has a right to present their own words in their defense under the 5th Amendment. Under the 6th Amendment, a client has the right to present witnesses favorable to the defense. The 14th Amendment also governs the right to testify through its due process requirement.

In essence, a lawyer must protect the client's Constitutional right to testify. In fact a lawyer must defer to the client's decision in this regard absent a legal reason to do so like diminished capacity of the client. *State v. Edwards* (1997), 119 Ohio App. 3d 106, which indicates that the decision whether or not to testify is a fundamental matter where counsel must defer to the client's decision.

Beyond the ethical and legal requirement that impact consideration are the tactical considerations. Indeed "[T]he guiding hand of counsel at every step of the

proceedings” is necessary for a constitutional defense. See *Powell v. Alabama* 387 U.S. 45, 69 (1932).

The lawyers guiding hand must consider the theory of the case in assisting the client with making the decision to testify. Does the theory lend itself to client’s testimony or does it obviate a client’s testimony? Do the facts in the case create a question for the jury that can only be answered through a client’s testimony?

The decision to testify is not static; it is affected by the dynamics of trial. Did something happen during trial that impacts the decision to testify? Has the “temperature” of the trial created an inference that the client’s testimony is crucial? Did a witness or some other evidence change the lawyer’s opinion about the decision to testify?

The Method

Keeping these considerations in mind, how does the lawyer prepare the client to testify? What is the method that will assist the client in preparation for and execution of testimony favorable to their case?

I recommend developing a theory of the case that includes the client’s testimony that is corroborated by some other evidence. Can times and dates be otherwise verified? Are there ways to support the need for a client’s actions or inferences? Is

there something that will buttress the client's version of the events? A theory of the case is strongest when a client's testimony is supported by independent evidence.

The theory of the case is simply the defense version of the events, supported by facts and law that logically lead to a client's acquittal. This theory must take into account "bad" and immutable facts. Facts that are unfavorable to the defense that will be known to the jury must be considered in the theory to obtain a favorable outcome. One cannot argue that the sky was not blue if, in fact the jury will be provided evidence that the sky was blue. The theory must explain why the blue sky is irrelevant or supports the client's theory of the case.

The theory of the case should be developed in consultation with the client.

If the client is unaware of the basic principles of the case, their direct testimony cannot be responsive to the dynamics of trial allowing a prosecutor to lay a trap for the client. The client should know the theory and the reasons supporting the theory.

The client should know how all of the evidence relates to the theory of the case. This includes pretrial motions, voir dire and all aspects of the trial. In developing the client's testimony, the client can assist with information that is favorable to the defense but unknown by the lawyer. The client can ask questions that promote investigation of issues that are favorable to the case. The client can effectively assist in their own defense.

As a theory is developed, the client's testimony can be developed so that it honestly fit within the theory of the case. I believe that assisting the client with crafting answers is superior to crafting answers for the client. The goal is to use the client's own words so that they are authentic as the jury hears them and have the client testify in a way that is helpful to their defense.

To accomplish this I suggest the chapter method of preparation. The chapter method allows the client to understand the goal of the direct and each section within the direct but to present testimony that is both spontaneous and genuine. The chapter method advances the theory of the case, anticipates objections and provides a compelling narrative.

The chapter method essentially divides the client's testimony into small subjects. The subjects can usually be covered by questions that take not more than one page. Each subject has a goal and the goals of the subjects further the goals in the theory of the case. Each chapter should be given a headline that signals to the client the subject to be discussed in the chapter.

An example would be establishing that a client saw what they proclaim to have seen. One chapter may be on the client's proximity to the thing seen. Another might be on the lighting, another on the weather if relevant. There may also be a chapter on the client vision. A chapter on possible distraction that may have influences the client's

attention during the relevant time. Another chapter may include questions to elicit how long the client observed the event.

During preparation, the goal of each is made known to the client. The lawyer ensures the client understands the goal of each chapter and how this goal fits within the theory of the case.

Once the lawyer is convinced the client understands the chapter, the client can answer the questions assisted by the lawyer. I suggest allowing the client to use their “own voice”. If the client’s grammar does not include standard English, don’t correct it, except to ensure the words move the theory forward. Changing a client’s words may make them appear uncomfortable and disingenuous.

Once the lawyer and client craft answers to the questions, the chapter can be practiced and refined. Chapter can be taken in different order each time so that the client does not know what comes next. This allows the client to testify in a manner that is spontaneous because of the changing order but controlled because the client knows each chapter goal.

Redirect should be anticipated and practiced in the same manner as direct. The lawyer should anticipate cross and prepare a re-direct with the client. The lawyer should advise the client that there will be unanticipated subjects that need to be

included in re-direct. If the client understands the theory and its goals, these should not be difficult to handle without preparation.

Additional Thoughts

A client should be prepared for objections during direct. The client should be instructed what to do if the prosecutor objects during the direct. The client should also be instructed what to do if defense counsel objects during cross-examination.

The client must be prepared for cross-examination. I recommend preparing the client with mock cross-examination with the lawyer. The lawyer will need to thoroughly prepare the prosecutor's case in order to cross the client but this preparation was likely already done while developing the theory of the case. The client's dress and demeanor should be discussed. Non-verbal communication should be discussed with the client as well. A discussion about emotions is also important.

In addition to mock interviews with the client, the lawyer should obtain the assistance of others for mock cross of the client. Mock cross by a lawyer unknown to the client allows the client adjust to the unfamiliar feeling of cross. I recommend having the mock cross lawyers adapt different styles – aggressive, kind, etc. so the client can adjust to them. Make objections during the mock cross so the client can practice what to do if an objection is made. It might be helpful to observe the prosecutor in order to have someone emulate the prosecutor's style of cross.

The lawyer should assist with answers in the same way as with direct. The client's vernacular should not be different from direct. The lawyer should assist the client with understanding the prosecutor's goals during direct and help the client understand how to answer.

One piece of advice that is helpful for clients is to listen to the question. A client who is anticipating a question or an answer may fail to answer the question asked and appears to be hiding something. An instruction to listen to the question and to even repeat it if necessary to ensure the client understands the question allows the client to remain calm and to focus on the goals of the question and provide an answer favorable to their defense.

If possible, allow the client to see the courtroom where trial will take place. If the client can sit on the witness stand ahead of time, the courtroom can be more familiar to the client. The lawyer should explain the actors in the courtroom as well, including the bailiff, court reporter and others. This can help the client dissipate the natural nervousness the client experiences at trial. If the client is able to observe the judge and prosecutor ahead of time in other proceedings that may be helpful as well.

For clients who have not been released, a lawyer may want to invite the client to pay attention to the judge and prosecutor during court appearances to get a sense of their demeanor.

Finally

Some lawyers draw a bright line with respect to a client's right to testify. Some feel a client should never testify. Aside from the fact that it is a client's right and therefore decision, I invite lawyers to consider the client's dignity. It is the client's liberty or life that is at stake. If the client wants to rely on their own words in defense of their life and liberty, we should respect that desire. The client is the sole person who pays the price for this decision.