

# **Telling the Client's Story Effectively: A Model for Direct Examination Preparation for Law Students**

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**Once Upon a Time, Chapter 2:**

**Applied Storytelling in Law**

**Lewis & Clark Law School**

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## Introduction

- Step 1: Teach students effective interviewing skills.
- Step 2: Teach students to consider the law, their client's experience, and other facts in developing a compelling theory of the case.
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- Step 5: Teach students how to form questions using head-notes and list of details.
- Step 6: Teach students to practice with client, redraft direct and practice again.
- Step 7: Prepare students on how to use direct in actual hearing in case judge asks some or nearly all the questions.

## Conclusion

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### **Introduction**

I teach a Trial Practice Clinic. Students represent individuals with unemployment compensation claims. These cases involve administrative hearings and come up very quickly. Students are often in trial within 2 to 3 weeks after initially meeting their client. This case type was chosen because it allows students to complete 2 trials within a semester. However, the short time line exacerbates a common challenge I have seen for most law students. It is extremely difficult for them to conduct their first direct examination.

As a clinical teacher preparing law students to conduct effective direct exams is a major priority. The direct of the client is usually the heart of the trial. It is the chance for the client to communicate personally with the decision maker. It is their chance to help the judge walk in their shoes, understand their experience, understand what they believe justice requires. It is their chance to help persuade the judge. Ultimately, it is the chance for the client to tell their story.

The direct exam of client is critically important and very challenging for most law students. To further complicate matters sometimes the judge in administrative hearings will ask some or many of the questions the students have prepared for direct exam. Before trial the students do not know what the judge will do. They need to be prepared to be nimble on their feet and ready to cover all or some of the material they have prepared in response to what the judge does.

To address the difficulty students normally have with their first direct examination, compounded by the uncertainty of what or how many questions the judge will ask, I have prepared the following 7 step process for preparing students. It is intended to teach law students how to help clients achieve fluency in the unusual mode of storytelling we lawyers call direct examination.

### **Step 1: Teach students effective interviewing skills.**

Developing an effective direct examination starts with the development of a high level of trust between client and student. In unemployment compensation cases, as in many types of cases, the subject matter can be quite traumatic for clients and thus difficult to talk about. It is emotionally difficult to be fired or to have things go so badly at work that the client quits. There is the added stress of financial difficulty surrounding job loss. Some clients face potential homelessness. Students must be prepared to interview about these difficult issues with compassion and empathy.

Students should be prepared to explain why they are asking the questions they are asking based upon the elements of the law. They may explain what the judge needs to know, helping the client understand why they are asking difficult questions. Students should also be prepared

to allow clients to explain their experience in their own way with open ended questions, providing plenty of time. Students should be made aware that people do not necessarily want to tell their stories in linear fashion. Ask students to be open to hearing the client's story in the order and the way they wish to tell it. Ask students to be patient and to ask clients about their feelings with regard to their experiences. From the client's perspective what was right or wrong, just or unjust in their situation. Students should also be prepared for cross cultural interviewing and for effective interviewing with the help of interpreters.

**Step 2: Teach students to consider the law, their client's experience, and other facts in developing a compelling theory of the case.**

Once students have interviewed their client, conducted investigation for other facts and researched the law they are ready to develop a theory of the case. The theory must be legally sound, based upon the law and facts. To be persuasive, however, in my experience, the best legal theories come quite directly from the client's story, from the client's perspective of what happened. What does the client think was unjust? How does the client think the judge can help right a wrong?

The attached direct exam model lists, as a theory of case, the following: Amy's errors on the job and late arrivals were not misconduct but the result of inability due to undiagnosed Multiple Sclerosis. In this case, the claimant was a good worker, whose first year on the job was stellar. In the second year she started having problems on the job by making errors and arriving late due to fatigue. She didn't understand what was wrong. After termination she saw a doctor and found out she had Multiple Sclerosis. When she learned this she realized that her typing errors, lost transfer call and lateness due to fatigue could actually be attributed to the symptoms of M.S.

After developing a theory of the case that combines the legal elements and facts, I ask the students to reduce that legal theory to a very short compelling, persuasive theme. In the attached hypothetical case the students come up with the following: Multiple Sclerosis is not misconduct! Both the legal theory and shorter theme derive from the client's experience, as well as, the law.

**Step 3: Teach students to design the direct exam with the legal theory in mind in an effort to be most persuasive.**

As the students begin to design their direct exam they should think back to the client's interview, the client's story, the client's theory on what justice requires, and their own carefully crafted theory of the case and case theme. How should the client's story be arranged to best help the judge stand in the client's shoes, see things from the client's perspective, and be persuaded of the righteousness of the client's cause?

In the attached hypothetical case the theme is Multiple Sclerosis is not misconduct. However, the claimant didn't know she had M.S. until after termination. The direct is arranged chronologically. It tells the story of what really happened from the client's perspective. It tells the story of an excellent worker with a great first year.

The plot thickens in the second year as the excellent worker starts making typing errors she can not understand. She is so fatigued she is late. A bit of a mystery develops as she doesn't know why she is unable to perform up to her own high standards.

A crisis occurs with a lost call the day before firing and lateness that leads to termination. After termination and consultation with doctors the mystery is solved. She is diagnosed with M.S. That diagnosis explains her fatigue and loss of fine motor coordination that led to typing errors and a missed transferred call. From the client's perspective justice requires that errors due to Multiple Sclerosis should not be considered misconduct as they are not intentional.

The direct is arranged to help the client tell her story most persuasively. In this case it was arranged chronologically. That will not always be the best choice. Ask students to spend time pondering the most persuasive order of telling the story.

**Step 4: Teach students to take components of direct exam and divide them into logical sections, giving each section a head-note and listing details of client's testimony under each head-note in order to be discussed.**

This is usually the most difficult step for students. When they think of direct exam they think of questions. Here I am asking them to think of client's answers and list those in logical order under sensible head-notes. This is very difficult for students to do. Sometimes they will add an extra column with their questions for their own comfort level. They attached hypothetical uses head-notes that are chronological and are like the chapter headings in a story:

- Background
- First Year on Job
- Second Year on Job
- Day Before Firing
- Day of Firing
- After Firing
- Learned about Symptoms of M.S.
- M.S. symptoms help explain problems on job
- M.S. is difficult to diagnose

Details to develop in each section are listed under the head-note in the order they should come out. Underscores before each detail can be used as a check off after the testimony is heard. I explain to the students that there are several reasons to avoid a list of questions. First of all, if you have questions but no answers you won't be sure the client testified as to all points you wanted to make. The list of important details that you need and can check off is a safeguard to help you avoid leaving anything out. Secondly, clients never testify exactly in the same fashion twice. A list of questions is much more difficult to use than a list of needed points. If a needed point doesn't come out as expected with a particular question another question can be framed. Thirdly, if the judge asks some or many questions you will be lost if you are relying upon a list of questions for direct exam. You can't scan a list of questions to see what was left out. A list of answers takes many fewer pages than a list of questions and details are easier to scan and check off if a judge asks some of the questions. It is less stressful.

Despite all these considerations it is difficult at first for students to develop a list of answers without questions and to think of how to ask a question from a list of answers. Therefore, Step 5 is necessary.

### **Step 5: Teach students how to form questions using head-notes and list of details.**

Before students practice their direct exam with clients they should practice asking direct examination questions from a list of head-notes and answers. I use the attached model in class. Students also draft a direct for another hypothetical and practice forming questions for both models in class. It can also be very helpful for them to practice with you from their actual direct before they practice with the client.

The key issue for students is to figure out how to ask a question without leading. I talk to them about the fact that not only is leading objectionable but it is better for client's testimony to come out in their words rather than ours. In addition, the focus of the direct should be on the client telling their story. The student should simply be a conduit for the client. Appropriate non-leading questions puts the client at center stage and the student in the background.

We talk about using the head-notes to orient the judge and client as to where you are in your questioning (for example, now I am going to ask you some questions about the first year on the job). To help them avoid leading I suggest they ask who, what, where, when, why and tell me more about x type of questions. I also suggest they use some of client's testimony in forming the next question to make the testimony flow. (For example, you said you felt exhausted when the judge asked you what you told your supervisor. Did you tell her anything else?). Once students feel comfortable with practicing hypothetical directs, they are ready to practice with their client.

### **Step 6: Teach students to practice with client, redraft direct and practice again.**

My students have often had two or more interviews with their client before it is time for the direct examination practice. Nevertheless, the first direct practice often serves as another interview. New facts come out. Other facts need to be corrected. The direct needs to be redrafted. In addition, the first direct practice can take much longer than the time allotted for the hearing. With additional practices that time is substantially reduced. It is very helpful for the supervisor to sit in on the direct practices to make notes and suggestions for later debriefing with student.

The key to an excellent direct in trial is several practices and direct redrafts. With that kind of preparation I have seen clients do an excellent job even when the judge takes over almost all the questioning. They are so well prepared and comfortable in telling their story.

### **Step 7: Prepare students on how to use direct in actual hearing in case judge asks some or nearly all the questions.**

By the time students have practiced their direct with their client as outlined in step 6 they are well prepared to ask all the questions. They won't be prepared if the judge asks some or most the questions. In administrative hearings that is not an uncommon event.

Prepare students for that possibility. My students write reviews of judges they appear before. If we have prior history on a particular judge I can share that with the student. However, in each case I tell students that the judge may ask some, none or many questions and they have to be prepared.

They may use their direct examination lists to follow the judge and check off testimony the judge elicits. I suggest they leave a margin for notes and perhaps circle items they want to

highlight when the judge turns questioning over to them. They need to avoid repeating questions the judge has already asked but bring out important information left out. Again I suggest they use the head-notes to orient both the client and judge as to where they are in the questioning. They may also repeat testimony to further develop it. (For example, you said you felt exhausted when the judge asked you what you told your supervisor. Did you tell her anything else?)

Step by step they should go through their direct outline to bring out all facts that are important and didn't come out in the judge's questioning.

## **Conclusion**

Preparing law students to do a good job helping clients tell their stories effectively in direct exam is hard work for everyone, supervisor, student and client. It is very rewarding, however. Clients often seem quite empowered and grateful for the assistance they received in being able to tell their story effectively in trial. The direct exam format is not the way normal people tell stories. We do not normally speak in question and answer format. It takes the student lawyer and client together to develop an effective direct exam. The student must first clearly understand the client's story and then develop a direct exam that allows the client to fluently tell it in trial.

The law student gains a great deal of confidence in their abilities as lawyers. They often receive good feedback from a client which empowers them a bit. They realize they can think on their feet and do what lawyers do. For the supervisor it is doubly rewarding to see both law student and client develop fluency in storytelling in the very unusual direct examination method.