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[LETTER to a young trial lawyer]

LAWYER AS DIRECTOR: THREE WAYS TO IMPROVE DIRECT EXAMINATION

by DAVID K. BISSINGER

Direct examination lies at the heart of every trial. That is where the parties tell their story. But while law libraries abound with books about cross-examination, few writers address direct examination.

So how can lawyers improve their direct examinations to elicit a story that persuades? Here are three ways: Know your client; develop the plot that underlies the case; and lead your witness (yes, lead) through the plot so the jurors, judge or arbitrator can follow.

• *Know your client*. In far too many trials, direct examinations suffer from a lack of basic rapport between lawyer and client. We all know the excuses. Other billable tasks come first. The client lives far away. The corporate representative has too many other obligations. The client wants to trim costs.

Take the time to get to know your witness and your witness' story. Many great courtroom experiences come from good rapport between lawyer and client.

Consider the exemplar direct examination of Ann Sakowitz by Houston trial lawyer David Berg in *Wyatt v. Sakowitz*, as recounted in Michael Tigar's book "Examining Witnesses":

> [Berg] turned his chair toward the witness box, sat facing her (not the jury) and asked [Sakowitz] about her life. He never let the action slack off, never waited more than a heartbeat to get to the next question, and let shine possibly the best witness he would ever get on the stand in his lifetime. The two became a duet. The rest of the world seemed to disappear. [Berg] spent days with his client, at her home, in his office, at mealtimes, in order to understand her so fully that his direct examination could serve as a window to the soul of her claim for justice.

The time spent with the client pays off in at least three ways. It gives rise to new avenues of testimony, brings the client into the trial preparation process, and enhances the lawyer's and the client's insights by increasing

the time they can spend absorbing the facts. As *Wall Street Journal* science reporter Robert Lee Hotz noted in a June 19, 2009, article, "A Wandering Mind Heads Straight Toward Insight," psychological research confirms that this so-called mind wandering is "a much more active state than we ever imagined, much more active than during reasoning with a complex problem."

Similarly, comedian John Cleese observed in a recent speech on the Presentation Zen blog that creativity requires someone to put himself into "a tortoise enclosure where your timid tortoise mind can come out and play — so your timid mind comes out." This mind-set applies to meetings with witnesses in preparation for direct testimony.

ON DIRECT, A LAWYER SHOULD LEAD HER WITNESS THROUGH THE PLOT SO THE JURORS, JUDGE OR ARBITRATOR CAN FOLLOW.

The Plot Thickens

• *Develop the plot*. The time with the witness (not to mention analysis of the documents) should lead to the discovery of the plot. The direct examination, like the case itself, must flow like a story. In building that story, consider reading screenwriter Syd Field's "Screenplay" or other how-to manuals about writing for movies and television. As Field warns, the story must be something more than "a series of random moments strung together in haphazard fashion."

Some lawyers might object that their cases lack the facts of a good story. Good trial lawyers refuse to accept that thinking. As the great southern writer Shelby Foote observed in a 1994 interview on C-SPAN's "Booknotes": "I think history has a plot. You don't make it up; you discover it. It's there. . . . It's a very strange business, but that's art taking over, insisting on giving a thing form when it seems to be formless." Cases, as history, have a plot.

• *Lead your witness through the plot.* The lawyer must lead — that is, "direct" — the examination. Most courts permit a far greater degree of leading questions than many lawyers think. As Ralph Adam Fine notes in his book "The How-to-Win Trial Manual," too many lawyers examine their witnesses on direct with questions such as, "What happened next?" Fine points out that this approach "is suicidal to effective, forceful, winning advocacy."

Fine contends that lawyers have more freedom to lead witnesses than commonly believed. For support, he notes that Rule 611 of the Federal Rules of Evidence states: "Leading questions should not be used on direct examination of a witness except as may be necessary to develop the witness's testimony." As Fine notes, "that is a broad license."

Fine also quotes evidence scholar John Henry Wigmore that a question "may legitimately suggest to the witness the topic of the answer" without leading the witness to the specific answer desired.

Finally, Fine observes, based on his own experience as a lawyer, judge and scholar, "[j]udges are generally more relaxed about this than are lawyers."

Although some judges may impose severe restrictions against leading, Fine's authorities and experience show that much of the time trial lawyers have the leeway — and thus, the duty — to lead witnesses. The burden rests on the trial lawyer to keep the witness on track. And, by doing this, the trial lawyer can make the witness' job, as well as that of the judge, jury or arbitrators, that much easier. TNL

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