

HOW NOT TO REGRET YOUR DIRECT: EXPLORING THE HUMAN STORY

By Benjamin K. Riley

To avoid regret after direct examination, listen to the witness, get to know the witness, and weave your examination around his or her human story—the interesting and unique aspects of the witness that best highlight and teach about the issues in the case.

Direct examination, at its best, is mentoring. If you listen to and get to know your witness, break down some of the witness's insecurities and concerns, offer pointed and sometimes tough suggestions and criticisms, and become a teacher in an unfamiliar area, your witness will testify confidently and persuasively on the subject matter. When you say "No more questions," you can take pride in your witness's testimony and performance and be confident that the witness will hold up on cross-examination.

The importance of listening. The most important lesson for a great direct examination is to listen during the preparation sessions. In the beginning, resist the temptation to lecture too much or tell the person what he or she needs to say. Before a trial examination, take the time to listen to the witness's entire story, including the parts you didn't have the time to learn before the deposition. More often than not, the witness will have important testimony you've never heard that reinforces other themes in the case.

Once you have listened to and learned the witness's story, start integrating the information into your outline. Reiterate that you want only the truth from the witness, and your questioning will focus squarely on those areas for which the witness has solid personal knowledge. I call these areas the home bases, where the

witness can always come home safely and feel comfortable. Clearly define the home bases with each witness for each case before deposition and trial. Make sure the witness understands that you will try to avoid any areas that make him or her uncomfortable. Your witness needs to trust you. By the end of the process, the witness should be comfortable and confident.

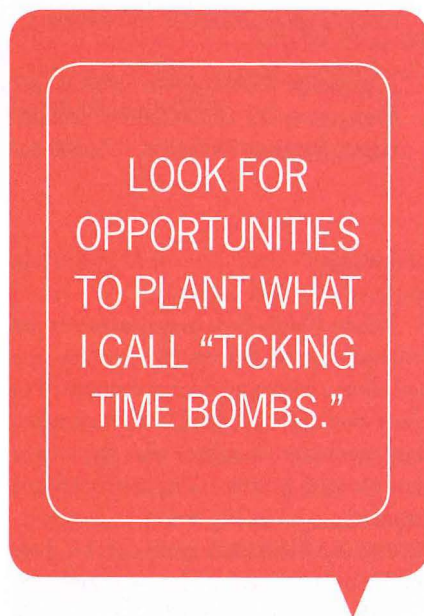
Next, review with the witnesses the key exhibits that will form the backbone of the examination. Identify those

and expected testimony, it's time to start working on nuance and style. Multiple sessions and repeated rounds of practice questions are a must. Your witness must be sufficiently prepared and confident that you can simply introduce subjects and then ask when, what, and why.

Don't write out your questions. If you do so, you'll be reading instead of listening. Outline the key topics and expected areas of testimony, grouped chronologically or by major topic. A good outline reflects a synopsis of the expected testimony, not the questions. On direct, aim for simple, open-ended questions to elicit the witness's account. The outline should allow you to see if the witness answered as expected or if you need to follow up. It should allow you to introduce the topic and then ask open-ended "when, what, and why" questions to obtain the expected testimony. Depending on the witness's answer, you might ask one, two, or even three questions to fully elicit each expected point.

During preparation sessions, offer many suggestions and even pointed criticisms of the witness's word choice, clarity, demeanor, etc. Be candid and direct with the witness in terms of his or her strengths and what the witness needs to improve. If the witness has distracting ticks or mannerisms, take videos so he or she can see and minimize them. Teach the witness how to make eye contact with jurors.

Cross-examination. In many cases, the witness will have been deposed and you'll have a good idea of the areas vulnerable to cross-examination. Again, the most important messages to the witness are to tell the truth and stick to the home bases where he or she truly has personal knowledge. An honest answer that a particular topic is outside someone's personal knowledge is always better



documents and areas of testimony on which the witness has important additional information and avoid repetition. If an area is important to the case but not central to the witness's story, save it for someone else. Exposing a witness to an area not within his or her home bases provides fodder for needless cross-examination. Make your points only with the appropriate witnesses. Don't later regret leading a witness into unfamiliar territory.

Once you're satisfied that you know the witness's story, areas of expertise,

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than trying to stretch recollection in an attempt to be helpful. Role-play cross-examination extensively—be tough and aggressive—working on key areas multiple times. Especially where the other side will stress previous deposition testimony or statements in documents, reviewing the potential cross-examination multiple times will make the witness comfortable with the testimony and his or her word choice so that the testimony will not appear defensive or troubling.

Look for opportunities to plant what I call “ticking time bombs.” Often a key fact will come out in deposition or a document—and the other side loves it. You know they can’t resist asking about it. But at times, something will occur after the deposition that changes the otherwise troublesome meaning of the earlier statement or better explains it. Normally, you’ll want to include the potentially harmful facts in your direct and thereby present them in the best light. But if you have a fact that is no longer damaging, and you have confidence that the other side can’t resist asking about it, think about skipping it on direct and letting your witness spring the real facts on opposing counsel during the cross.

Once you’ve fully prepared your witness, make sure the witness sees the courtroom in advance and, if possible, sits in the witness chair prior to giving testimony. Point out where the judge and court reporter are, where you’ll be, and, most important, the jurors’ seats, especially the potential leaders of the jury.

Calling your witness. When it’s time to call your witness, announce your witness’s name confidently and give your witness a welcome smile as he or she walks to the witness stand. If the court permits, stand right next to the far end of the jury box when you ask questions.

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That way, while looking at you, the witness is also looking in the direction of the jury. Start out with personal facts about the witness: education, residence, and expertise so that the witness is comfortable from the outset presenting his or her human story. Then move to substantive areas with a topic heading that tells the witness (and the jury) where you’re going. For example, “Let’s now turn to the termination of the contract. What was your involvement with that process?” There will be no need to ask leading questions because the witness will be fully prepared and comfortable with the questions you’re posing. If the witness needs a little orientation for a particular area or question, ask a follow-up “why” question. For example, “I’m wondering why you thought the plaintiff understood the termination clause? Can you tell us about that?”

Pay attention to the jurors during the examination to see if they’re following the witness’s testimony. When you

notice a juror looking quizzical and so perhaps missing an important point, re-confirm or follow up. When the witness makes a particularly important point, ask a question to reinforce it (looking at the jury when you ask the question, thereby prompting the witness to direct the answer to them). Use your outline to orient you and to confirm that the major points are covered, but focus your attention on the witness and the jury.

When you’re done, thank the witness for his or her testimony and have a seat. As cross-examination proceeds, you can remain relaxed, knowing your witness is fully prepared and should do fine. If necessary, follow up with redirect, but keep it short to reinforce the comfort and confidence you have in the witness. Cases are never won on redirect!

When the examination is done, confirm that the witness may be excused (and not be recalled to testify) and walk the witness to the door with a big thank-you as you call the next witness. ■