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Cross-Examining the Mistaken Witness

By **Ben Rubinowitz and Evan Torgan**

When a witness testifies falsely at trial there are generally only two reasons for such testimony: Either the witness is mistaken or a liar. These two types of witnesses should never be confused. It is clear that the motives of the mistaken witness are honorable. That witness understands the truth, respects the court and the system, and genuinely intends to tell the truth. The problem is that his facts are wrong. On the other hand, the motives of the liar are anything but honorable. He too understands the oath (but does not intend to follow it), has little or no respect for the system, and is willing to perpetrate a fraud for his own self interests.

A trial lawyer must consider how to attack these two types of witnesses. Too often, lawyers approach cross-examination of both the mistaken witness and the liar with a “one-size-fits-all” approach. This is a mistake. These two types of witnesses are completely distinct beings that think and act differently, and as a result, they must be approached differently on cross-examination. An ineffective trial lawyer might undercut his own credibility by attacking the mistaken witness as if he is a liar. The jurors might think the lawyer is a bully—attacking without justification or regard for the good faith nature of the response. Conversely, failing to appropriately attack the lying witness by exposing the perjurious testimony can result in an adverse verdict.

Attacking Mistaken Testimony

Carefully constructed questions are a critical part of cross-examining a mistaken witness.¹ A trial attorney must consider the manner in which the questions are asked, the tone of the examiner's voice, and the subject area of inquiry before posing the first question.

All testimony, to a certain extent, includes three elements: First, a witness's ability to perceive an event. Second, the witness's ability to accurately recall that event at a later time. And third, the witness's ability to appropriately articulate his recollection of the initial event. Scrutinizing each answer through the lens of these three elements allows the cross-examiner to not only see why a mistake occurred, but also how to most effectively expose it.

Attacking Perception

When attacking a mistaken witness's perception of an event, an effective trial attorney must consider the significance and the duration of the event in question. Often, the more unusual the event, the more likely it was noted by the witness. In the same way, the longer an event took to unfold, the more memorable it likely was. Conversely, an instantaneous, less significant event does not carry with it the same import. Simply put, the event did not last long enough to for the witness to form an accurate perception of it.

Consider the following as an illustration. Imagine a scenario where a witness to a motor vehicle accident was with a friend, enjoying a cup of coffee inside a local restaurant located near a busy intersection. The witness hears the sound of tires screeching, turns away from her friend, and sees a car and bus collide. On direct examination she is asked what she saw and she

¹ For an in depth review of cross-examination of the mistaken witness *see* Patrick L. McCloskey & Ronald L. Schoenberg, 'Criminal Law Deskbook' §17.12 (1984 Matthew Bender).

testifies, among other things, "I saw the bus run a red light at 40 m.p.h. and crash into the car."

In this example, an ineffective cross-examiner could attack the witness by forcefully asking, in a loud voice, the following questions:

Q: You didn't have time to see, correct?

A: I know what I saw.

Q: The whole event took less than two seconds, true?

A: I know exactly what I saw and I am telling the truth.

By posing loud, boisterous questions, the ineffective cross-examiner works against his own interests by putting the mistaken witness in a defensive posture, thereby locking in testimony that is detrimental to his case. Instead, the effective cross-examiner can benefit by first focusing on the event itself in easy-going, nonthreatening tones to both relax the witness and develop factual support for the lack of perception:

Q: Can we agree that before the accident you were enjoying a cup of coffee with your friend?

Q: Can we agree that you had no idea that an accident was about to take place?

Q: Is it fair to say that this was not the kind of situation where you were staring at the street watching an accident unfold?

Q: You were talking with your friend?

Q: You were enjoying her company?

Q: You were listening to your friend?

Q: You weren't watching the color of the traffic light, correct?

Q: And, wouldn't it be fair to say, that after you turned away from your friend, the whole event took less than two seconds?

Q: Can we agree, in fairness, that's a very short amount of time?

The effective trial attorney is able to undermine the witness by employing a “voice of reason” approach, methodically and delicately laying out the brevity of the event, thus bolstering his case.

Attacking Recollection

After the nature of the mistake is brought to light through a “voice of reason” line of questioning, the witness’s recollection also must be attacked to further expose the mistake.² As with the witness’s perception, the witness’s recollection must be gingerly attacked without bullying the witness like he is purposely lying. The witness’s ability to remember event depends on many factors, including the duration of the entire event and the length of time between the event itself and the in-court testimony. Thus, an effective trial attorney can develop a fertile line of inquiry by attacking the witness’ recollection, particularly when the witness had a short amount of time to perceive the event and there is a lengthy amount of time since the event took place. Once again, nonthreatening “voice of reason” questions pave the way for a compelling attack on the mistaken witness:

Q: We can agree that the entire event that you saw lasted two seconds, true?

Q: And we can agree that four years have passed since the accident, correct?

² See Ben B. Rubinowitz & Evan Torgan, *The Voice of Reason: A Powerful Approach to Cross-Examination*, N.Y.L.J., Aug. 19, 2002.

Q: Can we also agree, in fairness, that your memory was better then—at the time of the accident—than it is today?

Q: That's because the events were fresh in your mind on the day of the accident, true?

Q: And although you are trying your best to recall accurately what took place, wouldn't you agree, in fairness, that you can't remember all the specific details?

Even if the witness answers "I remember it clearly" or "I remember it like it was yesterday," a "voice of reason" line of questioning in a calm voice will subtly cast doubt on the witness's accuracy:

Q: You're not suggesting, are you, that you remember ALL details as if they happened yesterday?

Q: After all, more than 1,000 days have gone by since the accident, right?

Q: And you agree, obviously, that memory fades as time goes by, true?

By highlighting the length of time between the event and the witness's in-court testimony, an effective trial attorney can highlight the possibility that the witness's testimony is inaccurate because it faded over time.

Attacking Articulation

Once the mistaken witness's memory of the events is called into question, the next line of attack should focus on the witness's ability to articulate his recollection of that event to the jury. The cross-examiner should scrutinize the answers given by the witness on direct examination, and then carefully evaluate whether the witness stated a known fact or is merely engaged in guesswork and speculation. A witness's uncertain recollection is highlighted

through the use of words like, “approximately,” “perhaps,” “about,” “like,” “near,” and of course, “I guess.” The cross-examiner can further expose the witness’s mistake by focusing on the words that provided an inexact description:

Q: You testified on direct examination that you first saw the bus when it was 20 feet from the light, true?

Q: In fairness, we can agree that was an estimate, right?

Q: And although you were trying to be precise, you can’t say exactly where the bus was when you first saw it?

A: It was about 20 feet from the light.

Q: You just used the word “about,” true?

Q: That’s because you are not certain, right?

Here, the examination should continue by asking short, one fact, baby-step type questions:

Q: Just before turning around you were speaking with your friend?

Q: You heard something, right?

Q: You heard the sound of tires screeching?

Q: You started to turn?

Q: You focused your attention on the vehicles?

Q: And you saw an impact within less than two seconds?

Q: In fairness, you weren’t really focused on the distance, in feet, from the light at that moment true?

Just as it is important to focus on the inexact language of the witness to expose a mistake, it is equally important to focus on the “conditional” or “imprecise” words used by the witness. Words and phrases such as “often,” “generally,” “possibly,” “normally,” “most times,” “looks like,” and “I think,” each demonstrate that the witness’ memory and ability to recall are less than clear. In this instance, the cross-examiner must expose the weakness:

Q: You told us on direct examination that you saw the bus traveling at 40 m.p.h., true?

A: Generally, buses drive through the intersection at 40 m.p.h.

Q: When you say “generally” you mean that you have observed buses driving, in the past, at 40 m.p.h.?

Q: In the past, you have had an opportunity to watch the buses for more than two seconds, correct?

Q: And when you use the word “generally” you’re basing your answer, in part, on what you know from past experience, right?

Q: In fairness, in using the word “generally” you were making certain assumptions, true?

Q: You assumed that the bus was moving at a speed you had observed in the past?

Q: You assumed 40 m.p.h., true?

Q: Is it fair to say, that based on the short amount of time in which you observed this bus, you can’t state with certainty its exact speed from personal observation, at the time of this accident?

Q: Can we agree there’s a difference between personal observation on the date of the accident and knowledge gleaned from past events?

An effective trial attorney can thus call attention to the unreliability of the witness by focusing on the witness's inexact and conditional language.

One of the more difficult aspects of cross-examination is dealing with a mistaken witness who was prepared by the direct examiner. Often, the mistaken witness adopts or picks up the language, views, and even the nuances of that preparing lawyer during the pretrial meeting. There is little question that a lay witness coming into court for the first time has a certain amount of pre- and in-court anxiety that may lead to adoption of the preparing lawyer's views. The fact that certain words or ideas were used or suggested by the attorney during pretrial preparation must be brought out on cross-examination.

Q: When you met with (the adversarial attorney) prior to court, did you discuss the speed limit?

A: Yes.

Here, a low-risk, open-ended question is necessary:

Q: What was said?

A: He told me the speed limit was 30 m.p.h.

Q: Did you know that before the meeting?

A: No.

Q: Was a suggestion made about speed?

A: All he said was that if the bus was going to 40 m.p.h. that would be too fast.

Q: Was that the first time you heard the words "40 m.p.h.?"

A: I guess so.

Q: In fact, he mentioned the words "40 m.p.h" before you said them, true?

While there is a fine line between fact gathering and suggestion of answers, trial attorneys must be vigilant not to allow their overzealousness to distort or change a witness's recollection of the events. Clearly, subtle manipulation by an attorney during pre-trial prep has the ability to cast doubt on the credibility of both the mistaken witness and the attorney. In such an instance there is no need for the cross-examiner to call the witness a liar during summation. The point was clearly brought out on cross:

“We heard from the attorney. It's too bad we didn't hear from the witness.”

The goal of all cross-examination is to create a powerful and winning argument on summation. If done properly, exposing the witness as mistaken, rather than a liar, allows the cross-examiner to take the high road while still effectively discrediting the witness. An effective trial attorney can ride that road all the way to summation, where the many factors that demonstrate the witness's lack of credibility can be summed up at once. Reminding the jury of the witness's limited perception, his fading memory, and his imprecise recollection will drive home the point to the jury that this witness's account simply cannot be believed. Discrediting the mistaken witness with careful attention to detail and courteous inquiry will lead trial counsel, and his client, to a favorable and just result.

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