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## Trust and Reliance: A Powerful Theme for Cross

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As consumers of various products and services, we often place our trust and reliance in those who make weighty decisions that have the potential to impact our health, safety, and well-being. The concept of trust and reliance permeates almost every aspect of our lives; however, we rarely, if ever, stop to contemplate whether our trust and reliance should properly be placed in those who make these weighty decisions in the first place. Everyday examples of us placing our trust and reliance in others are almost infinite: we rely on the bus company to select safe drivers; we rely on buildings to properly service and maintain their elevators; we trust airlines to have hired only those pilots who are properly trained; and we rely on our schools to thoroughly vet teachers to ensure those teachers will not cause harm to our children. But how many times have we, as consumers, asked before traveling on an airline: tell me about the qualifications and training of your pilot. How many times, before boarding a bus, have we asked whether the driver has been convicted of any traffic violations? How many times, before sending our kids to school, have we asked the school whether it conducted a background check on the teacher?

The truth is that even if one wanted to make such an inquiry it would be difficult, if not impossible, to get an immediate response. While there are times when consumers do check professional qualifications — such as finding out about a heart surgeon before going in for surgery — the qualifications of ancillary professionals are almost never checked, such as the background of the anesthesiologist, radiologist, or pathologist. The trust and reliance that we place in those who make crucial decisions about our health and safety often goes unchallenged until something goes wrong. But when something bad does happen, the concepts of trust and reliance can form the basis for the successful prosecution or

defense of a claim if the proper trial techniques are used to develop and explore the adequacy or inadequacy of those major decisions.

Consider first a scenario in which a fourth-grade teacher sexually abuses a 9-year-old child in his class. Prior to being hired, the teacher filled out a job application that asked whether the applicant had ever been convicted of a crime. The teacher checked “no” and submitted the application, but it turns out the teacher had been convicted, out of state, of the sexual abuse of a young boy and was fired from his job in that school district. No independent background check was ever made of the teacher. While the cross examination of the individual who hired the teacher could be made without referencing “trust and reliance,” the power of the cross is diluted by failing to focus on those key words and concepts:

Q: You made a decision to hire the teacher, correct?

Q: You never conducted a multi-state criminal background search, true?

A: We asked directly “Have you ever been convicted of a crime?” He lied to us and stated, in writing, he had not.

Q: But you never conducted an actual background check, did you?

A: We asked about past criminal conduct.

Q: No background check was done other than that, true?

A: True. But you have to understand, there are 3,000 teachers in more than 65 separate schools in our district. I did the best I could under the circumstances.

The problem with this line of cross is that it fails to properly set the witness up, fails to anticipate the defense, and fails to secure short responsive answers. The better approach is to take the time to set the witness up while anticipating the defense, demand responsive answers and work in the concepts of trust and reliance:

Q: Mr. Jones, two years ago you were the person responsible for hiring teachers, true?

Q: Your responsibilities included “vetting” teachers, correct?

Q: And when we say “vetting” that means looking into the teacher’s past to be sure they are suitable and well-qualified for the job, true?

Q: Calling the references, correct?

Q: Performing a background search, correct?

Q: Verifying their teaching license, true?

Q: And certainly conducting criminal background checks, true?

Q: You understand that parents are relying on you to select the most qualified teachers, true?

Q: Parents are trusting that you will hire only those teachers who will put the safety of their child first, true?

Q: You understood that parents are trusting that you will do a full background check of the teacher, true?

Q: They are relying on you to do a thorough background check of the teacher, correct?

Q: And certainly a background check that is complete, true?

Q: After all, you don't expect the parents to conduct a background check of the teachers, do you?

Q: You understand that parents are putting their trust and reliance in you to make a well-reasoned decision when hiring a teacher, true?

Q: You take that trust and reliance very seriously, don't you?

It is at this point that the failures or omissions in making the hire should be brought out by anticipating the defense and contrasting trust and reliance with the failures that jeopardized student safety:

Q: You agree that there are more than 25,000 students in your school district, true?

Q: There are approximately sixty-five schools there, correct?

Q: And 3,000 teachers, true?

Q: Knowing there are more than 25,000 students, you rely on the teachers that you hire to ensure the safety of the students while in school, true?

Q: That's why you take the time to fully vet each teacher, correct?

Q: That's why you take the time to conduct a thorough review of the teacher's qualifications, correct?

Q: And to perform a complete background check of the teacher, true?

Q: To the extent you did not fully vet the teacher can we agree that would be improper?

Often a witness is reluctant to fault himself for any improper conduct, but will have little problem faulting someone else. An effective technique of cross-examination where the witness faults another should be used as follows:

Q: Can we agree that if someone considering an applicant failed to vet the teacher that would be wrong?

Q: And the reason it would be wrong is because you understand that parents are relying on the school district to vet the teachers, true?

Q: To ensure the teacher is properly qualified?

Q: To the extent someone hired a teacher without checking that person's qualifications that would be improper, true?

Q: Certainly, you would never allow someone to work for you who fails to conduct a background check of a teacher, true?

Q: Mr. Jones, to the extent you failed to order a criminal background check on a teacher, that would be wrong, true?

A: I do the best I can under the circumstances.

When a witness gives an answer like this, the easiest way to combat the witness's attempt to wriggle out of the answer is to show the absurdity underlying the excuse:

Q: When you say you do the "best you can," are you telling us that you do not need to perform background checks?

Q: Are you telling us that a background check is not important?

Q: Are you telling us that you take shortcuts when conducting background checks?

A: No.

Q: And the reason you say "no" is because when it comes to safety, shortcuts are completely unacceptable, true?

Q: And the reason they are unacceptable is because you understood the parents are relying on you to conduct the proper background checks, correct?

By continuing to contrast trust and reliance on the one hand with the failures that undercut trust and reliance on the other, the cross becomes a strongpoint for summation. Working with the omissions — those things that were not done but should have been done — serves to drive the point home that the school district failed to make the safety of its children a priority:

Q: You understand that Mr. McGuire has pled guilty to one count of criminal sexual conduct against a child in the first degree, correct?

Q: Against a child in your school, true?

Q: When you told us that you do the “best you can,” can we agree that when it came to Mr. McGuire, your best was to not conduct an independent background check of him, true?

A: He wrote on the application that he had no criminal convictions. He lied.

Q: Can we agree that relying solely on the teacher’s representations on the application is a far cry from an “independent” background check?

Q: Who told you that an “independent” background check meant taking the applicant’s word at face value?

Q: Knowing parents were trusting you to conduct an independent background search on the teachers, did you tell any parents that you would not be doing the background check?

Q: Did you tell any parents a background check was not necessary because McGuire said he had no past criminal convictions?

Q: Which parent told you – don’t worry about the background check for Mr. McGuire?

Q: You asked Mr. McGuire for references before hiring him, true?

Q: And the reason you asked for references was to learn what other people thought of him as a teacher, true?

Q: You called three references, correct?

Q: But you only received a call back from one, true?

A: Yes, from an assistant principal who worked with Mr. McGuire in the past.

Q: Two references never called you back, true?

A: He had a very strong recommendation from the assistant principal I did speak with.

Q: I am focusing on the two references who never called you back. What did they have to say about Mr. McGuire?

Q: Did either of them give McGuire a good reference?

Q: What concerns, if any, did they have about McGuire?

Q: Did you ever tell any one of the parents before they sent their child to school: "I'm too busy to complete the background check"?

Q: You understood those parents were trusting you to do a thorough check?

Q: You understood they were relying on you to do your job, true?

The unfortunate aspect of this concept — placing trust and reliance in others — is that the only time these areas are fully explored in Court is when something has gone terribly wrong. But like so many other concepts in trial advocacy, what is good for the plaintiff can be equally good for the defense.

Consider, for example, a medical malpractice case in which a patient was prescribed a non-steroidal anti-inflammatory medication (NSAID) for arthritis. The prescribing physician, Melissa Lee, made clear to the patient that he should only take one pill per day or he could suffer a heart attack. In addition, when the prescription was filled, the bottle containing the medication came with the following warning: "IF YOU EXPERIENCE CHEST PAIN OR SHORTNESS OF BREATH SEEK MEDICAL ATTENTION IMMEDIATELY." One week after filling the prescription the patient increased the dosage without consulting his doctor and suffered a heart attack — a known risk of NSAIDs. In addition, the patient experienced chest pains two nights before; however, he did not seek medical help. The patient brought a claim for medical malpractice against his prescribing physician.

By using the concepts of trust and reliance the defense can create a powerful line of attack that, if conducted properly, can serve to create a winning argument on summation. A powerful set up for this attack may show that trust and reliance is a two-way street which, if violated, undermines the very negligence claim that is being brought:

Q: You trusted Dr. Lee, correct?

Q: You believed she was trying to help you, true?

Q: You relied on her to prescribe the appropriate medication to relieve your pain, correct?

Q: And just as you relied on her to prescribe the proper medication, you understood that she was relying on you to follow her instructions, true?

Q: You understood that she trusted you would follow her advice when she told you to take only one pill per day, true?

A: I was in pain. I only took one extra pill.

Here, an effective approach to cross-examination may focus on the choices the plaintiff made that led to the injury. Before focusing on the choices, however, the potential consequences of that choice must be explored in detail.

Q: When you saw Dr. Lee, she instructed you to take only one pill per day, true?

Q: She warned you about the potential risk of suffering a heart attack if you exceeded the recommended dosage, correct?

Q: You understood that if you increased the dosage, you were increasing your risk of suffering a heart attack, true?

Q: Before you took that "one extra pill" you had a choice, correct?

Q: You had a choice to follow her instructions and take only one pill per day, true?

Q: And you also had a choice to disregard her instructions and take more than one pill, correct?

Q: You chose to disregard her instructions, true?

Q: In disregarding her instructions, you also chose to violate the trust that she placed in you, true?

Q: When did you call Dr. Lee to say: "I am no longer going to follow your advice"?

The cross should continue by focusing on the warning on the medicine bottle. A powerful approach to the cross-examination is to focus on the negatives, those things that were not done, but should have been done.

Q: I want to focus on the medicine bottle. That bottle came with a very specific warning, correct?

Q: That warning stated that if you experience chest pain or shortness of breath that you should seek medical attention immediately, true?

Q: Two days before suffering the heart attack, you were experiencing increased chest pains, correct?

Q: You understood those warnings were on the bottle to protect you, true?

Q: But you made a conscious decision to ignore those warnings, right?

Q: So when you experienced those chest pains, you chose not to call Dr. Lee, true?

Q: You chose not to go to the emergency room, true?

Q: You decided to wait, correct?

Here some low risk open ended questions can serve to drive the point home with the jury that the plaintiff made choices that caused his own injury:

Q: Who told you that you did not need to seek medical attention when you first had those chest pains?

Q: Who told you to wait two days before seeking medical attention?

Q: Can we agree that the decision to wait was yours and yours alone, true?

Q: The truth is that the trust and reliance that you and Dr. Lee shared came to an abrupt end when you chose to disregard her instructions and the warning on the bottle, true?

Q: And that trust and reliance ended not by something Dr. Lee did but solely by the decisions you made, true?

In everyday life, we all place our trust and reliance in others out of necessity. We trust people to do their job and rely on them to do it properly. By carefully exploring the concepts of trust and reliance during cross-examination, you will be well on your way to creating a winning argument for summation.



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