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Cross Examination: Exposing a Lie

By Ben Rubinowitz and Evan Torgan

Often, the objective in cross examination is two-fold: first, to elicit testimony from the witness that will strengthen your case; and second, to challenge any weaknesses in your case. When you are able to prove a lie in your case, especially as it pertains to a central fact that is in dispute, it is essential to develop a thorough line of attack to fully expose the lie. Too often trial lawyers fail to maximize key points that, if fully developed during cross, will serve not only to discredit the witness, but to anger the jurors so that they begin to question and doubt your adversary's entire case. A thorough line of attack with respect to a lie does not simply prove that a witness was dishonest, but explores the thought process that went into concocting the lie in the first instance, the motives behind that lie, and the ultimate goal that the witness hoped to achieve by engaging in such deception.

To illustrate this point, imagine the scenario in which a driver, who worked for the Department of Transportation, struck a pedestrian, who was lawfully in the crosswalk, while he was making a left turn. After leaving the accident scene he drove his truck back to the depot and, as part of his job, filled out an official accident report later that day. The driver knew he never saw the pedestrian before hitting her but he chose to write something else in his report. In his report he chose to write: "Pedestrian ran out between two parked vehicles, tripped and fell under the left rear tire." What the driver did not know when he filled out his report was that there was a video camera at the intersection that captured the entire accident.

Here, there are generally two schools of thought for exposing this lie at trial. The first school suggests that it is best to get in and get out quickly. As such, the plaintiff's lawyer could quickly prove the lie as follows:

Q: You didn't know there was a video camera at the intersection, did you?

A: No.

Q: You lied in your accident report, true?

A: Yes, I shouldn't have done that.

While the attorney has proven the lie, the attorney has not maximized the impact of the lie for the jury.

The second school of thought calls for a much more comprehensive line of attack. It allows for the development of the underlying reasons why the lie was created, the choices that were both made and disregarded in the creation of the lie, and the goals the witness hoped to achieve by telling the lie. Moreover, if executed correctly, this second approach will serve not only to expose the lie but to punish the witness for such dishonest conduct. If properly planned and executed, this second approach will also serve to create a logical, compelling, and winning argument on summation.

The best method for developing the cross with this second approach is to start at the end. If the lawyer thinks through the words that she wants to use during summation, she is well on her way to creating a powerful line of attack. By carefully analyzing the underlying conduct the word choices describing the conduct become clear:

Deceive

Manipulate

Tell Less Than The Truth

Fraudulent

Obstruct

Those words should be incorporated into the cross of the witness so they later can be used in summation. To start this line of attack, be patient and deliberate. It is not necessary to pounce immediately. The better practice is to surgically set up the witness before knocking him down. A good place to start is to focus on the witness' training and education:

Q: Mr. Brooms, in addition to being trained to always look for pedestrians, you were also trained to fill out accident reports, true?

Q: You were trained to fill out those reports fairly, true?

Q: You were trained to fill them out completely?

Q: To document your observations?

Q: To record the facts, no matter who they help or who they hurt, true?

Q: At no time were you trained to make up facts, true?

Q: At no time were you trained to report things you never saw, correct?

Q: You would never put fraudulent information in your report, true?

Q: That would be completely unacceptable, true?

Q: To the extent someone wrote fraudulent information in a report, you would agree such conduct would make everything else they wrote less than valid, true?

Once the training has been covered, the thought process of the witness should be explored. It is important to recognize that telling a lie requires that a choice be made. In simple terms, a decision must be made by the witness to do either the right thing or the wrong thing. Comparing and contrasting the choices on cross paves the way for a compelling line of attack:

Q: As you drove back to the depot following the accident, you thought long and hard about what happened, true?

Q: You thought about what you would say in your report?

Q: And you thought about what you would write, true?

Q: Before you filled out the official report you had a choice didn't you?

Q: You had a choice to be honest or to be less than honest, true?

Q: You had the choice to be forthright or to be deceptive?

Q: To be helpful or to obstruct?

Q: To tell the truth or to tell less than the truth?

Q: During that drive back to the depot, you decided that you were going to write something that was less than honest, true?

Q: You knew that you were doing something wrong didn't you?

Next, the motives for the bad conduct should be explored. Additionally, the witness' willingness to put his own needs and wants over the truth should be brought out:

Q: We can agree that as you drove back to the depot you were concerned about your job, true?

Q: You were concerned about being disciplined, true?

Q: So you made a conscious decision to put your needs above the truth?

Q: And in putting your needs above the truth you chose to put fraudulent information in the official report, true?

Q: And the reason you did that is because you were concerned about one person and only one person, true?

Q: Not once while you were filling out the report did you give any thought to the injured pedestrian, true?

Q: Certainly, in putting fraudulent information in your report you were not trying to help the injured pedestrian, true?

Q: Instead, the only person you were concerned about was yourself, correct?

Next, the witness should be confronted with his conduct following the submission of the report along with the reason he finally admitted the truth:

Q: Eventually, you became aware of the video of the accident, true?

Q: It was then that you realized your choice to deceive was exposed, correct?

A cardinal rule of cross examination is to only ask leading questions. However, there are times when "low risk" open ended questions can be much more powerful than a simple leading question. But to use this technique effectively, the trial attorney must be sure it is truly "low risk."

Each of the following three questions are examples of "low risk" open ended questions:

Q: Mr. Brooms, before you knew of the video tell us how many times you told your supervisor you were putting fraudulent information in your official report?

Q: Mr. Brooms when was it that you were first instructed to put false facts in your report?

Q: Mr. Brooms when did you decide that it was better to deceive than to tell the truth?

To buttress the bad conduct, the attorney should always return to leading questions on cross:

Q: Can we agree sir that in writing this official report you chose to put your own needs above the truth?

To the extent the witness personally spoke with his supervisor following the accident and told his supervisor less than the truth, an even more powerful line of cross can be created. Too often trial lawyers fail to take full advantage of the importance of the face-to-face conversation.

Typically, the cross in this situation does not go far enough:

Q: You spoke with your supervisor following the accident, correct?

Q: Did you ever tell him you were not reporting the events accurately?

Q: Did you ever tell him you were making up facts?

Compare that to a complete cross that magnifies the choices made by the driver and paints a picture of the conversation:

Q: You spoke with your supervisor after the accident, true?

Q: He asked you a straightforward question, correct?

Q: He asked you: "What happened?"

Q: And you had a choice in how to respond, true?

Q: You had the choice to be honest or to be less than honest?

Q: To tell the truth or less than the truth, correct?

Q: And what you did, was you looked him in the eyes, true?

Q: And you looked him in the eyes and you continued your deception, true?

Q: So not only did you put false information in your report but you chose to deceive your supervisor true?

Q: And you were able to deceive him while looking him in the eyes, true?

Q: You wanted to be convincing while you were looking him in the eyes and telling less than the truth, correct?

Once the attorney has proven the lie it may be tempting to pounce and call the witness a liar.

Case law in New York and other jurisdictions has held that it is improper to call a witness a liar

and in some circumstances it may be reversible error. However, the more powerful approach is

to let the jurors form their own conclusions that the witness is a liar. By focusing on the conduct

of the witness and not the label, the attorney is actively engaging the jurors and allowing them to

come to their own conclusions and opinions about the witness. After all, the goal is often not to

prove the witness actually lied but to get the jury to disregard the witness' entire testimony.

Imagine the following cross:

Q: When you arrived at the depot, you sat down with the accident report and a pen, true?

Q: You were alone at the desk in the room, correct?

Q: Nobody told you what to write, true?

Q: And as you sat there, you wrote something specific, true?

Q: You wrote that the plaintiff ran from between two parked cars, correct?

Q: You wrote that the plaintiff tripped, true?

Q: And you wrote that she fell under the left rear tire, correct?

Q: After you submitted your report, you saw the video of the accident, true?

Q: Let's take a look at the video together. (Playing video.) That's your truck, true?

Q: That's the plaintiff entering the roadway, true?

Q: She is walking, true?

Q: She is walking into the marked crosswalk, correct?

Q: And there is the front left corner of your truck striking her in the crosswalk, true?

Q: Sir, we can agree that what you chose to write in your report, did not happen, true?

Q: You chose to write facts that never happened, true?

Q: Who told you to make up the facts in your report?

At no point has the attorney called the witness a liar. Instead, the attorney has focused on the conduct and the choices made by the witness. After such a cross, a juror may well conclude the witness was lying but more importantly, the juror will conclude the witness simply cannot be believed.

The attorney, having developed a thorough and comprehensive cross about the choices the witness made in concocting his lie now has the ammunition needed to drive the point home in summation. As always, when summing up, it is important for the attorney to use rhetorical questions and to answer those questions for the jury.

(Members of the jury) Mr. Brooms was faced with many choices on June 12 and he made many decisions. The decisions he made have impacted Ms. Jones, three years later, and will continue to impact her for the rest of her life. When Mr. Brooms knew he was going to make a left turn onto 36th Street, he had a choice to look before he turned, he had a choice to look at the crosswalk to make sure it was clear, and he had a choice to look to see what was there to be seen – Ms. Jones walking in the crosswalk. Instead of choosing to look, Mr. Brooms decided to turn without making sure the crosswalk was clear, he decided to turn without making sure he could safely do so, and he decided to turn despite plaintiff walking in the crosswalk in front of his truck. Was it too much to ask him to slow down and check the crosswalk? Why didn't he look? Why didn't he look before he turned? The reason he didn't look was because he was in a hurry. He was running late to his next job. The reason he didn't look is because he was more concerned about being on time than being safe. Even after the accident, Mr. Brooms continued to be faced with choices and to make decisions. He knew he never saw Ms. Jones. He knew he never looked. He knew his conduct in operating his truck was careless and negligent. And as he drove back to the depot he was faced with choices in how he would complete his report. He could deceive or be forthright. He could tell the truth, or tell less than the truth. He could be honest, or less than honest. Why didn't he

simply write what he saw? Why didn't he write: "I never saw her"? Why did he choose to write something that never happened? To make up facts? Because he decided to put himself above the truth. He decided to manipulate the truth to protect his reputation. To protect his job.

When an attorney is faced with a lie by a witness, the attorney must probe the lie with a thorough and comprehensive cross examination to maximize its impact for the jury. It is not enough to simply establish the lie. The attorney must develop and explore the choices, motives, and decisions that went into creating the lie. By thoroughly developing the process of the lie, the attorney is well on her way to not just getting the jury to disbelieve the witness but to develop anger at the conduct of the witness. That anger, if properly developed, will not only discredit the witness but work to discredit your adversary's case.

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