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HEADLINE: **Trial Advocacy, Common Mistakes and Simple Remedies**

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BODY:

When conducting a direct or cross examination, everything the trial lawyer does should be done with an eye toward summation. Before moving to another subject area, the trial attorney should continually ask herself whether she has elicited enough information from that particular witness to make a cogent and compelling argument on summation. If sufficient information has been brought out in a clear and convincing manner, then the attorney can move forward knowing that the argument on summation will be a powerful one. Creating the argument for summation during the trial, however, should not be based on guess work or faulty assumptions about what the witness really said. The trial lawyer must know, and the record must reflect, not only what the witness said but what the answer truly means.

Too often trial lawyers fall into traps that they themselves have set. These traps or mistakes serve to undermine what otherwise would be a powerful witness examination. These mistakes take many forms.

Grammatical Errors

Consider first cross examination. Both experienced trial lawyers, and the inexperienced lawyers trying to copy them, often attach a familiar but dangerous phrase to the end of their questions. The phrase 'did you not' can be head in almost every trial courtroom in every state, city, and county. While that phrase might seem a powerful way to end a question, it is fraught with danger. Closely aligned with that phrase are phrases such as 'Were you not' 'Have you not' and 'Are you not.' Each of these phrases tends to confuse rather than clarify an issue.

Imagine, for example, the scenario in which the only witness to an accident in which a child was horrifically injured when struck by a car, was asked on cross examination about the color of the traffic light.

Q. At the time the child was struck the light was red, was it not?

A. Yes.

Here, the trial attorney, satisfied with that answer, moves forward with confidence that she now has sufficient ammunition to make a powerful closing argument. Indeed, the argument is made, the court instructs the jury and while the jury is deliberating it asks for a read back on the one question and answer. What seemed on first blush to be a clear and direct answer to a straight-forward question turns out to be about as clear as mud. Was the witness answering that the light was red or that the light was not red? And if it was red, for whom was it red: the child or the driver? There is no clear answer. By using the negative phrase 'was it not' in her question, the lawyer has compromised the clarity of her position.

Removing confusion during witness examination should be a major goal of the trial lawyer. Instead of asking that cross examination question by using a negative phrase at the end of her question, the attorney should strive to create clarity. Substitute the following question for the one above and there is no guess work about the answer:

Q: At the time the child was struck the driver had a red light, correct?

A: Yes.

Words such as 'correct' 'right' or 'true' at the end of a question serve to solidify the answer.

The same confusing phrase is often used by trial lawyers at the beginning of a question.

For example:

Q: Did you not see the girl cross the street?

A: Yes.

Needless to say, the same confusion results whether the phrase is put at the beginning or end of the question. A better form, with less confusion might be:

Q; You saw the girl cross the street, true? or

Q: It is true that you saw the girl cross the street, right?

Conclusory Errors

Separate and apart from the use of a negative phrase built into a question is the problem of asking a question that does not fulfill its intended purpose. Too often lawyers assume a question has been fully answered when in fact a follow up question becomes necessary. Nowhere is this better illustrated than by the use of the 'do you know' question. Consider the following questions asked on direct examination:

Q: Do you know if the light was red?

A: Yes.

Q: What happened next?

A: The girl crossed the street.

If studied carefully, the only response received was that the witness knows whether or not the light was red; however, the jury never found out what the color of the light was. Obviously, the 'Do you know' question demands a follow up question such as:

Q: What color was the light?

The better approach is to limit the use of the 'Do you know' question to situations where it is absolutely mandatory such as those circumstances where it is necessary to lay a foundation for the next set of questions. It is far better to simply ask the question directly such as 'what color was the light?' If the witness does not know something the witness can state that in his answer.

Non-Verbal Responses

While it is a given that most of us speak with our hands, facial expressions, gestures and nods, in addition to our voice, the trial lawyer must be acutely aware of the havoc a non-verbal response can wreak. The trial lawyer must be constantly on the lookout for that non-verbal response to protect the record. Imagine, for example, the following questions being asked and the following answer given;

Q: What did the girl do before she crossed the street?

A: She went like this and then she went like that.

Q: Then what did she do?

While the jury might have seen the hand motions, the record reflects nothing. Not only is this a problem for use later on in the trial, but in the event of a read-back during jury deliberations or the creation of a record on appeal, the cold record offers nothing which clarifies or explains the witness' answer. This problem, however, is one that

can be easily cured. The trial attorney, immediately after the non-verbal response is given, must request that the trial record reflect what those movements were:

Your Honor, with the court's permission, may the record reflect that the witness first turned his head to the right and then turned his head to the left.'

Ambiguous/Equivocal Words

Even when a question is carefully crafted and put to the witness in a straight-forward manner, the answer given by the witness may be less than clear. The trial attorney must recognize the equivocal nature of the answer and seek immediate clarification. A simple illustration makes the point:

Q: Describe the girl.

A: She was young.

or

Q: Describe the speed of the car.

A: It was fast.

Although the answers given by the witness seem to answer the question, there is still a good deal of ambiguity in each answer. The best approach is to seek clarification immediately. In the first example, the follow-up should be:

Q: What do you mean by 'young?' or

Q: Tell us how old she was.

In the second example the follow-up should be:

Q: what do you mean by fast? or, even better

Q: When you say 'fast' tell us what you mean in terms of miles per hour.

Even where there is no ambiguity that jumps out at you, the trial attorney can enhance the prior answer by seeking clarification:

Q: After she was struck what did you see?

A: She landed about 30 feet from the point of impact.

Here the follow-up should be:

Q: Tell us what you mean when you say she 'landed'? or

Q: Describe the manner in which she landed?

Marking Up a Photograph

While it is a given that most trial lawyers use photographic enlargements or 'blow ups' to clarify the testimony of the witness and solidify their argument on summation, many attorneys fail to have the exhibit properly marked up by the witness. Often times, attorneys ask the witness to place a 'mark' on the exhibit to reflect important locations such as where the impact took place or where the parties were just prior to or after the impact.

A request that the witness 'mark' the exhibit in this manner is rife with problems. First, it allows the witness to

create any 'mark' he or she chooses and, second, it does not necessarily allow for an appropriate notation to be made that will continue to speak to the jury after the answer is given. On the other hand, markings which have some easily understood meaning will continue to provide information to the jury when you refer to them in summation, and more importantly, as the jury studies them during deliberations.

Suppose for example, the attorney asks the witness to 'mark' the exhibit where he was standing just prior to the impact. The witness complies and places an 'X' on the exhibit. The attorney then asks the witness to place a mark where the impact occurred. Again, the witness complies and places another 'X' on the exhibit. Clearly, the effect of placing two 'X's' on the exhibit does not allow for clarification and, indeed, serves only to confuse.

The better approach is to carefully mark the exhibit by selecting appropriate notations that will speak to the jurors during summation. Instead of allowing the witness to place a 'mark' on the exhibit, give the witness specific direction by saying' 'put your initials on the exhibit in the spot where you were standing just prior to impact' or 'write the little girl's name on the exhibit where she was standing before she started to cross the street.' Use the 'X' to reflect one and only one event: the actual point of impact.

Further, it is crucial that before requesting that a photograph be marked up by a witness, the attorney must make an initial determination that the markings on the photograph will indeed help her case. To that end, before requesting that the witness actually write on the exhibit, it is useful to ask the witness to stand next to the enlarged photograph and simply identify a specific location with his finger.

If the witness points out the area which he described in his testimony, you can feel free to have him mark the photograph, secure in the knowledge that the marking will enhance your case. On the other hand, if the witness misidentifies a specific area, you will have the opportunity to re-orient the witness to the photograph and/or omit having the photograph marked altogether. Without taking this precaution, you run the risk of permanently soiling your exhibit with inaccurate information.

Conclusion

With all of the intricacies of modern trial work, it may be easy to overlook the simple truths of trial advocacy. Nothing could be more frustrating to a trial lawyer than to seemingly score points examining a witness, only to find that the record fails to capture the essence of those winning points. By always focusing on these fundamentals, the skilled advocate can avoid learning such an unpleasant lesson the hard way.