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## Creating a Winning Frame: From Cross to Final Argument

By **Ben Rubinowitz, Peter Saghir and Evan Torgan**

The ultimate goal of every trial lawyer is to secure the best possible result for her client. To accomplish this goal, the lawyer must find a way to capture the jury's attention and to leave an impression that will last well into deliberations. One effective approach is for the lawyer to identify and emphasize key words or phrases that best frame an issue, work those words or phrases into cross-examination and emphasize that frame during final argument. (For an in-depth study of case framing, see Mark Mandell's *Case Framing*, published by AAJ Press.)

Clearly, the emphasis for the frame can start during jury selection, but the selected fact is really brought to life during the cross-examination or adverse direct of a party which, some trial lawyers would argue, is tantamount to cross-examination. The way in which the frame is brought out through words and phrases should not only serve to emphasize that individual fact during cross-examination but should also create broader implications for an even more important argument during summation.

As an example, take a medical malpractice case in which a patient went to a hospital and underwent surgery under general anesthesia. During the procedure certain complications arose and the patient died in the operating room. The medical record does not reflect the nature and extent of the complication but the anesthesia chart does have one significant notation: there is a note crossed out and initialed at the bottom which reads: "awake, alert, recovered from anesthesia without complication." While doctors are taught to cross out and initial a mistake, this notation has broader implications. The chart was obviously filled out at an earlier point in time and not contemporaneously with the events in the operating room. Simply put, the notation does not reflect what actually took place during the procedure but it does reflect something far more significant—dishonesty in charting. To the extent the plaintiff's lawyer can show this

dishonesty to the jury, the integrity of the entire chart could well be called into question. If successful, the lawyer will not only bring this fact to life but in doing so will create an argument for summation that will stick with the jurors during deliberations. To discredit the rest of the chart the lawyer must methodically plan her line of attack. While the trial lawyer could begin the cross by immediately pouncing on the error, this line of attack will likely backfire:

Q: Doctor, you made a mistake, true?

A: Yes. I crossed it out and initialed it.

Q: But the patient never recovered, true?

A: That is correct. That is why I initialed the error. That is what we are taught to do.

Q: Your patient died?

A: Yes.

Q: And you wrote something that never happened?

A: I made a mistake. I was merely trying to be efficient. When I recognized the mistake, I corrected it and made sure the chart was free from any error.

Here, the lawyer lost control of the witness and, more importantly, lost a crucial argument for summation. Instead of jumping to bring out the error, the better approach is to properly set up the witness, lock in admissions and work in the important words that will be used in summation to frame the central issue. Careful preparation must begin before the cross starts. The word choice, which serves to frame the issue, should bring life not only to the cross but to the summation as well. Suppose the trial lawyer framed the issue to be used in both cross and summation as “shortcuts”:

Q: You have undergone training to be an anesthesiologist, true?

Q: And as an anesthesiologist part of your responsibilities include training younger, less experienced doctors, correct? Residents, true?

Q: In that training you instruct residents on how to properly fill out an anesthesia chart, correct?

Q: One of the goals in filling out an anesthesia chart is to allow anyone who reads the chart to know exactly what took place at specific points in time, true?

Q: To that end, the anesthesia chart should reflect, in real time, the events that actually took place, correct?

Q: Certainly, you never taught your residents to take SHORTCUTS while charting true?

Q: To the extent you saw a resident taking a SHORTCUT you wouldn't stand for that, true?

Q: You would never permit it?

Q: The reason you would never permit it is because your most important concern is the health, safety and well-being of your patient, true?

Next, the lawyer must confront the witness about the "mistake" while maintaining control during the attack:

Q: You made a "mistake," didn't you?

Q: You crossed out certain words, true?

Q: Let's take a look at the words beneath the cross out. You wrote, and I quote, "awake, alert, recovered from anesthesia without complication," true?

Q: You wrote those words?

Q: And you wrote those words at the beginning of the procedure, true?

Q: I suppose you are going to say you were trying to be efficient?

Q: Yet you wrote something that never happened, true?

Q: You wrote something that was not created in real time?

Q: In fact, you were guessing about something that might happen at a later point in time, true?

Q: Do you teach your residents to guess while charting?

Q: Do you teach your residents that efficiency and guessing go hand in hand?

To emphasize the egregious nature of the conduct, low risk, open-ended questions can be used to drive the point home:

Q: Who taught you to write the end at the beginning?

Q: Who taught you to guess while charting?

Q: What medical text taught you that it's ok to guess?

Q: How often do you teach your residents that it is ok to guess?

Q: The reason you have NEVER taught your residents to guess is because the chart must reflect reality at all times, true?

Q: If guesswork in medicine is allowed the integrity of the entire chart can become an issue, true?

Q: When did you tell your patient that you would be guessing and taking shortcuts during the surgery?

During summation the words that were brought out during cross-examination can be emphasized not only to frame the issue but also to develop simple but powerful takeaways the jurors can use during deliberations. The use of powerful rhetorical questions in summation serves to bring the frame to life:

Why would any doctor write something that never happened? Why would a doctor fail to follow his own training? Why would a doctor guess about patient care? Isn't the answer clear? Isn't the answer obvious? Isn't the answer the one word the doctor said he would never permit: SHORTCUTS. A man is dead and one thing we know for certain—shortcuts were taken.

This method of selecting words to frame an issue is portable and can be used in virtually any type of case. Take, for example, a financial planner who is being called as an expert by the defense to testify that

your client, a sanitation worker, does not have the ability to pass a test to become a chartered financial analyst. He bases his opinion on the fact that, although your client went to college, he did not take any business classes, never worked in the financial field and for the last 18 years has worked exclusively as a sanitation worker. Through research, you discovered that this same expert not only taught review courses in the past, but also advertised that under his tutelage “anyone can pass the test—no business experience required.” In this instance, the words to be used to frame the issue on cross could be “false advertising” and on summation the frame could be expanded to enhance the argument: “false advertising, false testimony or both.” To accomplish this goal, however, the lawyer must not rush to drive her point home. Patience while setting up this expert on cross will serve to close off avenues of escape and cast doubt on the credibility of the witness. Consider first what would happen if the lawyer rushed in without an appropriate set up:

Q; Sir, you’ve advertised in the past, correct?

Q: You advertised that anyone could pass the test, true?

A: Yes, provided they took the requisite financial courses in college.

Q: But your advertising says “anyone” doesn’t it?

A: Anyone who took the requisite courses. Unfortunately, your client didn’t take any of the necessary courses.

By properly developing the cross, closing off avenues of escape and working in the key words to support your frame for summation the point will be made clear to the jury and will resonate during jury deliberation:

Q: In the past you’ve taught classes to help people pass the chartered financial analyst exam, true?

Q: You considered yourself a good teacher, true?

Q: In fact, you considered yourself a gifted teacher, am I right?

Q: You had a very successful pass rate?

Q: You were proud of that exemplary pass rate, true?

Q: With respect to the classes you taught, you advertised those classes, correct?

Q: The purpose of the advertising was to attract people to take your course, correct?

Q: To get people to enroll in your classes, true?

Q: Can we agree your advertisements were honest?

Q: There was no exaggeration in your advertising?

Q: Your advertising was not misleading, true?

Q: In fact, you would never mislead your students, true?

Q: You would never engage in false advertising, true?

Next, the lawyer must slowly work in the frame:

Q: You wanted people to believe the words written in your advertisement, right?

Q: There was no "hidden" language, true?

Q: No "small print," true?

Q: You meant what you said, right?

Q: Honesty in advertising is your motto, true?

At this point, the best line of attack is to show the advertisement to the expert (and jury after it is authenticated). Here, it is critical that the lawyer work with not only what is written in the advertisement but also that which is not written:

Q: Let's take a look at your advertisement (handing). This is your advertisement, true?

Q: You wrote it, correct?

Q: When you wrote the words in the advertisement, you expected people to believe what you wrote, true?

Q: Focusing on your advertisement, we can agree it does not say one word about college courses, true?

Q: It doesn't say one word about prerequisites?

Q: Not one word about sanitation workers or any other profession, true?

Q: What you wrote is: "ANYONE can pass the test," correct?

Q: Your words, true?

Q: You also wrote: "No business experience required," correct?

Q: Again, your words, correct?

Q: When you wrote "ANYONE" in your advertisement were you exaggerating?

Q: Were you being less than honest?

Q: When you wrote: "No business experience required" were you being truthful?

Q: Were you manipulating the truth solely for the purpose of filling the seats in your class?

Q: That's because you would never engage in false advertising, true?

At this point the lawyer should stop the line of cross. Enough has been brought out to support the frame.

Once again rhetorical questions should be used to emphasize the importance of the cross and to enhance the frame:

Why would an expert advertise that "ANYONE" can pass the test? Do you think that had something to do with making money? Making money by putting students in seats? Why would that expert advertise that "ANYONE" can pass the test but then come in to this Court and testify—anyone, but a sanitation worker? Is that right? Why is it permissible for an expert to say one thing in his advertisements and another thing

in his testimony? So let's take a good hard look at what we have here. Either his testimony is false or his advertising is false. They both can't be true. False testimony or false advertising? Members of the jury when you put false testimony together with false advertising you know what you end up with? A false expert. And we all know what to do with the testimony of an expert who has been less than honest. Throw it out. Disregard it entirely because it cannot be trusted.

Before stepping foot into the courtroom, the lawyer must give thought to what words or phrases should be used in summation to best frame the issues in the case. With a proper set up, the attorney can bring the words to life on cross with the goal of creating a compelling argument for summation. With the effective use of rhetorical questions, the words will reverberate with the jury well into their deliberations.

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