New York Law Journal

Wednesday, July 27, 2005

HEADLINE: **Trial Advocacy, The Virtue of Patience: Setting Up Expert Witness on Cross-Exam**

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BODY:

Undoubtedly, cross-examination is an exciting and often dramatic part of the trial. Too often, however, lawyers are overly eager to attack and, thus, miss opportunities that would otherwise make for a more compelling summation.

The damaging information elicited during cross will seem far more potent, if instead of trying to take out the witness immediately, the lawyer expands the cross by setting up the witness to fall.

To accomplish this feat, the lawyer must first commit the witness to a foundation in the abstract that will later be used to attack him. In doing so, the sharp cross-examiner anticipates the avenues of escape a cornered witness will try to find and eliminates in advance a witness' wiggle room when the questions get more probing and precise. After securing agreement with seemingly noncontroversial facts, you then must lock the witness into a position, which will later be attacked. Third, the lawyer must use the witness' own words and admissions during his earlier testimony against him when going in for the kill.

This tactic works well with so called "expert" witnesses. If we carefully analyze the opinion offered by any expert in any field in any court, each expert is, in effect, saying the same thing every time he testifies. Each is saying: "I am honest," "I am believable," "I am credible," and of course, "you should accept my opinion because I am a pillar of truth and knowledge.'

It is cross-examination that allows you the opportunity to expose the witness as one who is less than honest, not believable, not credible and, simply put, a waste of everyone's time.

The Set-Up

Imagine the scenario in which an expert orthopedist witness has testified that your client's herniated disk was not sustained in the accident, as you claim, but instead represents a degenerative pre-existing condition. You know from his expert report that he has failed to review medical reports and MRIs from doctors who saw your client some time after the accident. That fact, by itself, might be viewed as insignificant or it could serve to undermine his credibility. Cross-examination could begin, in typical fashion, by asking one question in a loud prosecutorial tone:

Q: You never reviewed the subsequent medical records of Dr. Gold, did you?

Here, you, as the trial lawyer will get one answer and then be forced to move on to the next subject.

'Voice of Reason' Form

By taking your time, however, and setting up the witness by laying a strong foundation for attack, you will not only receive an answer to the ultimate question, but will enhance your case by undermining the witness' credibility through a more methodical approach. There is no need to yell. A calm, quiet and deliberate approach will serve you well. Your questions--all asked in the "voice of reason" form--will prevent the witness from disagreeing with your points for fear of looking and sounding foolish.

Q: In reaching your opinion, you took your time to conduct a thorough exam?

Q: One that was meaningful, true?

Q: An exam that you believed to be fair?

Q: And certainly one that was thorough and complete?

Q: In order to be thorough and complete, you needed to look at all relevant records?

Q: That would be in keeping with your own professional standards, right?

Once the witness has affirmed the all-encompassing nature of his investigation, you can bolster your attack by turning the questions around:

Q: You would agree, wouldn't you, that if you didn't take the time to conduct a thorough review, your opinion would be less than fair?

Q: If you didn't take the time to view appropriate records, the foundation for your opinion would be less than adequate?

Q: Indeed, your opinion might be less than accurate, true?

Q: You certainly wouldn't come to court and give an opinion to a jury without ensuring that your opinion was based on all the relevant facts, true?

Although you could, at this point, get to the heart of the issue (the doctor's failure to review the record), you can build up the doctor's inexcusable failure to review this record even further.

Q: Doctor, did anyone prevent you from reviewing (this medical record)?

Q: Did any of the lawyers who hired you suggest that you not look at the record?

Q: Did the say, point blank: "Whatever you do, make sure you don't look at that record?'

Q: Well, when you teach residents at your hospital, you wouldn't tolerate it if one of your students failed to review all of a patient's records before reaching a treatment plan, right?

Q: That would be flat out wrong, true?

Q: It would be unacceptable, correct?

You are now prepared to confront the witness with his failure to review this record. At this point, you know the witness will certainly try to minimize the significance of the fact, most likely professing the reasons why that record holds no value in the context of this lawsuit. Such a response is easily attacked:

Q: Two minutes ago, doctor, you told this court and jury that it was important to review all relevant records in reaching an opinion?

Q: You certainly could have looked at this record to determine if it supported your opinion, true?

Q: You could have determined, before reaching an opinion, the value of another doctor's findings?

Q: You're now forced to say it's irrelevant to justify your failures here?

Q: When you said all relevant records should be reviewed, did you really mean all records which support your opinion?

Q: Did you mean, forget the records which might disprove your opinion?

Q: Is it your testimony, doctor, that you review a record when it helps you, and ignore a record if it hurts you?

Q: The bottom line is, doctor, you never took the time to conduct a complete review of all records. Isn't that true?

Note how much more effective these questions are as a result of the initial set-up.

Use Witness' Own Testimony

Indeed, let's revisit that scenario in which the eager cross-examiner begins by pointing out the failure to review the record, and then seeks admissions as to its importance. When the witness denies that it was important to review the record or that good practice required him to do so, this cross-examiner can do nothing other than argue with the witness, rather than the far more powerful technique of using his own testimony against him:

Q: You never reviewed that (subsequent medical record), right?

A: Yes.

Q: Didn't you need to see that record before reaching an opinion, here?

A: Not at all.

Q: Well, isn't it important to see all of the medical records relating to a patient before reaching an opinion?

A: This record would not have affected my opinion at all; may I tell you why?

You can see that by failing to close off the avenues of escape in advance, the skillful witness will beat you to the punch and justify his actions.

In this instance, you are left hoping that the jury understands the significance of the failure to review the record, as opposed to having that point made clear by the witness himself.

One of the goals of cross-examination is to permit you to make the most powerful argument on summation that you can.

The attorney who cross-examines without investing the time to set up the witness, risks relying upon his own powers of persuasion. While practitioners of this technique can ensure a powerful argument, consider the difference between what can only be viewed as a weak summation and one which was made strong by a well-designed set-up:

• Summation No. 1: This expert came to court and gave you an opinion without looking at the subsequent records. Don't you think that was something he should have done? Wouldn't it have been better if he really looked at all the records?

• Summation No. 2: When you think about this expert's testimony, you need look no further than his own words. Don't his own words undermine his credibility? Of course they do. First he told you how important it was to review medical records like the ones (he failed to review). He left no doubt that it was "unacceptable" to reach an expert opinion without all of the appropriate data. Then, after admitting, in effect, he did just that in this case by failing to review all of the records, he tries to sell you on the idea that that record just happens to be irrelevant. He can't have it both ways.

Conclusion

The art of patience during cross-examination is not as easy as it seems. Although one can outline something like the scenario set forth above in advance, an exaggerating witness will invariably say something surprising and eminently attackable during direct examination. The well-prepared lawyer will begin to salivate in anticipation of

cross-examination on that point. Still, it is crucial that the appropriate set up be maintained in order to get the most mileage from your cross-examination of this expert.