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HEADLINE: **Trial Advocacy, Direct Examination of a Hostile Witness**

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BODY:

When a plaintiff's attorney prepares to present a case, he must give thought not only to which witnesses to call to testify, but also the order in which those witnesses will be called.

While it may seem to some that the case would be best served by calling the plaintiff himself or other favorable witnesses at the outset of the case to establish the plaintiff's claims, calling the defendants or those with a hostile interest first is often the best way of proceeding.

Right to Ask Leading Question

The advantages to placing a hostile witness on the stand as the first witness in a case are as follows: First, this approach allows you to know, in no uncertain terms, exactly what position the defendants are taking on certain issues in the case. Moreover, this decision allows you to lay the building blocks needed for the proof to follow, such as your own expert's testimony, and permits you to set forth the predicate for that expert's testimony in a manner which is not dependent in any way on guess work.

If the decision is made to put the defendant on the stand first, then the "direct" examination must be handled in the proper fashion. While it goes without saying that one of the most powerful methods for maintaining control of a witness is to ask leading questions, many lawyers think that this technique is limited to cross-examination. In civil cases, however, the ability to pose pure leading questions to a witness, even on direct examination, is permissible where that witness is an opposing party, an adverse witness or in some manner hostile to your case.¹ This is so for the very sensible and sufficient reason that he is adverse, and that the danger ensuing from such a mode of examination by the party calling a friendly or unbiased witness does not exist.²

The doctrine which permits leading questions on direct examination does not restrict that right to only situations in which a named defendant is on the stand. Anytime a hostile witness, such as a non-sued employee of a defendant employer who is liable for the witness' acts of negligence or anyone who demonstrates "hostility" to the party's case, is called by the opposing party, the questioner is permitted to conduct a direct examination in the same manner as a cross-examination of that witness, using leading questions throughout the examination.

Clearly, leading questions allow you as the examiner to both control the witness and limit his answer. Leading questions always allow you to select specific area of inquiry and demand responsive answers to each question.

At common law, however, limitations exist with regard to impeachment of a hostile witness. The problem stems from the antiquated notion that a party calling a witness is vouching for his credibility.³ Thus, at common law, impeachment of such a witness is impermissible under the reasoning that one who vouches for the credibility of a witness cannot then challenge his testimony.

New York's CPLR modifies that rule, but only to a limited extent. [CPLR Rule 4515](#) states that "[i]n addition to impeachment in the manner permitted by common law, any party may introduce proof that any witness has made a prior statement inconsistent with his testimony if the statement was made in writing subscribed by him or was made under oath." Thus, impeachment of a hostile witness during direct examination by other types of evidence remains outside the scope of this statute.

In our view, this outdated common law doctrine has no vitality in light of today's litigation world, and should be abandoned in its entirety. Our view is not new. The Federal Rules of Evidence state simply that "[t]he credibility of

a witness may be attacked by any party, including the party calling the witness.⁴ Further, the advisory committee notes reflect that this rule was enacted for the purpose of abandoning the traditional rule against impeaching one's own witness since it is based on a false premise. The committee went on to note that "a party does not hold out his witnesses as worthy of belief, since he rarely has a free choice in selecting them. Denial of the right (to impeach) leaves the party at the mercy of the witness and the adversary."

Simply put, it is time for the Courts of New York State to recognize the fallacy of the common law rule and put it to rest. The absurdity underlying the rule requires little analysis. Indeed, consider the normal course of events: a person brings a lawsuit, alleging some type of wrongful conduct by another. The defendant is deposed, during which he offers a defense to the claim which the plaintiff obviously disputes. The case continues on to trial, in which the plaintiff exercises his right to call the defendant to the stand. Could one possibly make the argument that the plaintiff is now vouching for the truthfulness of the defendant?

A Practical Example

Perhaps nowhere is this technique of calling hostile witnesses to testify more widespread than in medical negligence cases. It is a basic tenet of New York law that a plaintiff in a medical malpractice case may call as a witness the defendant doctor or hostile witness and pose leading questions to him. With this principle in mind, counsel should consider the strategic advantages and disadvantages in calling such a witness as the very first witness in a medical malpractice case.

Consider, for example, the following scenario: You represent an individual in a medical negligence case. Your theory of the case is that the defendant doctor signed a discharge order without ensuring that your client -- the plaintiff -- was examined prior to discharge. Your client suffered devastating injuries as a result of an undiagnosed spinal cord compression. The doctor's defense is that he told others at the hospital to examine the plaintiff and to make sure she could walk before being discharged; however, no note or order was written to that effect.

Here, there are a number of ways to proceed. You could begin the order of proof by calling your own client to the stand as the first witness and then proceed by calling your own expert to the stand. The problem with this approach is two-fold: First, it forces you to pose hypothetical questions to your own expert with the hope or expectation that those questions accurately anticipate the testimony to come from the defendant at a later point in time. Second, it allows your adversary to tailor his defense around any faulty assumption made by your own expert.

Here, the better approach might be to call the defendant as the very first witness and begin the examination by asking pure leading questions. The voice of reason approach, as discussed in our earlier articles, paves the way for such questioning. Start by posing leading questions that suggest answers with which any reasonable witness cannot quarrel:

Q: To the extent you could, you did what was necessary to help the patient?

Q: Your goal, at all times, was to care for the patient?

Q: Your treatment centered around helping the patient, correct?

Q: You wanted to make sure that the patient's health was not put in jeopardy in any way, right?

Now, meet the defense head-on by focusing on the defense theory of the case which you learned during discovery and through defendant's opening statements. But make sure to continue by carefully probing with voice of reason questions:

Q: Certainly, you are familiar with the term "continuity of care", true?

Q: Obviously, many medical health practitioners care for the patient?

Q: You can't speak to every one of them?

Q: But there is a tried and true way to communicate your thoughts, needs and wishes to them, true?

Q: You have the ability to make notes in the chart?

Q: You have the ability to write orders in the chart?

Q: Notes and orders allow others to know exactly what treatment you wanted for the patient?

Once the set up is complete, you can show your theory of the case through leading questions:

Q: Doctor, my question is specific: Isn't it true that you did not write one note that a physical examination should be done prior to discharge?

Q: Isn't it true that you did not write one order requesting a physical examination prior to discharge?

To enhance the presentation of proof, plaintiff's counsel may even ask leading questions calling for expert opinion from the defendant doctor himself. Although the defendant might not agree with the questions, if they are skillfully posed, the defendant will be made to look foolish for disagreeing with the plaintiff's position. Once again, voice of reason questions should be used to set down the foundation for the opinion questions:

Q: Would you agree that notes (or orders) serve an important function in patient care?

Q: Would you agree such notes allow other health care practitioners to know exactly what your intentions were?

Q: They can help prevent miscommunication?

Q: They can help prevent misunderstanding?

Q: In other words, notes spell out in clear terms what should be done for the patient?

The opinion question itself is where you might encounter disagreement:

Q: Knowing how important notes (or orders) are in patient care, wouldn't you agree with me that it would be a departure from accepted standards of medical care to fail to write an order specifying your intentions?

A: No.

Q: Knowing how important orders are, wouldn't you agree with me it would be a departure from accepted standards to fail to write an order directing specific patient care?

A: No.

Once the doctor has denied that this is a departure, expand the line of inquiry by posing more leading questions. Stress the absurdity of the position taken by the defendant:

Q: To be clear, your position is that this is not a departure?

Q: Your position is that it is in keeping with good patient care to make sure no order is written concerning your intentions?

If the doctor works at a teaching hospital, take the line of inquiry one step further:

Q: In fact, you would tell your residents to make sure not to write an order regarding follow-up care?

Q: This way the other residents or healthcare providers can guess what should be done if they looked at the chart? Or,

Q: This way the residents would have no chart entry to refer to in the event they had any questions?

Now you can take the specific questions and answer and pose them to your own expert when inquiring about medical departures. Here, the basis for the hypothetical is set on hard facts contained in the trial transcript without any room for equivocation:

Q: Dr. (expert), assume the defendant doctor stated he wanted others to examine the plaintiff prior to discharge. Assume that the defendant stated that he wanted others to make sure the plaintiff could walk prior to discharge. Assume further that the defendant admitted he made no note to that effect and that he made no order to that effect.

Do you have an opinion within a reasonable degree of medical probability as to whether the failure to make such a note was a departure from accepted standards of medical conduct?

Q: What is your opinion?

Q: What is the basis of your opinion?

Conclusion

Many times, a plaintiff will need to put hostile witnesses on the stand in order to make out a prima facie case, such as situations in which the defendant and their employees are the only ones who can testify regarding the prior existence of a dangerous condition. In any case, a plaintiff can score points with a jury by starting out calling the adverse or hostile witness, skillfully destroying his credibility and establishing the improbability of his story. In order to accomplish this, it is vital that attorneys use those skills traditionally reserved for cross-examination as the framework for a successful direct examination of an adversarial witness.

1. [Becker v. Koch, 104 NY 394 \[1887\]](#); [Gornwell v. Cleveland, 44 AD2d 891, 355 NYS2d 679](#) [4th Dept 1974]; [Matter of Arlene W. v. Robert D., 36 AD2d 455, 324 NYS2d 333](#) [4th Dept 1971]; [Ciaccio v. Houseman, 97 Misc 2d 367, 411 NYS2d 524, 525](#) [Sup Ct Queens County 1978]; Richardson, Evidence §6- 228 (11th Ed 1995).

2. Becker v. Koch, supra.

3. Richardson on Evidence §6-419 (11th Ed. 1995).

4. [Federal Rules of Evidence Rule 607](#).