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HEADLINE: **Trial Advocacy, Cross-Examination: The Basics**

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BODY:

Cross-examination involves relatively straightforward skills. Through preparation of your case, and a basic knowledge of the fundamentals of cross, you can set up a winning summation by scoring points during the cross-examination of each witness.

First, know exactly what your purpose is and structure the examination accordingly. Second, always maintain total control of the witness through both attitude and leading questions. Bearing in mind the concepts of primacy and recency, begin either on a high point or in areas where the witness must make important concessions. The less-important and less-dramatic areas should be saved for the middle of the cross, while the ending should also be on a winning point. Potential impeachment materials should be reviewed and used to elicit the answers you require and to impeach the witness by exposing inconsistencies.

Purpose, Structure of Cross

Before beginning the cross, one must know why he is doing it. Is the goal to destroy the witness? Is it to impugn his character or credibility? Is it to attack the testimony rather than the person? Does the trial attorney want to attack perception or recollection? Can the attorney show bias? Should the attorney cross-examine at all? Bear in mind, that all of cross should be viewed with an eye toward summation, where the attorney ties up all the seemingly loose ends at the end of the case. Vigorous cross-examination of a witness on an insignificant point or of a witness who is actually helpful to areas of the case, can ultimately cause more harm than good.

The principle of "primacy and recency," that is, that people tend to best remember that which they have heard first and last, must be kept in mind when structuring a cross. If the examiner has a bombshell, for example, it may be an excellent place to start the cross. The jury will hear it and remember it during deliberation. There are two potential pitfalls with this technique: You may not be "warmed-up" enough to start with such important materials and if you do not succeed in this area the jury will remember that victory for your opponent more clearly than if it had been lost in the middle of the cross.

It is far safer to begin with areas that support your case that the witness must concede. Do not forget, at the end of direct examination the witness' credibility is usually high. He has told a cogent well-rehearsed, well-choreographed story. Use that to your advantage. Try starting this way in a typical automobile case involving a rear-end collision:

Q: Mr. Witness, let us see if there are some things we can agree on.

Q: You are the defendant in this case, true?

Q: You were driving a 1997 Mercedes Benz on June 4, 1998, at 4:00, correct?

Q: At that time you were traveling on Fifth Avenue, right?

Q: You were involved in an accident with my client, Mrs. Brown, true?

Q: And you would admit that the front of your vehicle struck the rear of Mrs. Brown's vehicle?

If the witness is a bad person and you have the impeachment ammunition to prove it, you might consider drawing the battle lines for the jury right from the start. For example, in a case where the plaintiff has testified on direct that he had never injured his back before, but defense counsel has depositions from a prior lawsuit wherein the witness testified about the horrible back pain from that case, counsel might consider starting dramatically, by setting up the witness and then knocking him down as follows:

Q: Mr. Plaintiff, you've testified to a great many things today, and not all of them were true?

Q: You testified on direct that you never had back pain before your accident of June 4, 1998, correct?

Q: And if you had hurt your back before, and were actually hospitalized for that injury, that is not something you would forget, true?

Q: Sir, isn't it true that you were in another car accident on Jan. 2, 1993?

Q: The police came to the scene of that accident?

Q: An ambulance came too, correct?

Q: You complained of back pain, true?

Q: You were taken to the hospital, right?

Q: You were placed in traction for a week, correct?

Q: And you even brought a lawsuit for that back injury, correct?

Q: Just like the lawsuit brought before this jury, right?

Q: You'd agree, that you didn't tell this jury about that prior injury, true?

The body of the cross should contain the necessary facts needed to prove your case. The ending should be as dramatic, if not more dramatic, than the beginning. Toward that end, it is always better to save two high points for the end in case one turns out not to meet expectations.

Use of Leading Questions

The trial attorney should always ask leading questions on cross. Never ask non-leading open-ended questions unless they are low-risk questions to which you either know the answer or the answer cannot hurt you. A leading question, by definition, is one that contains the answer within the question. It is also a question that suggests the answer. A leading question can also be defined as one that calls for a yes or no answer. Here are some examples, all of varying degrees:

Q: Was the light red?

Q: The light was red, wasn't it?

Q. You knew that the light was red, true?

To prepare leading questions, list the facts that you would like to prove through the witness. Then put those facts in question form by adding the words "true," "correct" or "right" or add words to the front of the statement that serve the same purpose, such as "would you agree with me," "isn't it true," "is it fair to say," "isn't it a fact" or "there is no question that." Many times words do not have to be added at the beginning or end of the statement if the examiner, by proper voice inflection, makes the statement sound like an interrogatory.

Inconsistent Statements

Impeachment with prior inconsistent statements. One of the most dramatic parts of cross-examination is the impeachment of the witness with a prior inconsistent statement. In a civil case, potential impeachment materials can take many forms: examinations before trial, written statements taken by investigators, recorded statements taken by insurance adjustors, motor vehicle accident reports, police reports and oral statements to other persons. In the case of expert witnesses, there may be transcripts of prior testimony from other actions.

There are some basic rules to follow when impeaching with a prior inconsistent statement. Firmly commit the witness to his present in-court testimony so he can not subsequently wriggle out of it; direct his attention to the date, time and place of the prior statement without physically confronting him with the actual document; build up the credibility and importance of the prior statement; and then impeach him with the actual language of his prior inconsistent statement and drive the inconsistency home.

It is critical that you first commit the witness to his present testimony so that it is clear and unequivocal. If this is not done, he may come up with a perfect reconciliation of his present testimony with the prior statement. By way of example, assume we have an eyewitness who saw Dirk Defendant go through a red light. He gives a written, signed statement to the investigating police officer to that effect. Yet he comes into court and testifies for the defendant that the plaintiff's light was red and the defendant's light was green. The cross should go like this:

Commit to Present Testimony

Q: You testified on direct examination that the defendant had the green light at the time of the accident, correct?

Q: You're sure of that, aren't you?

Q: No doubt in your mind, right?

Another method is to make the witness commit to his prior testimony by immediately attacking it:

Q: The truth is, that light was red for the defendant, wasn't it?

Q: So it's your specific recollection that the light was green, true?

Direct Witness to Prior Statement and Have Him Credit Its Importance

Q: As a matter of fact, a police officer came to the scene of the accident, correct?

Q: The officer had a uniform and a badge?

Q: You told him you saw the whole thing, true?

Q: That you had a clear view?

Q: Certainly your memory for these events was clearer then than it is today?

Q: That was before any lawsuit had started?

Q: Before any lawyers were involved?

Q: He asked you to sign a statement, didn't he?

Q: You did sign the statement, true?

Q: You signed it in his presence within minutes of the accident?

Q: You read it before you signed it, true?

Q: You checked it for accuracy?

Q: You wouldn't sign anything that wasn't true would you?

Impeachment

Q: You told the police officer that my client had the green light and that the defendant had the red light, true?

Q: Isn't it true that you told the officer that Paul Plaintiff had a green light and Dirk Defendant went through a red light?

(Here, to be mindful of courtesy in the courtroom and to show proper respect for your adversary, call your adversary's attention to the statement)

Q: Is that the statement you signed?

Q: That is your signature on the bottom of the page, right?

Q: There is no doubt about it, is there?

Q: There is no doubt that you told the police officer that Dirk Defendant went through the red light, correct?

Drive the Point Home

(Here, you can present these questions with righteous indignation)

Q: There is no doubt that your signed statement is different than what you say now?

Q: You'd agree that the statement you gave to the police was right after the accident?

Q: When the event was clear in your mind?

Q: Before you spoke to any lawyers representing the defendant, right?

Q: You'd agree that the statement to the police is the opposite of what you told us today in court, true?

Q: You would agree that one version is less than truthful?

Q: You would agree that both statements cannot exist as true at the same time?

Impeachment with an examination before trial is accomplished in a similar fashion. Be sure, however, to read each question and answer verbatim from the transcript and be sure to actually preface each question with the word, "question" and each response with the word "answer." You must also direct the court and your adversary to the page and line numbers from which you will be reading. Never ask the witness if he remembers giving the testimony; rather, tell him he gave it and direct him to the time and place. If you ask him if he remembers, he will probably say "no."

Control of the Witness

Exercising total control over the witness takes more than just using leading questions. One must also recognize unresponsive answers. An answer may be totally unresponsive, partially responsive with gratuitous information added or totally responsive. As a general rule, the trial attorney should settle for nothing short of a totally

responsive answer.

Here is an example of a totally unresponsive answer and what the cross-examiner should do:

Q: The defendant was driving west on 53rd Street, correct?

A: He was driving slowly and cautiously.

Q: I didn't ask you about his speed, my question was simple: The defendant was driving west on 53rd Street, true?

Another way to deal with the unresponsive witness is to allow the jury to see how uncooperative the witness is being. If you can afford to, it is a good idea to permit the witness to be unresponsive on some unimportant area, so the jurors see the problem for themselves. While you could ask the court for assistance in reining in the witness, it is usually better to establish your own control of the courtroom and deal with it yourself:

Q: My client had a green light, correct?

A: But he was on his cell phone.

Q: Sir, did I ask one word about a cell phone?

Q: You chose to volunteer additional information that you weren't asked about, right?

Q: Now, can we go back to the question that I asked you?

Here is another way to deal with a difficult witness: When you do not get a responsive answer, rather than pointing that out directly, demonstrate it indirectly by merely repeating the same question until you get a responsive answer. Your tone of voice is important here as well.

Q: The light was green for my client, true?

A: I had a clear view of the light sir.

Q: The light was green for my client, true?

A: Your client was going too fast.

(Now, pause and change the tone of your voice)

Q: The light was green for my client, true?

A: True.

Conclusion

Once some basic skills are mastered, cross-examination is neither frightening nor exceedingly difficult. The key is not to get carried away: Do not cross-examine longer than necessary; do not be arrogant; and do not be overly aggressive with a sympathetic witness. At the same time, always exercise control, recognizing unresponsive answers and demanding responsive ones. Always ask leading questions. Make a statement and get the witness to agree. Your cross-examination at its best should sound like a summation. At a minimum, it should provide ammunition for your summation.

When attempting to impeach with a prior inconsistent statement, always follow the rules of commitment and impeachment, never relinquishing control of the document you are using until the impeachment process is well

under way. Never impeach a witness on an insignificant or irrelevant matter. Never forget to drive the point home to the jury.

Most cases are won or lost on cross-examination. Mastering these skills combined with judicious decisions on how to apply them will maximize your chances for a favorable result.