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TRIAL ADVOCACY

Using Operative Terms From Jury Charge in Cross-Exam

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The ultimate goal of cross-examination is to elicit facts to provide support for the argument you wish to make on summation. To accomplish this goal, advance planning is the key. The cross-examiner must know exactly where he wants to be and, more importantly, exactly where he needs to be at the end of his cross-examination before even asking his first question on cross.

To achieve this task, many trial lawyers focus first on the summation they would like to give and then seek to create a powerful cross-examination with that goal in mind. While this is an appropriate starting point, and one well worth your effort, an even better strategy would be to begin with the court's instructions or charge to the jury and then work backwards focusing next on summation and only then on the cross itself.

Know the Operative Terms

By familiarizing yourself with the jury charge first, you gain a crucial advantage: Not only do you know the operative terms to be used by the court at the conclusion of the case, but you also get to use those terms first -- in both the cross and summation. It is your preparation which allows you to skillfully map out and conduct your cross-examination in such a way as to drive your point home on summation and then allow the court to reinforce your argument in its charge.

By way of illustration, take the scenario in which a police officer arrests a man for committing a crime. When asked his name by the police officer, the man made up a false name in the hopes of preventing the officer from finding out his true identity. Assume you were asked to conduct a cross-examination of that man on that singular point. Assume further that the underlying crime or charge is irrelevant for purposes of this cross.

A lawyer could begin his cross by jumping right to the heart of the matter:

Q: You lied to a police officer, true?

Q: You provided false information to an officer, correct?

While these questions might, on first blush, seem to score points, they do little to reinforce the ultimate point you wish to make on summation -- that the witness was not worthy of belief then and is not worthy of belief now.

Take the same scenario, but this time approach the cross by reviewing the charge first. In virtually every case, a 'falsus in uno' [FN1] charge is given. That charge spells out, in part, that the jurors may, but are not required to, disregard the entire testimony of a witness who has testified falsely. Your goal on cross is to provide a basis upon which the jurors feel compelled to find the witness 'totally unbelievable,' thereby disregarding the entire testimony.

Map out your cross-examination by carefully considering the words you wish to use on summation. Scrutinize the underlying conduct. Here, we know a man had the ability to look an officer in the eye, speak directly to that officer, sound convincing and lie. A list of the words to be used on summation might include, among others: deceived, fraudulent, dishonest, phony, falsified, misinformed, misrepresented. Moreover, those same words can be used on summation.

Setting Up the Witness

However, before these words can be used on summation the witness must be set up on cross, locked in and buried by asking short, one-fact questions:

Q: Sir your name is Robert Veritas, true?

Q: That's the name that appears on your driver's license, correct?

Q: You've never changed your name, right?

Q: In fact, that's always been your name, correct?

Q: On June 12, 2007, you were stopped by a police officer, correct?

Q: That officer asked you a question?

Q: In fact, he asked you your name?

Q: Before answering you had a choice to make, correct?

Q: On the one hand, you could tell the officer the truth, true?

Q: On the other hand, you could tell him less than the truth, correct?

Q: On the one hand, you could be honest?

Q: On the other, you could be less than honest?

Q: You chose to deceive the officer, correct?

Q: You chose to provide false information?

Q: You chose to mislead the officer?

Q: The reason you did this was to try and help yourself, right?

Q: Before answering the officer, you had the ability to look him right in the eye?

Q: And while looking him right in the eye you spoke to him, correct?

Q: You answered him?

Q: You wanted to be convincing?

Q: You provided false information when you spoke to him, true?

Q: Not once did you correct your tale, true?

Q: You continued to look him in the eye?

Q: Knowing the entire time you were engaging in deceit?

Q: In fact, your conduct that day was a complete distortion of the real facts, true?

Q: But you did it to help yourself, true?

Q: It certainly wasn't helping the police officer, right?

Now, you have the opportunity to bring home your message. Before ending the cross-examination on this point, juxtapose his conduct while speaking with the police officer with his in-court conduct while on the witness stand:

Q: Today, you're answering questions as well, right?

Q: You're looking right at the jury, true?

Q: You want them to believe you?

Q: You want them to accept what you say as reliable?

Q: You want them to accept what you say as truthful?

Q: Just like when you did when you spoke to the officer?

Q: And there is no doubt about this -- you'd certainly like to get yourself out of trouble, correct?

Use All Predetermined Words

By detailing the underlying conduct the 'falsus in uno' charge comes alive. Here, a solid argument can be made on summation using all the pre-determined words to support your position.

This technique works equally well with the substantive aspects of the charge in a given case. Take, for example, a case in which one student beats up and severely injures another. A claim is brought against the school district for negligent supervision. You know that you want to be in a position to argue in summation that the teacher of the class was negligent in his supervision of the students. Here, as you plot out your cross-examination of that teacher, a review of the applicable

charge is imperative in order to formulate your plan of attack.

The governing jury instruction, [PJI 2:227](#), sets forth a detailed road map jurors are to follow in determining whether or not the school district should be found liable. With regard to the issue of negligence, the jury is instructed that, as concerns the Board of Education or school district, 'negligence is the failure to use the same degree of care and supervision over the pupils under its control as a reasonably prudent parent would use under the same circumstances.... If you find that a reasonably prudent parent would have considered that additional supervision was required under all of the circumstances...your finding will be that the Board (or district) was negligent.'

This charge is obviously crucial to your case, but it is not enough to simply include it in your requests to charge and have the judge read it to the jury. Rather, the concept embodied by the charge, that teachers are actually surrogate parents at a school, charged with the obligation to protect each child just as his own parent reasonably would, must become the jury's mind-set and prism through which it views all of the evidence, long before it hears the judge's instructions on the law.

Thus, during cross-examination of the teacher who was in charge of the classroom, but had stepped out of the room when the fight broke out, it is mandatory to establish that his actions must be seen in the light cast by the charge in this case:

Q: Sir, can we agree that one of the most important aspects of teaching is to make sure that the students are safe at all times?

Q: To protect them from injury?

Q: To ensure, as best you can, that there are no incidents or accidents of any kind?

Q. You know that the parents of the children in your class have entrusted you to safeguard their children?

Q: In fact, as a teacher, you consider yourself like a surrogate parent, true?

Q: It's your job to offer supervision to these students?

Q: Supervision at a level that parents would reasonably provide to their own child?

Q: The type of supervision you'd provide to your very own child?

Q. The type of supervision that you'd expect another teacher would provide for your own child?

Q: To do anything less, would be unacceptable, true?

Q: To fail to provide supervision that a parent would reasonably provide to their own child, that would not meet with your personal standards, correct?

Q: Simply put, that would be unacceptable, true?

Now that you've established the standards to which the teacher holds himself, you can begin to home in on the specifics of the case, always mindful of focusing the jury's attention on the legal standard that applies:

Q: Sir, can we agree that, prior to the incident which brings us here today, there had been issues with Student D (the student who attacked your client)?

Q: Specifically, you were aware he had bullied other students in the past?

Q: He had threatened other students in the past?

Q: He had gotten physical with other students in the past?

Q: You knew all about this student's prior history on the day that this incident occurred, true?

Q: You had been involved in disciplining this student in the past, right?

Q: In fact, you knew as much as anyone in the school about Student D's prior conduct, correct?

Q: Certainly, to your knowledge you knew much more about it than the parents of the other children in your class, right?

Q: In fact, sir, can we agree that, as far as you know, my client's parents knew nothing about the prior problems with Student D?

Q: Did you think Student D's history was something my client's parents had a right to know about it?

Q: The truth is, sir, you never wrote a letter to the parents in the class informing them about the issues with this student?

Q: You never called them on the phone about it, right?

Q: You didn't bring it up at the parent-teacher conference?

Q: In fact, you never notified them at all?

Q: Tell me, sir, if a student with a history like Student D's was in a class with one of your own children, would you want to know about that?

Q: In any event, knowing that you consider yourself a surrogate parent in the classroom, you considered it your job to deal with Student D?

Q: And certainly, you kept his history in mind as you supervised the class?

Q: That's what you expected of yourself?

Q: You would expect that of other teachers that you would train?

Q: You would expect that, if these parents had been told about Student D's history, they would have been concerned about it?

Q: They would have been even more careful with the safety and well-being of their own child, given that information, true?

Q: That certainly, they would have provided continuous supervision to the class?

Q: To ensure the safety of the child in the light of the potential danger that existed?

Q: Can we agree, you'd expect nothing less of a typical parent, right?

Now that he's locked in and the standard of a reasonable parent has been set forth your questions about the event will be far more powerful:

Q: Knowing all of this, isn't it true that you walked away from your classroom for 15 minutes?

Q: That no one was supervising the class at all during that time?

Q: That when you came back, you saw the children screaming?

Q: That Student D was assaulting my client?

Q: You would expect more of someone watching your children, wouldn't you, sir?

Conclusion

There may be nothing more important for the trial lawyer to keep in mind than the axiom 'At the beginning, know where you want to be at the end.' One of the most effective methods of fulfilling that winning directive is by tailoring your cross-examination to provide the foundation for your summation and in doing so, by utilizing the operative terms of the judge's instructions.

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FN1. [PJI 1:22](#) Falsus in Uno, Falsus in Omnibus