CROSS EXAMINATION
DEALING WITH CHANGING TESTIMONY: FROM SET UP TO KNOCK DOWN

By Ben Rubinowitz and Evan Torgan

Quite often at trial, a witness or a party to an action will offer a different response to a previously asked question in an attempt to create a more favorable impression in the minds of the jurors. While a certain amount of modification or change might seem reasonable or even innocuous, such action provides ample opportunity to attack the witness. In such a situation, the goal of the cross-examiner is three fold: First, to point out the change or inconsistency in clear and unambiguous terms. Second, to get into the witness' mind to explore the reason(s) for the change. Third, to develop sufficient factual support to create a logical and compelling argument for summation that the change was deliberate, significant and designed to enhance his position rather than offered merely to provide reasonable clarification.

Utilization of proper technique for questioning such a witness is crucial in developing this line of attack. Too often, lawyers rush through this line of questioning, and fail to establish and reinforce in the minds of the jurors that the change was substantial and must cast doubt on the credibility of the witness. By setting up the witness before attacking, the skillful cross-examiner makes the gravity of the change or modification clear.

Consider, for example, a scenario involving an intersection collision between a bus and a car. As a result of the impact, the car then strikes a woman and her child who were lawfully crossing the street; the child is injured, the mother killed. During the initial investigation on the day of the accident, the police took a statement from the bus driver who stated that, at the point of impact, he was driving at 15-20 mph. At a Department of Motor Vehicle hearing, conducted nine months after the accident, the bus driver claimed under oath that he was driving at

approximately 10 mph at the point of impact. At his deposition taken two years after the accident, he testified he was driving at 5 mph at impact.

Clearly, a lawyer could cross examine this witness by jumping right to the inconsistencies:

Q: You just told the jury you were driving at 5 mph at impact, true?

Q: That's what you said at your deposition, correct?

Q: But at your DMV hearing, you said you were driving at approximately 10 mph?

A: Yes, that was an approximation.

Q: You also told the police that you were driving at 15-20 mph?

A: Yes, I was approximating.

Although the inconsistencies were pointed out in this cross, the lawyer did little to bring home the severity of the change. Indeed, by failing to challenge the witness' statement that he was "approximating", the attorney missed a golden opportunity to destroy the witness' credibility.

Undertake the same line of attack by first setting up the witness by asking "voice of reason" questions and then knocking down the witness by using his own changes or modifications against him:

The Initial Set Up

Q: Sir, you were involved in an accident, true?

Q: You learned that this accident took the life of a woman, correct?

Q: You also learned that a young child was injured?

Q: That young child lost his mother as a result of the accident?

Q: Following the accident you spoke to the police, correct?

Q: You spoke to them on the very day of the accident?

Q: There is no question that you wanted to provide the police with accurate information?

Q: At the time you spoke to the police, you had a clear recollection of the events?

Q: After all, you spoke to the police on the very day of the accident?

Q: At that time, while your memory was fresh, you stated you were driving at 15-20 mph?

Q: You even signed a statement, taken by the police, stating that fact, true?

Q: Before you signed the statement, you were given an opportunity to proofread it?

Q: And you did proofread it, true?

Next, the attorney must move forward chronologically by pointing out that the bus driver's description of crucial facts had changed between the time of the accident and the time of the DMV hearing:

Q: Sir, within 6 months of the accident a lawsuit was started, true?

Q: You and your bus company were named as defendants in that suit, true?

Q: You knew then that allegations were made against you for causing this accident, true?

Q: After the lawsuit was started, you were asked to testify at a DMV hearing?

Q: Approximately 9 months after the accident?

Q: At that hearing, you were represented by an attorney, true?

Q: Before giving testimony, you were sworn to tell the truth, correct?

Q: At that hearing you stated, under oath, you were driving 10 mph at impact, true?

A: It was an approximation.

Q: Ten miles per hour was **your** answer under oath, correct?

Here, the experienced attorney should point out the reason(s) for the change regardless of the answer offered by the witness:

Q: Can we agree that you offered a different number at the DMV hearing than the one you offered to the police?

Q: You told the police 15-20 mph?

Q: At the hearing, though, you stated 10 mph?

Q: Isn't it true that you modified your answer to support your defense?

A: No.

Q: So the downward reduction was made to clarify your recollection of the events?

Q: You agree though that your memory was better on the day of the accident than it was 9 months after the accident, true?

The Continued Attack

As the chronology unfolds, the discrepancies must be brought out with even more force:

Q: Two years after the accident, you had an opportunity to testify at a deposition?

Q: That's where you were asked questions and you gave answers, true?

Q: Once again you were under oath, correct?

Q: You agree that you wouldn't just change your answers to support your defense, true?

Q: That would be completely improper, right?

Q: Once again, you were represented by an attorney?

Q: Once again, your goal was to provide clear answers reflecting only the truth, right?

Q: This time, you stated you were driving at 5 mph at impact?

Q: Can we agree that's a downward reduction?

Q: In fact, that's another downward reduction, right?

Q: On the day of the accident, you told the police you were driving at 15-20 mph?

Q: Do you agree that 5 mph to 15 or 20 mph is a 300 to 400 % difference?

Q: By the way, was your attorney present at the accident scene on the date of accident?

Q: Can we agree that before the lawsuit started, and before you were represented, you gave a very different answer to the same question?

The Kill

Finally, when moving in for the kill in the courtroom, take advantage of courtroom dynamics by using a blackboard. Put up the witness' differing answers with dates as you continue the line of attack.

Q: On the date of accident you said 15-20 mph, right?

(Write "15-20 mph" on the blackboard)

Q: Nine months later you said 10 mph?

(Write "9 months later = 10 mph")

Q: Two years later you said 5 mph?

(Write "2 years later = 5 mph")

Q: Today, we are 3 years post accident, true?

Q: Is your memory of the events getting better?

Now, although there are many ways to finish the attack, a nice approach is to ask the following question with a touch of sarcasm:

Q: We now have three different answers to the same question ranging from 5 to 10 to 15-20 mph. (Pointing to the blackboard) Which one are you going with today?

The potency of this method should be clear. By slowly expanding your questions regarding the witness' repeated changes, you are able to demonstrate to the jury not only the timing of the changes, but also the difference in circumstances which were attendant to those changes. Specifically, while the bus driver admitted to a greater rate of travel at the time of the accident, prior to the arrival of lawyers in the picture, he began to change his story once he was represented by counsel. By making that clear, you are attacking not just the credibility of this particular witness, but in reality, the resonance of the entire defense being put forth by the bus company's attorney. The message, while subtle, should come across: it was the attorney's influence which caused the driver to change his story. Their defense simply cannot be trusted.

Conclusion

Effective cross-examination techniques require the questioner to exhibit patience, slowly laying the groundwork for a more convincing attack. This example, a form of which occurs in virtually every trial, in which an interested witness attempts to modify his story to suit his needs, clearly demonstrates the vital importance of laying out all the facts before you leap in to assail the witness as dishonest.

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