

Exposing Biased Testimony On Cross

By Ben Rubinowitz and Evan Torgan

Few things are more enjoyable to a cross examiner than destroying a witness who has intentionally lied during direct examination. Catching the witness in such a lie serves three purposes: it destroys the credibility of the witness; it undercuts your adversary's cause; and at the same time, it strengthens your position in the eyes of the jury. Far more difficult than attacking the witness who has been caught in a bald-faced lie, or the one who has been convicted of a crime, is the task of attacking the law abiding witness who is biased in favor of the adverse party. To properly attack the biased witness, the underlying facts supporting that bias must be carefully brought out on cross. Any motive that the witness has for telling less than the truth must be exposed during the cross examination. Cross, in this situation, must expose the witness' bias, prejudice, sympathy, empathy, hostility, friendship, and any other interest the witness has in your adversary's case. Preparing a detailed list of those factors before ever setting foot in Court can serve as a roadmap for a powerful cross on bias. That cross, if successful, will allow the examiner to argue on summation that the witness concealed the truth and deceived and misled the jury by withholding crucial information.

Imagine, for example, the scenario in which the sole witness, (aside from parties), to an accident is a friend of the defendant. Although your investigator tried to speak to the witness, the witness refused to speak. Although you tried to speak with him as well, he refused to speak with you. No deposition was taken of the witness. As expected, the witness voluntarily appeared at trial for your adversary, testified, and hurt your case. Assume you also learned just before your cross examination that the defendant's investigator drove the witness to Court.

Without knowing more, many lawyers would say that there is some but not a lot of material on which to cross examine this witness. To the detail oriented lawyer, however, there is a good amount of material to expose bias and to suggest to the jury that the witness ought not be believed. A list of those factors on which to cross examine such a witness might include: bias based on friendship; bias based on a witness who testifies without a subpoena; bias based on transportation to Court and bias based on the witness' refusal to speak to the opposing party. True, each individual factor, might not, in and of itself, amount to much; but when taken together, these factors clearly serve as the basis for a powerful summation. It is the ability of the cross examiner to expose this bias, through carefully mapped out technique, that allows for a powerful argument on summation.

Cross on Friendship

Friendship has long been recognized as a fertile area for cross. The amount of time friends have known each other, the nature of their relationship, the frequency with which they see each other, and the knowledge the witness has in the defendant's (or plaintiff's) plight are all fertile areas for attack. Friendship serves as the introduction for the cross on bias:

Q: You've known (the Defendant) for a number of years, true?

Q: How many years?

A: 15

Q: He is a friend of yours, correct?

- Q: During those 15 years you have been to his house?
- Q: He has been to yours?
- Q: You know his family?
- Q: He knows your family?
- Q: You've socialized together?
- Q: You know his children?
- Q: They are on a first name basis with you?
- Q: You know them by name?
- Q: You also know (the defendant) has been sued, correct?
- Q: That he's being sued for money damages, true?
- Q: You would like to help him wouldn't you?
- A: I wouldn't lie for him.
- Q: My question is specific: You would like to help him wouldn't you?
- Q: You don't want to see him lose this case do you?
- Q: You would like to help your friend through your testimony true?
- Q: You would like to see a successful outcome for him wouldn't you?

Cross On The Absence Of A Subpoena

Next, the cross examiner should focus on the fact that the witness testified voluntarily and with out a subpoena. Generally, a subpoena can be thought of as an indicia of objectivity - - that is, that the witness has no axe to grind and will testify the same no matter which party called him to the stand. On the other hand, the argument is that the witness who testified without a

subpoena is, simply put, eager to help out only one side of the case:

Q: You were served with a subpoena in this case weren't you?

A: No, I wasn't.

Q: You mean you came to Court voluntarily?

Q: Certainly, you were asked to come to Court true?

Q: But you were asked (by the defendant), correct?

Q: And based on your friendship, you decided to come to Court?

Q: When did he ask you to come to Court?

A: A few days ago.

Q: He only had to ask once true?

Q: And you said you'd be happy to help him out right?

Q: There was no need for a subpoena correct?

Cross on Transportation:

Transportation to and from Court might seem innocuous. It is not. It is often strongly indicative of the witness' relationship with only one side of the case. The fact that the witness is receiving free transportation is only one aspect of the cross. Far more important, however, is the fact that the witness is often prepared or re-prepared for his in Court examination during the ride. In the event the witness chooses to deny that he was prepared during the transportation, he can be made to look foolish. If, on the other hand, he admits being prepared at that time, inquiry can be made as to the extent of such preparation:

Q: How did you get to Court today?

A: By car.

Q: But that car wasn't your car was it?

Q: In fact it was an investigator's car true?

Q: That investigator works for the defendant correct?

Q: That investigator spoke to you yesterday right?

Q: How long did you speak?

A: About 15 minutes.

Q: He told you he would provide free transportation, correct?

Q: Both to and from Court?

Q: By the way, did you discuss the facts of the case yesterday?

A: No.

Q: Not a word was said about the case during that 15 minute period?

A: True.

Q: How long did the ride to Court take?

A: About 45 minutes.

Q: During those 45 minutes, you discussed the case right?

A: No.

Q: Not one word was mentioned about why you were appearing in Court today?

A: No.

Q: You had no idea what you'd be asked?

A: That's right.

Then, in a sarcastic tone; the following questions can be asked:

- Q: Let's see - you discussed the weather for about 45 minutes?
- Q: You discussed current events for 45 minutes?
- Q: You discussed sports for 45 minutes?
- Q: The one and only thing you didn't discuss was this case right?

If, on the other hand, the witness chooses to say that they did discuss the case, the cross can proceed as follows:

- Q: You also discussed your answers to specific questions true?
- Q: You discussed how best to answer those questions?
- Q: You reviewed details of the accident?
- Q: You learned what happened in the trial so far?
- Q: You learned what was said during opening statement right?
- Q: You also learned about the types of questions I might ask true?
- Q: You were told to keep your answers short?
- Q: You were told what points to emphasize right?
- Q: You carefully reviewed the most important answers true?
- Q: You also spoke about what not to say, correct?

Cross On Refusing To Speak To The Opposing Party

The witness' refusal to speak to the opposing party must be brought out on cross. Clearly, the refusal, in and of itself, speaks volumes. If the witness was truly independent and had no interest in the outcome of the case he would have no reason to refuse to speak. If, however, the witness was worried about saying something that would jeopardize his friends case he might have a motive for his refusal to speak.

Q: You've told this jury you were a witness to the accident.

Q: And that you clearly observed what happened?

Q: Wouldn't it be fair to say that no matter who asked you questions you would tell the same exact story?

Q: Regardless of when you were asked?

Q: Regardless of who asked you the question right?

Q: In other words you had nothing to hide?

Q: And you had no one to protect true?

Q: But you deliberately chose to speak with only one side of the case true?

Q: You chose to only speak with your friend's investigator?

Q: How many times over the years did you speak to him?

A: About 5 -6 times.

Q: You reviewed the facts in detail with him true?

Q: My investigator contacted you shortly after the accident true?

Q: He was polite?

Q: He was kind?

- Q: He said all he wanted was the truth correct?
- Q: You refused to speak to him about the accident right?
- Q: But you had nothing to hide right?
- Q: He called you again before trial right?
- Q: He told you that all he wanted was the truth?
- Q: Once again he was polite?
- Q: Again you refused to speak correct?
- Q: You are aware that I called you before trial true?
- Q: And I said, very politely, all I want is the truth?
- Q: And you refused to speak to me?
- Q: Did anyone tell you not to speak with me?
- Q: Did anyone suggest that you not speak with me?
- Q: Did anyone suggest that you not speak with my investigator?
- Q: You consider yourself a fair-minded person true?
- Q: So fair-minded that you will only speak with one side of the case right?

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