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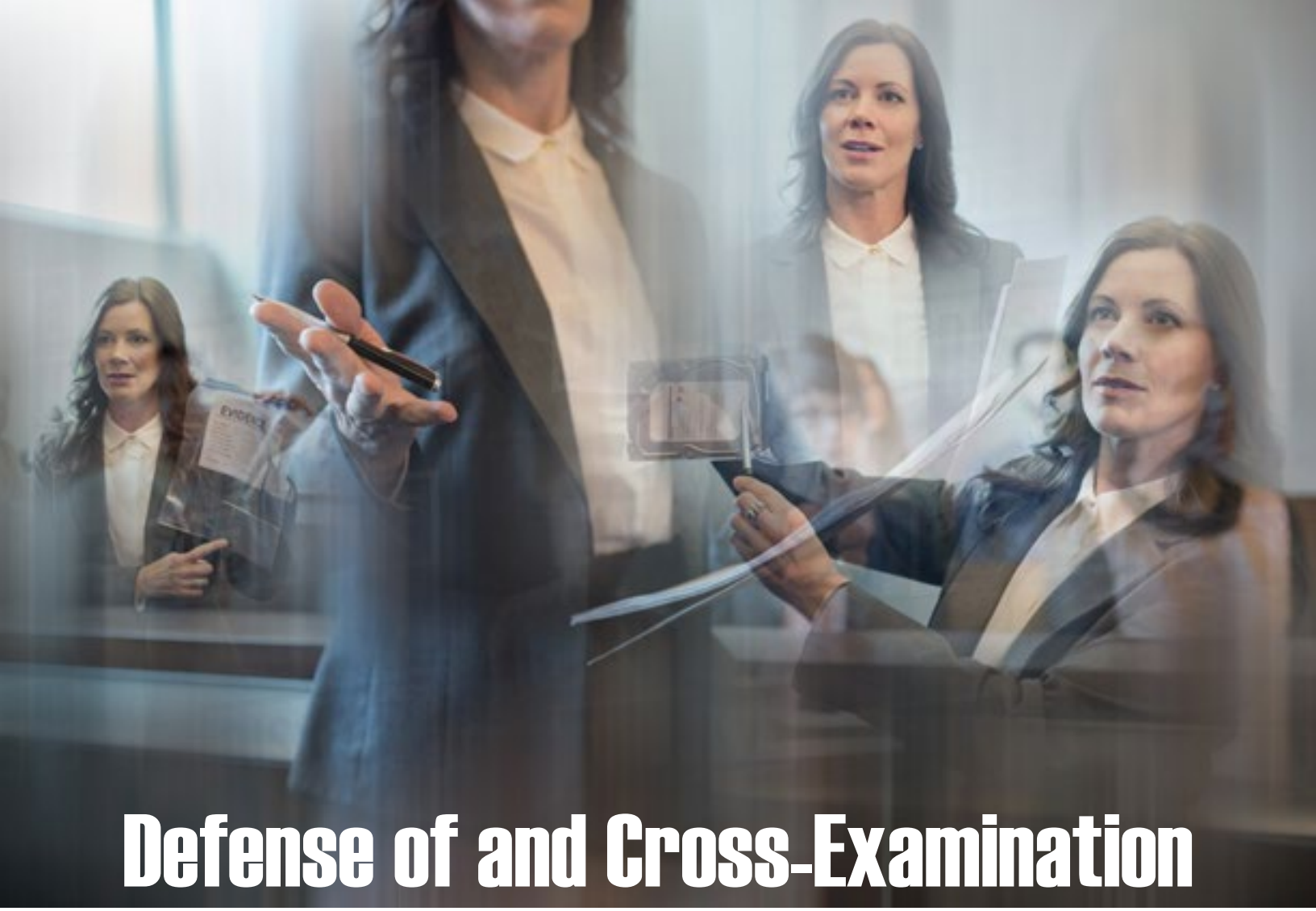

Defense of and Cross-Examination of Fact Witnesses

[InDepthAnalysis]

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Direct went great only to have what seemed like the majority of the "good" testimony totally unraveled by a seasoned cross-examiner. Although expert witnesses will generally anticipate the cross-examiner's line of questioning, fact witnesses are, more often than not, unaware of what they will be subjected to. This article will seek to provide techniques for defending and preparing fact witnesses for cross-examination, as well as performing cross-examination of adverse fact witnesses.

1. Preparing a Fact Witness for Cross-Examination

The fact witness comes into court believing courtrooms are places of conflict, and as will be discussed below, the best way to defend a fact witness for cross-examination is to totally prepare them for direct as well as the vulnerabilities and weaknesses that may come up on cross.

Make the witness comfortable

As cases develop, great effort is taken to discover evidence persuasive to our position. When evidence comes in the form of testimony from a fact witness as opposed to photographic or other demonstrative evidence, fact witnesses are often nervous if not terrified at deposition or approaching the witness stand thinking cross-examination means they will be attacked. Lay witnesses are not used to giving deposition or trial testimony. Being asked or subpoenaed to do so creates immediate stress and anxiety. A natural reaction is, "I don't want to get involved," believing no matter what they say, they'll be confronted by a lawyer – and people don't like confrontation.

To help gain cooperation of a witness, consider contacting them after being subpoenaed to explain the subpoena, the reason they will be needed for a deposition or at the courthouse. Cordially reiterate the location, date, and time. For trial, let the witness know courts don't know exact schedules of trial for that day so while the subpoena sets forth a time certain, such is actually an approximate time and often

witnesses must wait in the hall. Make them aware too, if permitted by the court, they can be offered a 24-hour notice form which while still under subpoena, if signed by the witness, they need not appear until the lawyer contacts them 24 hours ahead of time thereby minimizing waiting possibly returning the following day. Again, this is geared to create comfort for the witness, to advise what is expected of them, and, while not a direct assist on cross, this somewhat creates in the mind of the witness a relationship with the side who is calling them.

Providing assistance for cross-examination to a client, their family member, or employee is much easier than to other fact witnesses. It's expected that lawyers will meet with clients. Providing client comfort begins at the first meeting when that privileged relationship begins and, as the case progresses, their confidence and comfort compounds with each contact.

Things are more difficult with the "independent" fact witness. After learning of a witness, do everything possible to learn what they know: good, bad, or both. Contact should be made with the witnesses by one who has a pleasant temperament and manner with people. It's understandable that many lawyers are reluctant to meet with witnesses fearing the implication of coercion. If you subscribe to this make sure whoever you have meet the witness is cordial, not in a hurry, not pushy or phony, and conveys to the witness that the truth is what is wanted. The bottom line is to do everything that will make the witness comfortable.

Learn what they know: it will help you prepare them for cross or, help you in cross

To assist a fact witness for cross-examination, everything they know should be known. By going over the details of what the witness knows, you'll learn if you'll be calling this witness or not. Calmly going over the facts not only establishes whether the witness is favorable; even if not favorable, facts learned will provide ammunition to cross-examine them if called by another party. Once you've determined that the witness is favorable, narrow down precisely what facts the witness helps with.

Witnesses don't intuitively organize their thoughts or know the best way to explain things. When going over the details, begin to organize, possibly in chronology, the key facts. People like to know what's expected of them and witnesses are no different. Seems in the majority of cases, we only want to establish a few points with fact witness. Help them by reviewing those points. Often uncomfortable when initially contacted, let them know in an organized outline manner the three or four points they are key in establishing all the while making certain they are establishing the points. This helps in making clear what their role is.

> **"No one is born a great cross-examiner; it's a skill sharpened with practice. Cross-examination is an art form: never mastered, just practiced. As at all phases of trial, be yourself, always be civil and honorable, and convey to the witness, the jury and the judge, what you are truly after is the truth."**

An effective way to go over the points with the witness is to make sure they understand the "spirit" of what you're trying to establish, that no one expects them to memorize a script. It's best for the witness to fully understand the reason they are testifying, the importance of their truthful testimony, and how it fits in the overall case. This will not only assist the witness in explaining in their own words the points on direct, it will give them confidence to support the things they will say when challenged on cross.

Making a list of bad facts about your case will compel facing and meeting challenging facts head on. The list should include not only each bad fact, but the name of each witness (or document) where the fact will come in with, particularly clients. Openly discussing poor facts as early as possible will assist witnesses on handling these facts. Facts tend to cut both ways, and while a witness may have concluded a fact is not favorable, once all circumstances are considered witnesses often realize they may have jumped to a conclusion about something as there is another way to look at it. Discussing difficult facts with the fact witness and letting them know you'll be bringing these out on direct opens the door to cover all aspects, and such discussion often enables the witness to take some wind out of the sails of opposing counsel when being cross-examined.

Instilling confidence

In addition to comfort, confidence helps witnesses hold up on cross-examination; confidence not only in the knowledge of the facts but as to the foundational facts that further support the point. Demonstrating they were in a position to see or perceive, why they were where they were to see or perceive. This instills confidence in

their knowledge as well as in themselves. To empower the witness with confidence, it's always good for witnesses to know what they have previously said. Cross-examination using a prior inconsistent statement can jar a previously in-control witness out of control.

Prior to a favorable witness being cross-examined at a deposition, providing them a copy of prior statements held by your opposition will let the witness know what they've stated. This may refresh memory or provide the witness with knowledge the statement is not accurate. People like to know what they've said previously. The witness will likely appreciate your providing such statements as it's only fair they see what they've said before. This is not only an opportunity to briefly go over any statements with them, they can be reminded of favorable facts or qualify facts as not so good. Again, providing the statement will demonstrate cooperation, credibility and further a good relationship with the witness. After serving a favorable fact witness with a subpoena for trial, contacting the witness and providing them a copy of their deposition to review likewise provides another opportunity to go over these things.

Whether before cross-examination in deposition or trial, it's important to go over areas of potential vulnerability on cross. It's always critical to assure neutrality and remain impartial; when discussing anything with a witness, remind them no one is seeking to be pushy or urge any facts. Being polite, not one sided, and stressing the witness's honest responses is all anyone is looking for, and will pave the way to their answering questions on cross which seek to impugn the contact. However, as a matter of strategy, all facts testified to, good and bad, must be taken into consideration. Balancing the good and bad will determine if the witness could do more harm on cross than good on direct. Sometimes more impact can be had by letting another party directly examine the witness waiting to score your points on your cross-examination.

Assisting on cross with technique

Witnesses often feel out of place in depositions or on witness stands; they'll be nervous. Walking into a deposition, or a courtroom with a jury watching them, makes most witnesses clam up. Already having gone over, and the witness understanding the "points" and the spirit of their testimony is the best way of ensuring the witness knows what to say.

Walk, talk, and move at half speed

Even when a witness knows what to say, so often they don't know *how* to say it. Jurors listen to everything that comes out of a witness's mouth; they observe every move. Listening and watching, jurors are seeing and hearing the whole package, concluding on believability equally from what is said as well as how it's said. Before their deposition or trial testimony, let the witness know it might help if they do everything at half speed – to walk, talk, and move at half speed. Nervousness causes people to be fast and be choppy in their voice and movements. Let folks know to slow everything down. Trials are made up of "moments" that make a difference. Each witness is an opportunity for a persuasive "trial moment" and by slowing things down the jury has more chance of catching the moment. On cross-examination, the witness should speak just as he or she did on direct. The speed, cadence, and tenor of the witnesses speaking should slow – *half speed* – and confident.

Be in control, sit back, and relax

Witnesses know cross-examination is that time when opposing lawyers are going to challenge them. Over and over before deposition or cross, witnesses should be reminded to relax, speak, move and react at half speed, and stay calm. Many times when being cross-examined, witnesses will cross their arms, lean forward, grip a pen or exhibit, or do some other subconscious tick that everyone in the courtroom will take note of. A relaxed and slow witness is more at ease, and there is no reason to be uptight because all they are doing is telling the truth.

They should be reminded to sit with the small of their backs touching the back of the chair, move slowly, etc. Provide bottles of water as opposed to cups which can spill and show nerves. Witnesses generally gain comfort and confidence after being reminded they are there to speak the truth and they have nothing to hide. Likewise, the lawyer should demonstrate all these traits as well speaking and moving slowly and relaxed. Your relaxed behavior is contagious to your fact witnesses – they gain confidence from the lawyer. A witness's demeanor, body position, speech pattern, and manner should be the same on cross as it was on direct. Jurors and judges alike see the difference.

Guidelines

Witnesses should be advised not to interrupt the cross-examiner, to courteously wait to answer. They should be cautioned that when a question leads and suggests an incorrect position they should feel free not to agree. They need to know to deny a leading question if there is any part of the question is not correct. They need to know they're entitled to understand every question before answering, and to feel free to speak up when they don't understand. When on cross-examination, its best for witnesses not to use big words or any words they do not typically use in their daily life. Responding to questions on cross-examination should sound like they were speaking in the front room of their home. Responses should be to only the question, not rambling, as short as possible, and in as few words as possible.

Direct to cover negative testimony

The direct should move steadily covering the points desired. One of the greatest ways to defend a fact witness for cross is for the direct examiner to bring out all negative or bad areas in direct with the

witness. Reviewing bad facts in preparation, covering them in voir dire, opening, and possibly with other witnesses, and going over all bad facts with the witness on direct will put the witness more at ease and take the sting out of the bad fact.

Best made plans

Preparing for cross-examination (witness and lawyer) is like preparing to go into battle, and the best made plans often go by the wayside when the first shot is fired. Lawyers have to do everything possible to know not only what the witness said they will say, but what the witness can say. Establish a relationship with the witness, one of trust, credibility, and integrity. Let the witness know they'll be fine. Use your contacts and the deposition process not only to get the facts but to establish that relationship of trust. Let the witness know to default back to the spirit of why they are there and, when the bullets begin to fly, to rely on your preparation. Witnesses need to understand the spirit of the points they are being asked to make, not regurgitate a script. Never discount your talents as a trial lawyer to know how to rehabilitate a witness after cross.

Defending a fact witness on cross-examination is never easy. In addition to the above, a trial lawyer must be imminently familiar with the evidence code, making timely objections when appropriate. However the true assistance of a fact witness on cross is the preparation of the witness, standing on their own when under attack.

2. Cross-Examining an Adverse Fact Witness

There are multiple purposes of cross-examination. One is creating doubt in the jury as to the facts a witness just testified to. To demonstrate stated facts are either not as stated or there is doubt. A cross-examiner should attempt to establish the fact witness has no foundation to testify to such facts, a simple example being they had no personal knowledge or were not in a position to perceive what they testified to. Another purpose of cross is to demonstrate the witness is biased or can be discredited as not being independent. Cross-examination is also effective to bolster the testimony of another witness who stated a fact supporting your position.

Jurors understand cross-examination is the counter balance of the facts, in effect, testing the witness's true knowledge of the facts just testified to. Often, confident responses on cross-examination reinforces the jury's belief in what the witness said on direct. When cross-examination is wholly ineffective, the strength of direct shines through. So often, lawyers dream of their great cross neutralizing every fact a fact witness said only to find when actually in trial, their cross was unorganized and ineffective. Taking full precautions to fully prepare for cross will provide the best results from cross.

Preparation

Like every aspect of trial, preparation for cross-examination of a fact witness is absolutely key. Knowing as much as you can about the witness and what they know and don't know will get you ready to cross-examine them at trial. In today's world, before taking a fact witnesses deposition, so much can be learned about them online: Google, Facebook, Instagram, LinkedIn, and other social media platforms provide a wealth of information about a person. Use them. Fully investigating a case includes investigating the witnesses involved in the case to learn everything possible about the witness.

Taking the deposition of the fact witness is essential preparation for cross-examination at trial. At their deposition, learn everything the witness knows about the facts and issues in your case. Always inquire about foundational facts as to why and how the witness knows what they claim to know. Be thorough at the deposition; there's only one opportunity. Get all identifying information about the witness which will lead to learning more about the witness, prior statements, interviews,

diaries, or other writings. Learn the names of friends, family, employment, or other information that may prove helpful in the future.

It takes exhaustive efforts to organize all the information you have about the witness. As the case proceeds and as things are learned about the witness, create a separate file for each witness writing down the individual "points" you can make when cross-examining them. Stay focused on these precise points. Organize all writings, exhibits, and their deposition testimony in such a fashion that on cross-examination you're able to bring-up in a second information which the witness will have to agree with as to each point. You must know the answer to each question asked on cross and your precision notes will have the page and line of the deposition to enable you to cite it to the witness with virtually no delay. Make certain you have the page and line of each and every deposition "cut" that can be brought out in a moment's notice. Realizing it sounds cliché, preparation is the absolute key to effect cross-examination of a fact witness.

While every case and witness is different, effective cross-examination of a fact witness typically comes down to three or four points which, if established, may well sway the jury to doubt or at least question the believability of the witness. Keep your points solid; if they are not solid, they are not good points to raise on cross-examination. Keep your goals of cross realistic.

Listen to direct

Too often, lawyers are consumed with what they've previously prepared and fail to listen closely to the witness's direct testimony. Listen intently to direct. It's very common for witnesses to say things that are favorable to what the cross-examiner seeks to establish however these go overlooked because the lawyer is not listening during direct. When the witness says favorable things on direct, make note. Of course, when this happens, the direct examiner will quickly gloss over such hoping the points were not heard or understood. It is up to the cross-examiner to hear and revisit these gems on cross. If prepared, the favorable points are "in the can" enabling the cross-examiner freedom to listen to the witness and highlight any favorable testimony that slipped out on direct.

When to cross-examine

Before cross-examining, ask yourself, "Was my case hurt on direct?" The old adage is: "If you weren't hurt, don't cross" (aka "If it ain't broke, don't fix it"). Many times, points that could have been made on direct were forgotten about or for whatever reason were not made. Cross-examination often triggers the memory of either the lawyer or the witness and such forgotten points can be established on redirect. Remember, if the witness did no harm to your case, simply stating "no questions" will release the witness and any missed points on direct will never be made by that

witness. This having been said, cross-examination is the rule, not the exception.

Attitude and demeanor

Although cross-examination really is confrontational, it should not appear as such. People like nice people, and jurors and judges are no different – they like, and expect, people to be nice and pleasant. Always remember: jurors tend to want to help nice people, they tend not to help those that are mean or discourteous. There is a natural dislike for bullies, know-it-alls, and those who try to dominate. Facts raised on cross-examination should not be distracted by the cross-examiners attitude, belligerence, or over-powering attitude. Many times, great points are lost when they are over-shadowed by a lawyer's unpleasant demeanor. Not only are the points lost, often the offending party just lost the jury as well. Jurors are mindful of how the witness is being treated by all lawyers – no one wants to see someone being browbeaten, yelled at, demeaned, or dominated.

Great cross-examiners are humble, cordial, and civil. Points made from courteous cross-examination show the jury that the examiner was confident and knew all the while what they were going to do with the witness. Being calm, courteous, and organized will assist you in remaining in control. The jury is watching how the lawyer cross-examines and they will be putting themselves in the position of the witness. Let the witnesses crumble from the facts, not from being beaten.

Being in control

On direct examination, the witness is telling the story. On cross-examination, it's the lawyer telling the story with the witness simply agreeing. The trier of fact should be focused on the lawyer is in control, and for that it's essential to use leading questions. The questions asked should be narrow and precise as to a certain point. Using short, specific leading questions, the cross-examiner "leads" the witness step by step where the examiner wants the witness to go. Like holding the reins back on a horse, the examiner controls the witness.

Suggestive and leading questions do not have to sound aggressive. Using a calm voice, the cross-examiner can pleasantly ask leading questions varying the manner vocal tone in which the leading question is asked. Lawyers often aggressively cross using the same words, sounding like: "Isn't it a fact that . . ." and "Isn't it a fact that . . ." and "Isn't it a fact that . . ." and on and on. Using the same words and tone to lead a witness is not only distracting, it also creates an aggressive image of the lawyer.

Consider mixing-up the questions and tone of voice, all the while keeping the question leading such as:
"I understand that . . ."
" . . . isn't that correct?"
"You would agree that . . . right?"
"It's true that . . . ?"
"It's a correct statement that . . . ?"
"Isn't it true that . . ."
"The truth is . . . is that right?"
There are many examples of how to mix-up the phrasing of a leading question, and always remember a pheasant demeanor and tone usually makes it easier for the witness to agree.

Don't repeat what was stated on direct

Often, lawyers on cross-examination want to show they can get the witness to quickly agree so they'll start repeating things the witness said on direct: "Now you said . . . isn't that right?" then "And you said . . . isn't that right?" and on and on. While certain things a witness may have said on direct may be favorable, it's more likely that the questions being repeated don't help – in fact, more often they hurt. Cross-examination is to let the jury know the facts just stated are not true or are doubtful or that the witness is biased. Cross should stay on those topics, not repeat direct.

Be as brief as possible

Depending on the case, points on cross-examination can be made quickly. Jurors do pay attention. Lawyers have a tendency to make a point then make it again and again. Remember, they heard you the first, second, and third time. Once made, in an organized fashion, move to the next point. Typically, there is no need to regurgitate the question in a follow up question, "So what you said was . . . is that right?" Brevity: the jury and judge will commend you for it.

Short questions in common English

While everything said in trial should be easily understood, cross-examination of a fact witnesses is one phase that should be *especially* easily understandable. Questions posed to fact witnesses should be as short as possible. Remember, each question on cross-examination is to be very specific and narrow, asking the witness a very precise thing. There should be no need for long questions. Jurors want easy to understand simple questions. Let them deduce from the series of questions being asked. Like little sound bites, each question should be short and establish one thing closer to the ultimate conclusion. Know the answer to every question asked on cross – don't ask a question on cross-examination you don't know the answer to.

In addition to being short, questions should use simple, common words: sixth-grade-level words. Cross-examination is not the time to show off vocabulary or knowledge. This is the time to make communication to the jury easy and fast. Speaking slowly, using simple words and short sentences, will make your questions totally understandable to both the jury and the fact witness alike.

When a lay witness starts to balk at a truly simple, understandable question, the jury will see the game the witness is playing. Let them play and politely say, "I'm sorry, maybe it was hard to understand that question, I'll ask it a different way." Then ask the same exact question. Create the atmosphere that you are being open, honest,

and simple with your questions. The jurors will expect a quick answer to a simple understandable question. Anything less may establish weakness in the witness.

Establishing points

After you have prepared the points you are going to make with the witness, rate them as to the strongest and second strongest. Start your cross with your second strongest point, go through the others and end on your strongest point. If the witness has stated favorable facts on direct, highlight and mix them in with your middle points. Typically, it's most effective to end with your strongest point.

"Tee up" your points with facts that will bolster the point. In a personal injury case, the point may be that the defendant failed to yield to plaintiff's right-of-way. One way to get this out is to cut to the point:

Q: You knew plaintiff had the right of way?

A: Yes.

In a personal injury case where defendant failed to yield right-of-way, asking the question like this risks the jury missing the point. The key point from this key witness was made in a fraction of a second which can go right over the jurors' heads. The concept of "teeing up" the point in such a case involves cross-examination that bolsters the ultimate question as opposed to going right to it. Critical points in cases such as this can have greater effect by building up or "teeing up" the point:

Q: I understand you've been driving for many years, is that correct?

A: Yes.

Q: You've known for these many years the person going straight through the intersection has the right of way, right?

A: Yes.

Q: And you know this rule giving the through driver the right of way is a rule that provides for safety on our roadways?

A: Yes.

Q: And its always been your safe driving practice to give the through driver the right of way, not turning until the through motorist cleared the intersection, correct?

A: Yes.

Q: On the evening of this crash, you'd agree, Mr. Johnson who was going straight through the intersection had the right of way, true?

A: Yes

Q: And with you turning left at the intersection, it was your obligation to give him the right of way, correct?

A: Yes

This most basic example is used only to demonstrate how one can embellish the points on cross-examination by building up to the ultimate question as opposed to simply asking it in one question. This concept however must be balanced with the need to be brief and to the point. Experience with cross-examining provides the best yard stick as to this concept.

Be absolutely ready

Cross-examination is live; there are no re-dos, no starting over, so you must establish your points in an organized and smooth fashion. While being gracious and cordial to everyone in the courtroom, you must appear confident and effortless. Cross-examination is all about timing. Any exhibits to be used with the witness should be totally organized, pre-marked, at your fingertips within a second. Hard copies of exhibits should be in a separate folder for that witness. If you have exhibits in digital format, well before trial rehearse with your second chair bringing up the exhibits so it's known they can be brought up immediately without any delays. Make certain you know what equipment the court has as to projectors, screens, elmos, etc., and make sure your laptops and any other equipment you plan to use is compatible and works. Have hard copies of indispensable exhibits in the event there are any equipment issues. No matter what, you want to be ready with all exhibits for each witness.

You will likely be using depositions or other prior inconsistent statements on cross-examination. When one of your points requires the use of a deposition, have the precise page and line immediately at your fingertips. There is nothing worse than losing the impact of a point due to fumbling around wasting time looking for a deposition citation. Not only did you not score the point, the lack of organization leaves a negative impression with the judge and jury. Meticulous preparation for cross-examination will demonstrate to everyone you are organized, you know the case, and your points were known and effortlessly established. Lastly on the issue of timing, if nearing the end of the day, consider a request to the court to start your cross the following day to enable greater preparation.

Body positioning, interruptions

At all phases of the case, you should know where you fit into the courtroom environment. While some jurisdictions mandate positioning yourself behind the lectern, many judges permit you to move around and present from other locations in the courtroom. Depending on the layout of the courtroom, witnesses may be looking away from the jury box when answering questions on cross. Consider positioning yourself at a location in the courtroom where the witness is talking in the direction of the jury, where the jury can see the witnesses face, movements and manner clearly. Remember it is not only what they say, but how they say it.

Often while in trial, court staff or others come into the courtroom to drop off papers or have the court sign documents or otherwise. When anyone opens the courtroom door, it creates a distraction for the jurors. You've waited years to get this case to trial and while on cross-examination of a fact witness, you want all jurors' attention. If while cross-examining (as during any other phase of the trial) someone walks in, speaks to the clerk, judge, or others distracting the jury, consider stopping your cross and wait for the activity to stop. If the Court says something to the effect

of "You can go ahead counsel," let the Court know you'll wait. This will send the message to the jury (and the judge) of the importance of this cross-examination, that you don't want anyone to miss a thing.

Highlight a poor witness

Some fact witnesses just appear poorly, whether they're combative, aggressive, uncooperative, or just rude. As previously mentioned, no one likes these types of individuals. If you find yourself cross-examining such a witness, don't hesitate to keep them on the stand a little while to make certain the jury takes in all their qualities, long enough to enable them to shoot themselves in the foot a few times. Just like poor lawyer demeanor, poor witness demeanor will completely discredit what the witnesses testified to on direct. Once you have completed making your points and a witness has demonstrated enough of themselves to the jury, don't keep them too much longer – the jury gets it.

"When you hit oil, stop drilling"

Cross-examination is an exercise in patience and judgment. With every question, always consider, "Have I achieved my goals with this witness?" Sometimes you may have a litany of points to make and have everything totally ready to cross-examine all day. Yet, in the constant process of evaluating, an experienced lawyer knows when enough is enough. It is surprising how often a lawyer asks that "last question," where the witnesses response just nullifies 90 percent of what was established on cross. Cross-examination in trial is not a time to fish, to be greedy, or to show how much you know about your case or a witness. It is the time to get out of the witness just what you need. A great lawyer once said, "When you hit oil, stop drilling." This is a guideline all can learn from, one experience shows we've all violated on occasion.

3. Conclusion

No one is born a great cross-examiner; it's a skill sharpened with practice. Cross-examination is an art form: never mastered, just practiced. As at all phases of trial, be yourself, always be civil and honorable, and convey to the witness, the jury and the judge, what you are truly after is the truth. The above is in no way intended to be an exhaustive study of cross-examination, there is a wealth of information on the topic. No need to wait to be in trial to cross. In a humble and courteous manner, practice your skills with sales people, friends, and family, anyone you come across. The key is courtesy – you'll find when using polite, pleasant leading questions, people tend to agree with you more often than you thought.

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