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PERSPECTIVE

ART OF THE TRIAL

Cross-examination

By Marshall Camp

Few elements of trial practice are as theatrically, and often erroneously, portrayed in popular culture as cross-examination. In my experience, witnesses seldom yell “You can’t handle the truth!” immediately before making a case-dispositive admission. That said, crosses often *do* make the difference between winning and losing a closely contested trial. The ability to craft and execute an effective cross is one of the most important and highly prized skills a trial lawyer can cultivate.

While there are many effective styles of cross-examination, here are some guidelines that have worked for me.

Study the Part

Long before trial, I begin studying the “universe” for each witness I will cross-examine. I dig deeply into relevant case-related materials such as deposition transcripts, declarations and discovery documents. But I also go far beyond the four corners of the case. I study their prior employment history, social media presence, and requirements for a wit-

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In the best crosses, extensive research and preparation allow the lawyer to craft precise, leading questions that blend seamlessly with the witness’s answers. This creates a narrative flow that establishes important facts and admissions, while keeping the jury emotionally engaged. Some of my favorite courtroom experiences have occurred during cross-examinations — moments when I have locked eyes with an adverse witness and methodically elicited testimony that supports my client’s case and undermines the story the witness was called to tell.

ness’s professional certifications or degrees. Then I weave these details into my examination, enhancing my credibility (with both the jury and the witness) and adding memorable color to the narrative I’m establishing.

In a recent patent trial, for instance, we unearthed a PowerPoint presentation authored by the other side’s technical expert — widely regarded as one of the most experienced testifying experts in his field — that supported a key point I was attempting to make: This witness testified so frequently, and on so many subjects, that he appeared willing

to say almost anything for the right price. Language in his own PowerPoint offered the jury with a colorful term for such experts: “TechnoWhores.”

Begin at the End

Cross-examinations lay the foundation for closing argument. Every item of evidence offered and bit of testimony elicited during a trial should be aimed at proving the essential elements, or establishing the critical defense themes, you want to argue to the jury in summation. To maintain this focus in crafting witness exams, I sketch out my closing early in the process of trial prep. I then develop lines of questions directed at each issue. Although good trial lawyers constantly adapt to the shifting landscape of a trial, the key points for each witness are identified before I draft my first cross outline.

Isn’t It True That...?

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I work to maintain control of cross-examination by following a few key rules. First, ask short, clear questions. “The stoplight was red?” “Your car was stopped?” “You were looking in the rearview mirror?” Longer

questions invite narrative, non-responsive answers that allow a witness to seize control of your exam.

Second, frame key questions closely around the “impeachment material” you have for each witness — i.e., by phrasing questions that closely track the wording of impeachment material, the witness is forced to either agree with your question (in which case no impeachment is required), or attempt to deviate (in which case, they can be cleanly impeached).

Finally, resist the temptation to ask the ultimate “Gotcha!” question. You may have built a nice crescendo of implication through a long line of leading questions, but asking that final, conclusory question — “So you agree, sir, that this statement was false?” — can un-do the admissions and allow the witness to wiggle off the hook. Save it for closing.

Once upon a Time

No matter how riveting we trial attorneys find our own cross-examinations, it can be extremely difficult for jurors to follow every ebb and flow of a narrative. Even with extensive preparation and crisp, effective questioning, the story you are eliciting from an adverse witness may get missed. It is your job to bring that story to life. This is why lawyering is both craft and art. You don’t want to cross a line into blatant theatricality when doing a cross, but you do want to use all the tools at your disposal to emphasize key points.

This is primarily done through one’s voice (i.e., by varying your volume and cadence, use of pauses, etc.), and courtroom presence (reinforcing questions with hand movements, use of exhibits, etc.). If the statement is particularly important, the examiner’s voice,

facial expression, gestures and body movement should reflect that importance. Be serious, but not wooden. These methods of emphasis can be multiplied by breaking key points into several questions. “You signed this document?” “That’s your signature at the bottom of the page?” “You didn’t have someone else sign for you?” “You signed it yourself?” By asking related questions, pausing and moving between them, and varying your voice and gestures, it is far less likely jurors will miss the point you are making.

The Best Laid Plans...

It has been said that no battle plan survives contact with the enemy. So too with cross-examinations. Beginning with direct testimony, a cross-examiner should listen carefully to what the witness says.

Entirely new lines of cross may emerge, while some expected lines may be obviated. I generally break my cross materials into “modules,” with outline of potential questions on a particular subject clipped to a set of associated exhibits and impeachment material. This allows me to quickly reorganize the exam or adjust my questions based on the witness’s testimony. I also interlineate notes and questions into the margins of key documents, so I can stay focused on the document while asking questions about it.

Few examiners succeed in limiting a witness entirely to yes and no answers, and when a witness says something unexpected, or challenges the examiner with lengthy, non-responsive answers (a topic for another column), there are often new opportunities for cross-examination. A skillful examiner will either adjust the

exam on the fly or make a note to revisit the issue after a break.

A Star is Born

Remember that there is no “star witness” during a cross-examination, only a “star examiner.” When cross is most successful, the witness is limited to a staccato of short “yes” and “no” answers, forced — through impeachment or simply exacting questions — to acknowledge the truth of your inquiry. Your goal is to essentially “testify” through leading questions, with the witness’s role limited to confirming the accuracy of the statements those questions imply. Although the witness’s credibility may be impeached, this is not the primary objective of cross; it is simply the effect of attempting to resist or dispute a narrative that an effective cross-examiner is attempting to elicit.

Curtain Call

When I cross-examine a witness, everything clears. I don’t notice jurors, other attorneys or people in the gallery. I focus on the witness and on the points I am trying to establish. When extensive preparation and precise execution come together in a devastating cross, the feeling is exhilarating — and there is no need for the witness to announce that “You can’t handle the truth!” for everyone in the courtroom to know that the truth has, in fact, been revealed.

