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Professional Tools for Litigators: Direct and Cross-Examination

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What is really the difference between direct and cross-examination? Think of a megaphone. Direct examination is represented by the smaller end. You should ask short questions that call for the witness to expound upon and develop the answer, which is represented by the larger end. In direct examination, you are usually vouching for the credibility and knowledge of the witness, so you want the leave as much of the talking as possible to the witness that you called.

If you could get away with it, an ideal direct examination would consist of only three questions: "Who are you?" "How are you in a position to know something that will help me resolve this case?" and "What do you know?"

Frequently counsel focus only upon the last of these three questions. This is a mistake for three important reasons. First, most witnesses are uncomfortable at the outset of their testimony, and asking them to testify about something they are innately familiar with, namely themselves, will settle them down. Second, the answers to the first two questions will help the finders of fact draw conclusions about the credibility of your witness. And third, unless it has been established who the witness is and whether the witness was in a position to know something useful, the actual testimony will have little impact upon the finder of fact. So take your time in establishing the answers to those first two questions first.

Of course these questions would normally draw an objection that you are calling for a narrative, which would be a valid objection because that is exactly what you should be trying to do. Thus, usually the most effective type of direct examination is composed of questions like: "And then what happened?" or "What did you then see her do?" Furthermore, you almost never want to interrupt your witnesses while they are furnishing helpful testimony. Simply take note of areas that need further clarification or elaboration, and then, when they are finished, go back and ask them short questions that will fill in the blanks.

The best way to prepare for direct examination is to make notes of specific facts or areas of testimony you wish to establish, and then check off the fact or area once it has been addressed. But, except in highly technical areas, do not write down the actual questions you are going to ask. Often when the questions are written out in advance, the questioner has a tendency to be looking at the next question instead of listening to the answer. But when the questioner must focus only upon the facts or areas to be established, that person's attention will more likely be focused upon the answers.

Remember that most of these evidentiary issues will be hitting the judge for the first time, so when objections are inappropriately sustained, phrasing them differently can give the judges an extra opportunity to focus on what is really happening.

Finally, if objections are successfully made to your questions, don't give up - at least if the issue is important! Take a moment and think about the objection, and then rephrase your question to take the objection into account. Most times the testimony can be successfully introduced with some extra thought, even if the objections are well taken. Remember that most of these evidentiary issues will be hitting the judge for the first time, so when objections are inappropriately sustained, phrasing them differently can give the judges an extra opportunity to focus on what is really happening.

Cross-examination, on the other hand, is completely different. The best questions directly address one specific issue at a time, and exclude any possible responsive answer by the witness except "yes" or "no." Back to our analogy, the questions in cross-examination are like the large end of the megaphone, with the answers being restricted to the small end. And if the questions are asked correctly, the witness will be limited to "yes" and "no" answers.

Thus the best cross-examination questions end with words like "Isn't that right?" "Didn't you?" or "Wasn't it?" For example, if you know from the police report that the eye witness was not wearing his glasses at the time of the automobile collision, you should ask : "At the time of the collision when you were standing on the sidewalk, you were not actually wearing your glasses, were you?"

Maybe the witness could see perfectly well without his glasses, or maybe it really was the sound of the brakes that was the critical factor forming his opinion, but only answer that is responsive to the question is a yes or a no. Thus if the witness tries to explain, you should object and request the court to instruct the witness just to answer the question as it was phrased. Counsel in re-direct examination is certainly free to ask for a clarification of the answer, but as long as the question was appropriately phrased, there is no such entitlement on cross.

For many reasons, you almost never want to ask a "why" question to a hostile witness. For example, if a criminal defense attorney asks the arresting officer why she suspected the defendant had committed the offense, the officer will tell you, and that is not what you want! Furthermore, if the officer had four separate reasons to suspect

your client, it is only fair that she be allowed to explain all four reasons. So be supremely careful in this area!

Every trial attorney has heard the admonition not to ask a question on cross unless you know the answer. That is good advice, except in the few times when the answer will not hurt you regardless of which way it comes out. In addition, you should have some means of impeaching the witness if the answer comes out as a surprise, such as a document, the witness' prior testimony or another witness that will support your version. Documents do not change, so they can be relied on for impeachment purposes.

The most frequent mistake made in cross-examination is the feeling that you must cover all of the testimony that was elicited during direct. This is not helpful. Rather, it simply reinforces the damaging testimony the jury has already heard. And even worse, it usually is much more persuasive to the finders of fact if the damaging testimony is elicited by the opposition.

Instead, you should choose just those few areas in which you can successfully poke holes in the direct testimony. Then you can bring up those impeachment points in your closing argument. Often it does not even make that much difference if the points you raise are big or small, because if you can point out an inconsistency in the witness' testimony to the finder of fact, you can often successfully argue that if the witness couldn't be believed on this issue, how could the witness be believed on the other issues?

Neither direct nor cross-examination just happen. Sure, sometimes you can get lucky. But like with anything else, the better you prepare the luckier you usually are. So first identify the purpose for your questions, which could be to establish certain facts, or to impeach a witness etc., and then plan out your questioning with those points in mind. And once you are satisfied that you have made your points on the issues as clearly as you reasonably can so that you can use them in your closing argument - sit down! You, and your client, will be glad you did.

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