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TOP VERDICTS

Planning, drafting & executing effective cross-examinations

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Direct examinations are incredibly important. You tell your story, present your facts, let the judge or jury get to know your witness. Direct exams can also be harrowing. Anytime we have a witness on the stand, we feel *this close* to being physically ill. Cross-examination, on the other hand, is pure fun. Any points you gain are “freebies.” How can you best craft your cross-examinations to undermine your opponent’s case and to remind the jury of your affirmative story? Below are a few thoughts on strategy, drafting, and execution that we have found effective.

Strategizing: What should you try to establish during this exam?

Before you begin drafting a cross, outline what you think the witness will say on direct. Then ask yourself which of those points matter to you, which you dispute, and whether there are any that you can turn to your advantage.

Next, if you are in a jurisdiction where cross is not limited to the scope of direct, step back and ask yourself whether there are any other points that this witness *could* give you.

Finally, think about any

additional factors, such as bias or other types of incompetency (failure to perceive, lack of foundation, etc.).

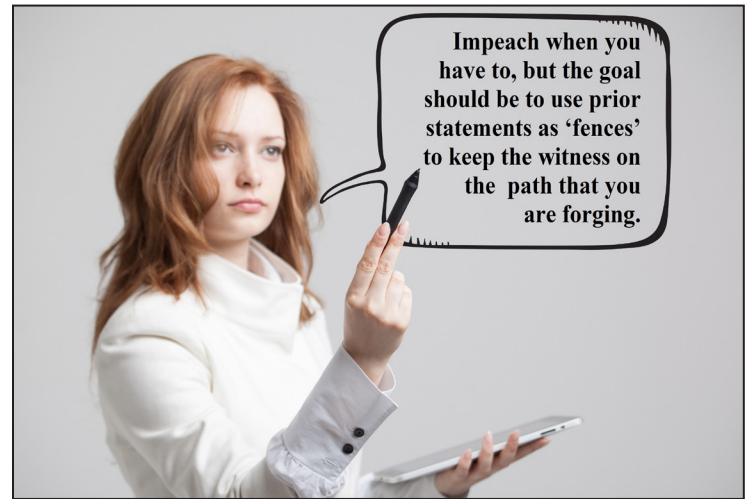
Drafting your cross

First identify any topics where you have the witness locked in at depo or in a document. Those are the easiest questions to write. A few tips:

- Build slowly. Remember that you need the judge or jury to *understand* your points, so don’t dive into the deep end.

- Use the exact language from the prior statement. Include page: line cites in your depo outline (and check those yourself the night before). If you want a witness to admit that he attended a meeting, say “You attended the meeting, didn’t you?” If he says no, you should be ready to impeach with a question and answer that says “Q. Did you attend the meeting? A. Yes.” Anything less is not clean enough. If the best you have in depo is “I think I attended the meeting,” go with that and ask “You think you attended the meeting, don’t you?” You are never going to love the exact phrasing used at depo, but try to stick to it as much as possible. This will minimize the witness’s ability to wiggle.

- Use documents effectively. Very few people cross effectively with documents. Most people say “you wrote this email, right?” Instead,



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take the substantive point of the document — “you believed that your company was stealing trade secrets, right?” When they say no, impeach with their email saying “it seems like we are stealing trade secrets.”

- One final note on impeachment: Conventional wisdom says that it’s great to impeach witnesses to show that they are lying. Maybe. In our experience, though, impeachment is less powerful than lawyers think it is. So, impeach when you have to, but the goal should be to use prior statements as “fences” to keep the witness on the path that you are forging. Focus on the substance, not on tripping people up.

Second, if there are any points you want to establish but you don’t have prior statements, think about a logical, baby-steps way to approach the problem. This is harder, but it can be done. To do an “it stands

to reason” cross, first identify the obvious: “What will this witness *have* to give you to avoid looking ridiculous?” Build your module from these first principles.

Third, cross is an exercise in discipline and editing. Limit yourself to one point per line of questioning. Ask yourself, for every set of questions: “What point am I making?” If you ever find yourself identifying two points, keep editing. One point at a time. Similarly, people can absorb only so much at a time, so each question should elicit one new fact.

Finally, emphasize important points by breaking them into a series of small questions. One time, a witness claimed to have not understood what was going on at a key meeting because she hadn’t spoken English very well at that time. That story fell apart after two dozen very short questions about the day-to-day events in her life at

that time where she had spoken English. As part of this editing process, put thought into the phrasing of your questions so that you can ask them most powerfully, avoid objections, and avoid getting a bad record

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(if you ask “you didn’t do that, correct?” and the witness says “yes,” what have you really established?). Set up each module to have all “yes” or all “no” answers, leading to your point.

Execution

Finally, style points: After all your preparation, foresight and careful planning, it’s game day. You will be fine if you have a well-prepared exam

outline, but to take it up a notch, retain a bit of flexibility and think about the courtroom presentation.

Sequencing. You will have sequenced your modules in your outline, but when you are in court, be ready to shift your order to build off the direct. Chronological sequencing is classic, but it can sometimes be a bit boring. One great way to start is where the other attorney left off. If you can really undercut their last bit and show that they were not being candid at the end of their direct, that is really powerful. Or maybe you want to undermine the witness’s credibility first, or go straight to their testimony about the operative event. No matter what, you’ll want to start and end with an impactful module.

Tone and pacing. When you’re asking questions, read the witness and the room. Know when to change your inflection to emphasize a point, and when to pause for emphasis. Think about

moments of drama. Practice them. (Nothing is more deflating than a moment of drama that wasn’t so dramatic because it didn’t actually work. We’ve been there. So it goes).

Sit down while you’re ahead! When you know your case, you’ll know when to stop asking questions. Beware asking the one question too many. You do not need to get each witness to say “yes” to the case dispositive question for you to win; you need to get the building blocks for an effective closing.

Each of these tips falls into the category of simple but

not easy, and they are far easier said than done, but with a little elbow grease and a plan, anyone can conduct an effective cross-examination. Good luck, and have fun!

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