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CROSS-EXAMINATION REVISITED

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Cross-examination of witnesses is one of the fundamental guarantees of a fair trial. (*Ogden Entertainment Services v. Workers' Comp. Appeals Bd.* (2014) 233 Cal.App.4th 970, 982–983 (*Ogden Entertainment*).) Here, I discuss fundamental rules of cross-examination, suggest certain techniques based on my experience, and reexamine the maxim that one should only ask a question to which the answer is already known.

Cross Examination Basics

"'Cross-examination' is the examination of a witness by a party other than the direct examiner upon a matter that is within the scope of the direct examination of the witness." (Evid. Code, § 761.) In cross-examination one can ask "leading question[s]," (id., § 767), "a question that suggests to the witness the answer that the examining party desires" (*id*., § 764).

Customarily, cross-examination occurs after the opposing party calls a "friendly" witness (a party, a sympathetic third-party or expert retained by that party) and concludes their direct examination questions, ones that don't suggest the desired answer. ("What happened then?," or "What did you say in the meeting?")

"Within the scope" means that the cross-examination should concern the subjects raised in the direct examination, not entirely new ones. However, the judge should not rigidly apply this standard. Any question tending to overcome, qualify or explain the direct testimony should be permitted. (*Smith v. Brown-Forman Distillers Corp.* (1987) 196 Cal.App.3d 503, 521.) The cross-examining attorney should not be strictly limited to questioning the dates, times or actions covered in the direct. (*People v. Farley* (2009) 46 Cal.4th 1053, 1109.) When only a portion of an act or statement is elicited on direct examination, the adverse party may inquire into the remainder of that act or statement under the "rule of completeness." (See Evid. Code, § 356.) Cross-examination may also probe credibility (*Ogden Entertainment*, supra, 233 Cal.App.4th at p. 983), reliability, or bias (*People v. Brady* (2010) 50 Cal.4th 547, 560).

The parties can agree to "waive scope" – in other words, all parties ask all questions of the witness at one time, then s/he is excused from the trial. This may be to accommodate third party witnesses or those who traveled to testify, so that they don't need to appear in one party's case and then potentially appear again in the other side's case.

A party can call a "hostile" or "adverse" witness in their own case, then examine that witness in the first instance in cross-examination style with leading questions. (Evid. Code, §§ 767, 776.) For example, a plaintiff may need to call a defense witness to establish an element of their case before resting. After the "776" examination, the friendly attorney would ask direct examination style questions, and so on. Since an "adverse" witness is often a party, the 776 examination would likely stay within the scope; then that witness would appear again at trial in their party's own case.

Standard Practice

The common cross-examination advice is to only ask questions to which you already know the answer. (See Fairbank, et al., Cal. Practice Guide: Civil Trials & Evidence (The Rutter Group 2024) ¶¶ 10:167, 10:187.) This is because if you ask an open-ended question at trial, you may give the witness an opportunity to repeat their side of the story.

The source of this advance knowledge of the answer comes from pretrial deposition testimony, writings involving the witness or prior witness statements.

If you have a useful admission in the deposition, pose the question at trial just as asked in the deposition. If the witness

waffles, go through the impeachment preamble ("Do you remember giving a deposition prior to trial?," "You told the truth in that deposition?," etc.) then read, or play, the question and answer. Just let the impeachment hang in the air for a moment, then move on. Don't ask follow-up questions, like "Do you remember saying that?" That could elicit a "Yes, but . . ." deviation.

These days so many of our words are memorialized in electronic communications—emails, text, electronic messages. Hopefully you will have discovered those electronic statements and established authenticity through pretrial admissions (consider using form requests for admission for genuineness of documents), or a joint exhibit list including stipulations and objections to admission. Even if you don't have a deposition question on an electronic communication, you will have the words the witness wrote or received in front of the jury. Display the communication, establish the time and persons involved, then ask the witness to confirm the document says X. If s/he demurs, read the statement aloud and ask whether you read the statement correctly. If s/he tries to bring up something absent from the document, ask them to tell the jury where the document says that. If the witness won't admit that the document says what everyone can see on the screen or tries to bring in something the document does not say, the jury could disregard that witness's credibility.

Motions to Strike

"A witness must give responsive answers to questions, and answers that are not responsive shall be stricken on motion of any party." (Evid. Code, § 766.)

It's one thing to ask an open-ended question, the response to which you do not have nailed down allowing the witness to damage your case. It's another thing to ask a question, they answer to which you do have nailed down, and have the witness prevaricate, either by not answering the question at all, or by admitting the answer and adding a "yes but" addendum that doesn't respond to the question.

The available and proper remedy is to move to strike the entire answer as non-responsive, or to identify the portion of the answer that is non-responsive. If the judge agrees, s/he will grant the motion and instruct the jury to ignore the answer, or which part to ignore.

If a witness deflects in answering my question, I don't necessarily move to strike immediately. Sometimes I try a nice follow up first: "I would be grateful if you would address my question," then repeat the question. The not-so-nice follow up is to ask if my questions are making the witness nervous, then repeat the question. If the witness sticks to the deviation, then I move to strike. This can be a powerful tool, for if the judge grants the motion and instructs the jury to disregard the answer, this give an official imprimatur to the suggestion that the witness is being evasive. If the judge grants my first motion and the witness continues in this vein, I may start moving to strike after the first evasive answer.

Going Off Script

Some of my best courtroom moments have come when I had a strong sense of a witness, and made an in-court judgment call to go "off script" though I did not have the answers nailed down in advance.

The Truth Teller

I appeared just prior to trial for an intervenor, the mother in an emotional elder financial abuse case where the elderly father sued the daughter and estate law firm over a revised trust that gave the family properties exclusively to the daughter and disinherited the son. Mom was aligned with the daughter. I was suspicious that the father's counsel on direct did not elicit testimony claiming he had been pressured or abused into signing the document, and the deposition I inherited did not have the answers. Dad was a Navy man and answered questions crisply and without evasion. So, on my examination I went out on a limb. He confirmed that when he visited the law firm to sign the revised trust, he was not taken into a separate room, he was not coerced, he had full documents rather than signature pages, and he was not prevented from reading them. He conceded the revised trust said on page one that the son was disinherited, and all the properties went to the daughter. He was so direct and honest, and I was on a roll, so I went with a gut feeling: "If the amended trust did not express your wishes, why did you sign it? The answer: "I guess I should have read it more carefully." That was the first line in my closing argument. The jury found for the daughter 11-1.

The Hothead

I was plaintiff's counsel in an investment fraud case where no discovery had been taken. My clients had been induced to invest in an agricultural enterprise where nothing was produced. They told me the defendant/promoter was a hothead. The investment circular was a rosy promotion piece, written by someone who promoted movies, promising risk-free returns with no cautionary language that the investment was risky. As I cross-examined the promoter about this fluff piece, my questions got louder, and I

began jabbing my index finger in his direction. His face turned a deep red and his answers became more agitated. Finally, he burst out, "Okay, so we cheated a little." That was the first line in my closing brief. The judge returned a judgment for securities fraud for every penny we requested.

The Folder

I had a witness at trial who acted very nervous. He had tried to dodge a couple of my questions, but I impeached him by reading choice excerpts from his deposition. When I asked another question, I unconsciously put my hand on the deposition transcript. I saw the witness look at my hand on the transcript, grimace and then agree with my question. It occurred to me that he felt chastened by the prior impeachments and might readily fold his hand if I bluffed. I asked a few aggressive questions for which I had no impeachment but touched the deposition transcript each time. The witness apparently thought my questions were fully backed by the transcript and conceded my points. The jury returned a verdict in favor of my client for copyright infringement and fraud.

The Waffler

I defended a vascular surgeon who supported the founding partner in a vascular surgery practice against accusations by two junior partners that the founder had subjected patients to unneeded surgeries. In May, the two junior partners went to my client with concerns about a handful of the founder's surgeries. My client went to the founder, who explained the treatment. My client reported to the junior partners that the chart could have been better documented, but the founder's reasons seemed valid. In the succeeding months the partners negotiated an amended partnership agreement, including new covenants that the surgeons would follow certain practice guidelines. The amended agreement was signed in late August, then a few days later the two junior partners had dinner with two prospective new partners about engaging in a thoroughgoing investigation of the founder's surgeries and hiring whistleblower counsel. In the ensuing litigation, the surgery guidelines that had been negotiated into the amended partnership agreement were the centerpiece of the cross-examination of the founder.

One of our trial themes was that the junior partners had negotiated a new partnership agreement while concealing their plan to accuse the founder of self-gain.

The first junior partner to take the stand was prepared and confident. He claimed that he had been fully satisfied by the May explanation from my client, had negotiated the new partnership agreement in complete good faith and attended the four-way dinner days later only over fresh concerns about the founder's surgeries. This seemed implausible, but he was rock solid, and I had no admission to the contrary, so I did not touch the subject with that witness.

The most junior partner, by contrast, clearly had buyer's remorse about the whole course of action. He was hesitant, emotional and ineffective on direct. Even though I had no admission from this doctor either, I decided to press on cross. His answers were hesitant and all over the map. Finally, while looking straight at the jury, I asked him whether he really expected jurors to believe that he and the other junior partner had been fully satisfied by the May explanation before acquiring fresh doubts about the founding partner, thereby justifying a massive investigation of his surgeries only days after signing the amended partnership agreement. He stammered, indicating to the jury that they should not believe his tale. The jury sided with my client 12-0.

Cross-examination is a difficult art. Done well, it can expose fatal flaws in the other side's case and drive the verdict. While sticking strictly to questions to which the answer is known is the safest tack, if you get a strong gut feeling at trial that something off-script might work, give it a try. The worst that can happen is the other side repeats their story, but maybe your gut instinct was right, and you will have a trial moment to remember.

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