GETTING THE BEST OUT OF WITNESS EXAMINATION

Prepared and Presented by:

William C. Trosch

Conrad Trosch & Kemmy, P.A.

GETTING THE BEST OUT OF WITNESS EXAMINATION

Prepared and Presented by

William C. Trosch

I. Direct Examination Techniques

Jury selection is where the people who decide a case are chosen. Choose poorly and you have an uphill battle winning. Cross-examination is risky, exciting, and sometimes explosive. Closing argument is when lawyers get to have center stage, putting everything together and persuading (hopefully) the jury. Direct examination, however, is the most critical part of a trial for the party with a burden of proof. Without presentation of evidence during direct examination, you cannot carry your burden of proof. Beyond proof, direct examination is where you present the building blocks and foundation of your case.

Direct examination comes with many challenges. Witnesses rarely know what they are doing and, consequently, are prone to mistakes (poor memory, brain farts, boring, droning on and on, contradict other witnesses, get angry, show their rear end, etc.). The rules of evidence limit what types of questions can be asked and what answers can be given. Witnesses can only testify in response to questions asked. Many times, they have no idea where the questioning attorney is going and gives answers that do not move the testimony forward (it is like repeatedly stepping on your dance partner's foot). Opposing attorneys can object and interrupt a witness's testimony, throwing off an otherwise fluid presentation of your story.

A direct examination that overcomes all of these challenges usually involves two things: 1) A prepared and confident witness that presents compete and descriptive testimony; and 2) An attorney that lets the witness do the vast majority of the talking.

A. Witness Introduction – Establish Credibility and Qualifications in Court

Witnesses are usually nervous when they are called to testify. There is no substitute to spending time with your witness prior to trial. A prepared witness will be more confident. A confident witness will be calmer. A calm witness will perform better. A witness that performs better is more credible, persuasive, and memorable to a jury. A persuaded jury that remembers your witnesses' credible testimony is more likely to vote in your client's favor.

Though judges frown upon overt credibility bolstering of a witness, lawyers can bolster their witnesses in lower key ways. A lawyer can ask a witness about relevant background information that has the effect of making the witness more credible to the jury (i.e. address, occupation, family, education, relationship to parties). You can also bolster your witness in direct by presenting evidence of the witness's credibility in ways directly relevant to the testimony (i.e. the eyewitness has perfect vision). You cannot bolster a witness's credibility directly by "un-impeaching') (i.e. testimony that the witness has not committed a crime before being impeached by your opponent during cross examination) or by presenting evidence of acts of good character (i.e. the witness is known to help little old ladies and gentlemen cross the street).

B. Making the Testimony Clear – Organization and Conversational Manner

A good direct examination presents the witness's testimony in a clear, persuasive, believable, and memorable manner. This requires an organized and planned presentation that looks conversational and unrehearsed (even spontaneous).

You should have a plan to get the information you need from a witness into evidence for the judge (survive directed verdict) as well as how a witness's testimony assists in telling the story of the case to the jury. Keep in mind that you should frame the testimony in ways that is consistent with your case's themes.

Create a detailed outline of your entire case, including 1) the essential elements that you have to prove, 2) all of the facts that support each of the essential elements you must prove as well as the facts necessary for your case's stories and themes, 3) all of the evidence you may present at trial, 4) which witness can testify in a way that presents the facts and evidence you need to prove the essential elements and present your stories and themes.

Have a conversation with your witness. It should appear as though you are meeting them for the first time, and you are very interested in finding out about them and what they know. Use clear simple language in your questions. They should begin with Who? What? Where? When? How?

C. Making the Testimony Persuasive – Help the Witness Tell the Story and Emphasize the Strong Parts

You must present enough evidence to make your prima facie case, but you should also weave said evidence into your case's story and themes. How you do this:

1. Let the witness be the star of the direct examination

Let the witness tell the story. The focus should be on the witness, not the lawyer. There is almost nothing worse in a trial than looking like you are putting words in a neutral or friendly witness's mouth.

2. BUT, keep control of the witness

a) Keep your witness focused

The best way to keep your witness on point and focused is to spend time with them and prepare them (see below) and let them know where they fit in to the whole case.

b) Runaway witness

No matter how prepared, some people just like to talk about what they want to talk about. These witnesses will respond to a simple question with a fifteen minute meandering answer about everything from their favorite color to their great Uncle Otis, who really liked to ride a horse. . .. "Did you know horses live on the Outer Banks? I

wonder if they like to eat oats. Oatmeal is my favorite food for breakfast. I had eggs this morning, though."

Try not to avoid interrupting if possible, but you must reign them in. Gently transition them from their "answer" to the issues at hand. "I like oatmeal too, but the jury really needs to know how long you were at the intersection before the crash happened." Treat them like you are talking to your Grandpa, who you love very much, but only have fifteen minutes to talk to.

c) Lead them without leading them

(1) Transitions

You will often have many topics to address with a witness. Use a transition to get from one topic to the next. Each transition will give a clear closure of the last topic, a pause or break in the action, and a clear start to the next topic. You may close a topic with a question such as "do you remember anything else about the argument?" You may follow with "you may take your seat" (if the witness is out of the witness chair) or by asking the judge something. Finally, you start the next segment by saying something like "Let's talk next about your relationship with George."

(2) Signposts

Signposts simply direct the witness where your questioning is going next. You may say something like: "Thank you for telling us how you investigated this matter; we would like to hear now about what you learned from your investigation." It really goes back to communicating with your witness like a conversation. You need to tell them (and the jury) where you are going next.

3. Prepare, Prepare, Prepare

Preparing the witness is the single most important thing you can do for a good direct examination. You want to instill a sense of confidence in your witness so they can best communicate your case (and survive cross-examination). Preparation also includes letting the witness understand your case, including the themes and stories you want to

communicate as well as the legal elements that must be tackled. In addition, let the witness know their role in the telling of the story and how he or she fits into the overall case. Show the witness an outline of the questions you will ask on direct examination (this does NOT mean to have their answers written down for them). You need to prepare them for what they are allowed to say and, more importantly, what they are not allowed to say.

For important witnesses, I conduct a complete mock cross examination of them. I try to be more brutal than any opposing attorney could be (I should be able to attack my witness better than my opponents, as I almost always know more about the witness). Once they have survived one or two rounds of mock cross examination by me, hopefully the real cross examination at trial will seem easy to them.

Again, a fully prepared witness is much more likely to be a confident, controlled, and mistake free witness.

4. Take your Poison in Direct

Take your vaccine in direct examination to inoculate your witness from a damaging cross. For issues that you believe will come up on cross examination, take the time to talk about them with the witness on direct. In this way, you are building trust with the jury (admitting he/she is not perfect) while at the same time framing your witness's side before the opposition makes it look much worse during cross.

D. Style – Relating to Witness and Jury

When I was in law school, I had a trial advocacy course with an adjunct professor that brought our class to tears every day. He would give us examples of his opening statements or closing arguments; they were better than the ones on TV. I wanted to emulate his style. I failed miserably. My speaking style is more like Spock and less like Charles Becton. During an interactive seminar, I approached one of these greats (who was instructing me) and told him I was thinking about giving up on litigation. I had just been (what I thought) bumbling through a mock trial. My instructor told me that he would give anything to be "real" like me. I was puzzled until he told me that he was so

trained up that everything was too perfect, too scripted … too slick. Juries may like to watch slick, but they vote for sincere and honest. I did give up, but it wasn't litigation that I gave up on. I gave up on trying to be like someone else. I had to tailor my style to me. Juries like and trust me because I am myself.

Just because your "courtroom" you should reflect your "real" you does not mean that you should not hone your trial skills. There are too many trial skills to get into here, but I will focus on a couple of skills relevant to direct examination.

Listen to your witness. Listen to your witness! Listen to your witness some more!!! First, this is just good to do in any conversation. Second, your questions will change based on what your witness just said (you can write down questions rather than an outline if you must, but NEVER read every question) and you must listen carefully to know what your witness said. Third, and most important, the jurors are watching you and if you do not show interest in what the witness says, the jury is more likely to discount what the witness is testifying to.

While still watching your witness, take peeks at the jury while the witness testifies (you should have others watching the jury as well.) Tailor your next question on how the jury reacted to the witness's recent answers.

No distracting movement by attorney. Listen and look like you are listening. Look engaged rather than preparing for next witness. Eyes on witness. Look like you have never heard these answers before. Take notes after an answer, so it gives the jury a chance to think about what was said. Good pace. Use "We" and "Us" and "the Jury." Think of ways to ask a little bit different questions that allows the witness to repeat and restate important points in a different way. Illustrate with exhibits. Lead (if necessary) without leading questions (signposts, with questions in front of leading questions).

E. Special Considerations in Direct Examination of Expert Witnesses

Most expert direct examination will follow a similar outline: 1) Ask the expert for a short introduction (i.e. "I am Dr. George Smith. I am a neurologist who practices in

Charlotte, North Carolina"); 2) Ask why the expert is here (i.e. "I am here to present my opinions about the Plaintiff's neurological condition"); 3) Have the expert present their qualifications (educational, work background, training, experience, etc.); 4) Publish the expert's CV to the jury; 5) Submit your witness to the court as an expert in their field (which you must identify); 6) I generally ask from the get go what the expert's opinions are ("Dr. Smith, you told us earlier that you were here to present your opinions about the Plaintiff's neurological condition, could you tell us now what those opinions are"); 7) The expert then gives the basis and reasoning for each opinion at length. Have the Expert get out of their chair and teach during their explanation; 8) Explain past testimony or potential problems (that may be pointed out during cross examination); 9) Have the expert summarize their conclusions at the end.

A few other expert direct examination tips: 1) You should reference other experts, if possible. 2) Try not to be too duplicative or too long. 3) Use illustrative exhibits. 3) Establish credibility and have them educate the jury. 4) If possible, use simple language and short questions. 5) Use demonstrative evidence to explain and get them out of their chair (they are teachers, let them move around). 6) Use hypotheticals if you understand how to use them and have troubleshot them over and over. 7) Anticipate what opposing experts will say and pre-rebut. Rebut what other experts have already said. 8) Support what your experts have already said.

F. Redirect Examination

1. Plug the holes

If your witness survived cross examination without damage, either do not redirect, or ask one question to emphasize they continue to endorse their direct testimony (see below). If cross examination put some holes in your witness's testimony, then plug up those holes in redirect. If there are additional facts that support cross examined issues, then present those facts in redirect. If facts were brought up in cross examination that can be framed in a way to support your witness's testimony, get your witness to explain on

redirect. Make sure your witness explains any apparent inconsistencies in their testimony.

2. Don't Open the Door

If you redirect, do everything you can to attempt to avoid giving the opposing attorney the chance to re-cross. This means sticking to what has already been discussed in the direct and cross examinations. Even better would be to anticipate the cross examination and cover (inoculate) everything in direct.

3. Don't Lead, especially on Redirect

If you use leading questions on redirect, it looks like you are putting words in your witness's mouth because they didn't say what you wanted them to say on direct or cross examination. This is objectionable, but more important, it actually undermines your witness and YOUR credibility. It makes it seem as though you are trying to manipulate or script the evidence rather than have your witnesses present it.

4. Keep it short – always
5. Reiterate original story

Ask: "Is there anything you want to change or add to what you have testified on direct or cross examination?"

Answer: "No"

II. Cross-Examination Methods

A. How to Prepare for Witnesses' Testimony and Potential Objections

There is one thing that you can do that gives you the best chance for a great cross-examination: Know the facts and law better than any witness, lawyer, juror or judge in the courtroom. Always!

It is beyond the scope of this topic to get into every area you could object to as well as every evidentiary rule. You, however, should prepare to try and limit your opponent's witness's evidence when you have a basis to do so, preferably through a pre-

trial motion. In addition, it is often a good idea to point out to the judge and jury when a witness testifies outside their personal knowledge. Other common objections include: hearsay (words or acts intended as an assertion and offered solely for the truth of the matter asserted), irrelevant (evidence has no tendency to make a fact of consequence more or less probable), lack of foundation (no personal knowledge and reading or offering an unauthenticated document), speculation (guessing other's thoughts or motives), assuming facts not in evidence, misstating the evidence, confusing/misleading, unresponsive, improper leading, beyond the scope of redirect or re-cross, unfairly prejudicial (Rule 403), argumentative (any question that is rhetorical or has no real answer), interrupting a witness, and improper character evidence.

Finally, you should remember to only object when it serves a purpose for your case. Objecting to things that do not matter can make it look like you are hiding something from the jury.

B. Organization

The highest purpose of cross-examination is to communicate your case through your opponent's witness. Of course, it also is always good to be able to discredit a witness whose testimony was harmful. Nevertheless, unlike direct examination, much of the attention and focus on cross examination is on the attorney questioning the witness. As such, the credibility of the questioning attorney in cross examination is key. An organized, thoughtful, respectful, calm, likeable, and sane attorney will have a much easier time with a jury.

Have an outline of topics and areas ripe for cross examination. You may impeach by prior inconsistent statement, impeachment (self-contradiction), contradiction, prior bad acts, convictions, character impeachment (lack of truthfulness), mental incapacity, perceptual incapacity, and bias, interest, motive or prejudice. You do not have to (and probably will not on any one witness) use all types of impeachment on a witness.

It is very important to listen attentively to the direct examination. If the witness said nothing that hurt you in direct examination, then consider not asking any questions in cross examination. If in direct examination, the witness explains something that you were going to address in cross examination, then you may have to change how you address it in cross examination (unless you were so prepared that you had thought out alternate lines of questions depending how the witness addressed that issue).

Try to start out and finish with a bang. You should let the jury know immediately that everything you say is true and that the witness cannot be trusted (unless they agree with you). When you begin your cross examination, the jury has just sat and listened to the witness's scripted testimony from easy questions. They likely have a positive impression of the witness. In addition, the jury is primed to see what you can do. As will be explained later, it is also important to show the witness from the start that you are in control and that the witness will be punished for not answering acceptably to your reasonable questions.

If you prepared well, then it is OK to conduct a cross examination that you planned out. Do not, however, merely stick to the script because you wrote it. This is especially true if you have pre-written all your questions and intend to just read the questions (a technique that I usually avoid). A better practice would be to make an outline (and even all of your questions if you must) but be prepared to adjust on the fly depending on the direct examination. There will be at least some issues that you will need to have locked down and will write out your questions beforehand word for word, but be ready to change them if necessary.

Better to remain nice with a conversational tone at the start than to come across like a jerk. Let the jury decide the witness is wrong. You do not need to tell them. You are just the good guy trying to get the witness to respond reasonably. When the witness responds in an effective or surprising way, never look or act surprised (never let them see you sweat). Your reaction may hurt your case more than the witness's answer (which the jury may have glossed over had you not drawn their attention to it).

C. Framing the Questions and Limiting the Response

Maintaining control of the witness is paramount in cross examination. Losing control hurts your credibility (and as mentioned earlier, your credibility is key in cross examination). Either ask leading questions or ask questions that hurt your opponent no matter what answer the witness gives. Have alternate paths where each and every path ends in something bad for the witness and good for your case.

Effective cross-examination usually consists of short leading questions that call for a yes or no answer. The questions should always be fair (remember your credibility is key) and easy to understand. Try and break down an event into its smallest components and have a question for each bare fact. Cross examination is made up of a lot of baby steps.

I try to have in my pocket (so to speak) a material issue that I think the witness has exaggerated, fudged, or (even better) lied. If the witness testifies honestly and I get them to answer my questions the way I want, I may not even use it. Catch them in a lie or an exaggeration, preferably with some form of written evidence or previous testimony. They will be embarrassed when their lie/exaggeration is exposed. You may even do this a few times. Later, whenever you sense they are going to answer dishonestly or in a way that does not fit your case, you just pick up a piece of paper, ready to read again. In this way, they are trained to answer the way you want them to (honestly, of course).

What if a witness is evasive or otherwise refuses to be controlled? These are actually the best witnesses to cross examine, because, when handled right, they can strengthen your credibility, hurt their's, and help your case. Do not argue with an evasive witness. Do not lose your cool. Do not show anger. Just respectfully ask the simple question. You might even apologize: "I'm sorry doctor, but for now I just want to know the patient's heart rate. It was below 50 beats per minute, wasn't it?" You may even have to politely interrupt the witness (with an apology of course). The point is to show how one sided, unreasonable, and argumentative the witness is being without joining the argument.

You need to show, not tell. Let the jury decide. Do not call the witness a liar unless the jury gives you "permission," which means just do not do it. A corollary to this rule is to never destroy a witness unless the jury is ready for it. This means that you must let the witness destroy themselves without your commentary.

Finally, when you get what you need, stop. Pigs get fat, hogs get slaughtered. Perry Mason type cross examinations where the witness exclaims "I did it" almost never happen. More likely, as you brow beat a witness, the jury starts to feel sorry for them and hate you. The witness might also be able to rehabilitate themselves while you ask unnecessary, unimportant, or repetitive questions.

D. Prior Inconsistent Statements – the What-fors and the How-tos

Gotcha moments feel great for the cross-examining attorney. You just heard the witness contradict something they said previously. You have them in the crosshairs. How do you do it under the rules?

1. Impeachment or Substantive Use

A witness's prior inconsistent statement, conduct, or silence (with some exceptions) may be used to impeach the witness at trial. Just because a prior inconsistent statement is admissible for impeachment purposes does not mean it is admissible as substantive evidence. If you want to introduce the prior inconsistent evidence substantively, you must contend with the Rules of Evidence (usually through some hearsay exception).

2. Form of the Prior Statement

The prior statement may be made in or out of court, sworn or unsworn, oral or in writing. No formality is required.

3. The Prior Statement Must be Inconsistent

Generally, a prior statement is inconsistent if there is any "material variance" between the testimony and the content of the statement.

4. The Statement Must be from the Witness

The prior inconsistent statement must have been made by the witness herself. You should note that you may be able to get prior inconsistent statements by others through other means. When witness 1 says something that contradicts witness 2 about a material fact, you may address this by "impeachment by specific contradiction." You also may introduce substantively any admissions of a party-opponent, which includes statements of a person's agents or coconspirators.

5. In Cross-Examination, Most Any Prior Inconsistent Statement is Allowed, No Matter How Collateral

6. BUT, You Must Live With the Witness's Answer if the Issue is Collateral (i.e. No Extrinsic Evidence of Prior Inconsistent Statement Unless the Issue is Material)

Extrinsic evidence may only be used for material issues. An issue is material if it is relevant to the case independently, as opposed to relevant for impeachment. Evidence of bias is always material and extrinsic evidence of bias may be presented. On collateral issues, a party cannot impeach a denial with extrinsic evidence of the prior inconsistent evidence.

E. Specific Techniques for Cross-Examining Expert Witnesses

You will almost certainly never know the entire subject area that an expert will testify, but you should make every effort to know as much as you can about the expertise of the witness. Pay attention to the very specific topics of expertise that will apply to your case. Use the deposition to get all of the expert's opinions as well as the assumptions underlying those opinions, which will usually be much more manageable. Try and learn these narrow areas as well as any expert you are cross examining.

Most experts may try and overstep. When they do, punish them. If you have done your homework, you will be able to discern when the expert is trying to BS you and the jury. Challenge the expert's assumptions and beat them down when they overreach.

At some point in their analysis, they will choose between two or more paths (they always do). Make sure you point out that they could have chosen to go in the other direction. Make them redo their analysis if they change their assumptions. Usually it will affect their ultimate opinions.