CHAPTER 32

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Examination of Witnesses

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§ 32.1 A RECOMMENDED SEQUENCE FOR TRIAL PREPARATION

In preparing for trial, our view is that one of the last steps should be the preparation of the questions for witnesses. First, there must be a thorough investigation (including any discovery obtainable) during which a theory of the case is developed; for example, as investigation proceeds the defense might determine that the theory best fitting the available facts is insanity, self-defense, mistaken identification, and so forth.

After investigation, discovery, and legal research point to a broad theory of the case, counsel should attempt to write a tentative closing argument, incorporating every significant fact in the argument.

The next stage is the preparation of questions to elicit witness testimony. All the facts in the closing argument must be elicited from the witnesses who know them or they cannot be used. Questions should be prepared that will elicit all these facts from the appropriate witnesses, using techniques that ensure: (1) testimony that is memorable and, in appropriate cases, dramatic; (2) in cross-examination, control over the witness; and (3) compliance with such evidentiary rules as govern form of questions, laying a foundation, authentication of real evidence, and so forth. In planning the questions, remember that emphasis and repetition of major points is an essential means of getting your theory across.

Finally, in any complex case a file should be created for each witness, containing: (1) the facts sought from the witness; (2) at least where precision is required, exact sequences of questions; (3) potential evidentiary issues that might bar the testimony, with authority for your position; and (4) in the case of adverse witnesses, for each fact to be elicited, an index of all sources of evidence supporting that fact (such as prior inconsistent statements, police reports, pretrial motion transcripts, grand jury testimony, other witnesses). This index may prove especially useful in the heat of examination for impeachment, refreshing recollection, or confronting the witness with extrinsic evidence. It should be continually updated during trial with testimonial references.

§ 32.2 THE ELEMENTS OF CREDIBILITY

It is important to remember that the facts counsel has to work with include more than the stories told by the witnesses or the real evidence. There is also the question of whether the facts presented can be believed: is the story credible? Is the witness a credible person? These issues must be dealt with by both the proponent of testimony presenting the direct examination, and the opponent who cross-examines. Professor

Paul Bergman's book *Trial Advocacy in a Nutshell*[1] identifies several factors that the fact finder will consider in assessing credibility, excerpted here in extremely abridged form:

1. Credibility of the testimony

(a) Is the testimony consistent with common experience?

> [E.g.] Witness B testifies that he can identify the defendant as the person he saw running away from him at a distance of 100 yards, though it was at night and there was no moon or streetlight.

(b) Is the testimony consistent with itself?

> The question you must ask is, "If what this witness says is true, then what other things would also be true?" If a holdup victim can identify the defendant's socks, but not his shirt, then that is inconsistent.
>
> The person who says different things at different times may be forgetful, or exaggerating, or careless, or a liar.

(c) Is the testimony consistent with established facts?

(d) Does the witness display adequate knowledge of details?

2. Credibility of the witness

(a) Is the witness biased or neutral?

> Our experience is that people tend to distort facts in order to resolve situations in their own self-interest. . . . Self-interest in this context can take a variety of forms, and includes both bias for someone or something as well as bias against. Greed. Hate. Jealousy. Love. Friendship.
>
> Interestingly, bias cannot often be detected from the testimony alone. And the main reason is that bias does not just affect testimony, it affects perception and recollection. . . . And that is why the biased witness often sounds so credible and consistent — as far as he realizes, he is swearing to the truth.
>
> There are fairly subtle forms of bias to which all witnesses are subject, even if they have no direct stake in the outcome of the case [. . . for example,] a bias which leads a witness to stick to a story which she has already told.

(b) Does the witness have special expertise?

> [E.g.] A cocktail waitress may not ordinarily testify at a trial as a witness imbued with high credibility. But on the issue of whether or not an individual was drunk, she may well qualify as an expert.

(c) What is the witness' demeanor?

> [Bergman suggests that a fact-finder will be influenced by such "demeanor" factors as physical attractiveness (and some attorneys suggest that their witness dress appropriately), personal style, and the manner of testifying.] As to the latter, the attorney's goal is to present a witness who appears relaxed, confident and sincere — without seeming to be repeating a memorized story for the four hundredth time.
>
> Does the witness answer questions crisply on direct, and then hesitate and qualify every answer on cross? Is he unable to answer a question without

[1] BERGMAN, TRIAL ADVOCACY IN A NUTSHELL 30–57 (2d ed. 1989). This material has been abridged and reproduced here with the permission of the author and the West Publishing Company.

staring at his attorney? Are answers filled with digressions, irrelevancies, and personal invective?

(d) What is the witness' socio-economic background?

Through voir dire or remarks to the court, the less-than-ideal factfinder can be reminded of the possibility of prejudice, and you can seek the assurance that prejudice will not possibly affect the verdict. Through questions of each witness, you may demonstrate to the factfinder that although the witness belongs to a different societal subgroup, his feelings on the subject before the court are very similar to those of the factfinder. Finally, if a witness' actions are rooted in a culture which is different from that of the factfinder, you must include testimony about these cultural variations.

Your task, then, is to convert the decision into a rational one, by convincing the factfinder to view your client or witness as an individual.

§ 32.3 DIRECT EXAMINATION

§ 32.3A. CHOOSING AND PREPARING WITNESSES

Before presenting a witness, counsel must calculate whether she helps substantially more than she hurts the case. Often a witness will know harmful facts that could be brought out in cross-examination, will not appear credible, or may be impeached by prior inconsistencies or a criminal record. There may be other witnesses who can provide the same testimony with less risk. On the other hand, failing to call an available witness (other than the defendant) may lead to an inference that the testimony would have been unfavorable.[2]

Before having the defendant testify, consider that it might lead to introduction of a prior criminal record; and that common wisdom is that if the jury disbelieves the defendant on any one fact the case is lost. Prior to trial, counsel should rehearse both the direct examination and the anticipated cross-examination with each witness individually. At this session, counsel can decide on the suitability of the witness, acclimate the witness to courtroom procedures, provide advice that will enhance her credibility,[3] and ensure that the testimony will come out as clearly as possible.

§ 32.3B. SELECTING THE AREAS OF TESTIMONY

The direct examination must be carefully constructed in advance. Among the goals that may be accomplished are the following:

1. *Order the witnesses, and each witness's testimony, in a persuasive way.* Context is everything; facts can be presented as a meaningless laundry list or as a coherent story. Just as a good opening statement is used to predispose the jury to a

[2] Failure to call witnesses may have this practical effect, and in narrow circumstances, it is proper for the prosecutor to comment on it. *See infra* § 35.3B(5).

[3] Such advice might include: (1) orientation to the rules of testifying, including the rule against hearsay; (2) advice on dress and demeanor; (3) do not volunteer any testimony other than that specified in the preparatory session; (4) wait until the question is completed, and cease talking when an objection is asserted; (5) avoid sarcasm, jokes, and anger, but remain calm and polite; (6) attempt to explain answers in cross-examination where a yes or no is insufficient, and correct any misstatements; (7) look at the jury periodically and, during cross-examination, do not look at me lest you appear unsure or coached.

certain interpretation of the facts, the order and pattern in which testimony is presented can make a story more or less plausible. For example, if the evidence shows that the victim took several minutes to identify a suspect at a lineup, this might be portrayed by the defense as uncertainty; but the prosecutor could blunt this effect by first eliciting testimony that the victim was told of the importance of the procedure and wanted to be careful and accurate.

Counsel should also consider that: first and last impressions are most memorable, so weak testimony or witnesses should be buried in the middle; certain sequences maximize flexibility in choosing defenses; the most common comprehensible sequences are stories that proceed either chronologically or following an initial overview; and if the defendant testifies last, she will have had the advantage of hearing all other testimony.

It is important to use powerful points early, because once a juror's mind is made up it may be hard to change it. However, attorneys sometimes reserve a favorable witness for rebuttal (or a portion of testimony for redirect). This is a gamble to be used with caution, since if opposing counsel does not present a case (or cross-examine), this evidence may be lost; but if she does, the reserved evidence may destroy its force.

2. *Set out all facts supporting the party's position.* These facts may be required elements of the party's case; for example, the defendant must prove all elements of an affirmative defense, or a motion to suppress a search pursuant to a warrant. Thus, special attention must be paid to listing the elements of the case and ensuring that someone testifies to them.

Other important testimony may simply make the party's case more plausible; corroborate other evidence already in the case; or demonstrate the credibility of the witness.

3. *Set out facts that lay a necessary evidentiary foundation for other evidence.*

4. *Set out facts that impeach or discredit opposing evidence.*

5. *Consider defusing inevitable, damaging evidence by disclosing it first, in the best light.* Hopefully the problem can be framed within explanatory circumstances, but even if not, disclosure will at a minimum avoid the appearance of misleading the fact finder, and credibility may be enhanced by the display of honesty.

6. *Present the testimony in a memorable way.* Since a trial contains a multitude of facts, many will be forgotten unless techniques are used to make them memorable. Possibilities include the order of testimony (the beginning and closing of an examination will be more memorable than the middle, where inconvenient facts might be buried); reinforcement through real evidence, which may be present in the jury room during deliberations; emphasis of important areas through follow-up questions; fashioning a simple and coherent story; elimination of unimportant facts; and dramatic presentation.

7. *Present facts that are important for perfecting the appellate record.*

8. *Underscore your theory of the case during redirect examination.* If cross-examination has harmed the case, redirect examination is an opportunity to “impeach the impeachment”; but most important, it enables counsel to restate the theory of the case in pointed, concise testimony. Because the scope of redirect is often limited to issues raised in cross-examination, some ingenuity may be required to establish this nexus.

§ 32.3C. TECHNIQUES OF QUESTIONING

1. *Use open, nonleading questions.* Leading questions are improper in direct examination except to (1) set the stage through preliminary questions, (2) examine

hostile witnesses, (3) examine children who are not fully adept at communicating, (4) examine a witness with a language problem, and (5) refresh the recollection after the witness's memory is exhausted. Apart from these occasions, short, simple nonleading questions should be used to move the story along and avoid a narrative.

2. *Use noncompound questions in simple language.* Questions should be short, seek testimony about only one fact at a time, and use clear and simple language.

3. *Use diagrams or exhibits where possible.* The memory will retain much more information if received through both the eyes and ears. Additionally, exhibits go into the jury room in a jury trial and therefore receive extra attention.

4. *Let the witness tell the story.* Unlike cross, the attorney stays in the background during direct examination. Given witness preparation, there is no need for the attorney to seem to be coaching the witness. Except where the witness is ill adept, he should raise the important points himself in response to completely open questions, with the attorney following up with more directed questions calling for elaboration.

Often, direct examination will follow the following format:

a. The background of the witness, including name, address, and employment. Generally, more leeway will be given to develop the defendant's background than that of other witnesses.

b. A preliminary question to set the stage. “Drawing your attention to June 5, 1979 at 4 P.M., where were you at that time?”

c. Description of the event.

d. Elaboration of any appropriate areas.

e. End on a high point.

5. *Comply with the Rules of Evidence.* In addition to the rules against leading or compound questions, remember the evidentiary rules barring questions that: call for a narrative or an opinion; have been asked and answered; lack a proper foundation; or assume a fact not in evidence. Nonresponsive answers may be struck. *See infra* § 32.8.

6. *Emphasize important points.* This can be accomplished through follow-up questions that seek additional details in an important area.

§ 32.4 CROSS-EXAMINATION

§ 32.4A. SELECTING THE AREAS OF TESTIMONY

1. Potential Areas of Cross-Examination

For each opposing witness assess whether there are any facts in your argument that you can bring out through examination of this witness. This step ensures that you only cross-examine for an attainable purpose. Aimless cross-examination unrelated to your argument may reinforce the witness's credibility, diminish your credibility, and reemphasize the direct testimony. Therefore, the presumption is against cross-examination. You need a reason to justify it.

While direct examination seeks to tell a complete story, the ideal cross-examination will contain only two types of testimony:

a. *Facts that support counsel's case:* This is done by either underscoring favorable testimony given on direct (“I saw the assailant's face for only ten seconds”) or by bringing out new and helpful testimony. This new testimony may consist of facts supporting the defense theory (“Officer, when you searched the defendant's apartment

you found no evidence of any crime, did you?"); facts limiting the direct testimony ("Doctor, when you say the bloodstain was consistent with the victim's, you are not saying it is his blood, are you?"); or facts laying a foundation to admit other testimony or exhibits.

b. *Facts that discredit the direct testimony or the witness himself:* A discrediting cross will present the witness as either mistaken or a liar. Often, a jury will more readily believe that a witness is honestly mistaken than intentionally lying.

The following are the most frequent grounds of impeachment:

1. The witness is a convicted criminal. A defendant's criminal record may not generally be introduced unless he testifies, as impeachment — which is a reason that many defendants do not take the stand. The court is also required to consider whether the prejudicial effect of the record is such that it should be excluded, as discussed *infra* at § 32.12C(4).

2. The witness is biased or prejudiced (a friend of the victim, a spurned lover, an expert with a stake in a pet theory, etc.).

3. The witness has an interest or motive in the case (for example, an expert witness has been paid by the prosecution; a witness has been granted immunity to testify by the government).

4. The witness made a prior inconsistent statement ("Didn't you say to the grand jury that the assailant was twenty-five, not forty?"). This is the most common form of impeachment and the safest.

5. The witness is mistaken because of:

Inability to perceive — the witness did not see or hear correctly because he was too far away, the lighting was poor, he was upset and confused, his eyesight is poor, he is deaf, etc.

Inability to remember — the event was too long ago, there were too many intervening events since that time, he claims to remember details about one particular event but not another occurring at the same time.

Incompetence to testify to particular facts — the witness was too young when the event occurred, or does not have firsthand knowledge because he was not fully conscious (due to drink, injury, or mental impairment) or was not there.

6. Another method of discrediting testimony is to show that it is internally inconsistent, inconsistent with other witnesses' testimony, or so improbable that it does not "ring true." For example, a witness in a bad check case may testify that he was the cashier who accepted the check from the defendant which later bounced. His identification of the defendant on direct, however, is inconsistent with the common experience that one does not remember what there is no reason to remember.[4]

The way to develop this line of cross-examination by inconsistencies is to meditate on the factual circumstances of the event. If the direct testimony is true, what else must be true? What else cannot be true?

2. Narrow the Focus to Reduce the Risks

The final step in selecting the subject matter of a cross-examination consists of taking the list of potential subjects and selecting only the most promising subject

[4] You might ask the witness, "You usually see over one hundred customers a day, don't you? And when you accepted this check, you did not identify it as a bad check, did you? And in the ten days before you found that the check had bounced, you had several hundred other customers, didn't you? And you didn't pay any particular attention to those other one thousand customers either, did you?"

matter. For example, the witness may be wrong about the time of the incident by fifteen minutes; in many cases, cross-examination on this point would seem like nit-picking. The witness may hate the defendant, but without a means of proving this, any cross-examination in the area will likely result in a denial, argument, or explanation. Counsel should select the strongest points with the lowest risk wherever the ammunition exists. Including other questions will destroy the force of the cross by permitting the adverse witness to present his story, not yours.

Paul Bergman has originated a "safety model of cross-examination" that emphasizes the importance of cross-examining on high-voltage, low-risk areas. According to Bergman, the key question to ask is, "How likely are you to be able to accomplish the purpose for which you are asking the questions? In cross-examination, this likelihood depends on your ability to refute an adverse answer, and on the way you phrase the question." Bergman's detailed model is instructive and well worth reading.[5]

What are such low-risk areas? In descending order of safety, they include:

1. Favorable facts for which extrinsic proof exists (in the form of prior statements by the witness, a more believable available witness, documents such as criminal records, or real evidence). If the witness does not give the expected favorable answer, counsel may not only prove the point but also discredit the witness.

2. Questions with a low risk/reward ratio. A favorable answer provides a building block for closing argument; an unfavorable answer permits counsel to abandon the line of questions without jury recognition of its significance.

3. Favorable facts where a denial would seem improbable and not "ring true" to the jury.

4. Facts that the witness *believes* can be proven by extrinsic evidence, thereby deterring an unfavorable answer.

Where the above ammunition is lacking but cross-examination is *truly* necessary, counsel may have to rely on:

5. Questions propounding your theory, where presentation of "your story" is helpful despite the inevitable denial of the witness. ("Isn't it a fact that you ran the red light?") At least this reminds the jurors of another side to the case they will hear later.

6. "Fishing" — using the cross-examination to fish for favorable facts.[6] Counsel must continually measure the witness's statements against the entire record in search of inconsistencies. This is, of course, a high-risk tactic that should be used only in the absence of the more fruitful areas above.

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[5] *See* BERGMAN, TRIAL ADVOCACY IN A NUTSHELL 174–209 (2d ed. 1989). The following discussion in the text draws on Bergman's safety model, with the permission of the author and the West Publishing Company.

[6] Bergman describes the process of "fishing" in this way:

> One fishing technique is to pierce the factual conclusions of a witness' testimony in an effort to show that sufficient support for those conclusions does not exist. In legal parlance, this is known as "testing the witness' ability to perceive." . . .
>
> Another fishing technique relies on that basic credibility tool, common experience. Examine a witness' story from the point of view of your knowledge of how the world functions. On the surface, the witness' story may be credible. Then ask yourself: If this story is true, what other facts would I expect to find? If the witness did this, what else would he also have done? Your cross, then, consists of asking about the presence of these other facts.
>
> [For example, in a rape case] what other facts might you expect to be present? Sufficient light for identification. Screams. Phone calls for help immediately following the attack. Bruises or other marks of attack. To ask about such details may mean you have to fish. But if some of them are absent, common experience suggests the story may be implausible.

3. Subject Matter to Avoid in Cross-Examination

Cross-examination should ordinarily be avoided when:

--The witness either did not hurt your case or testified to uncontested facts (unless additional helpful facts can be obtained from that witness). For example, in a "wrong man" misidentification case, the defense would not cross-examine on whether a robbery in fact occurred but solely on whether the defendant is the man who committed the robbery.

--The witness omitted crucial testimony. For example, if the prosecution forgot to get testimony on an element of the crime, you risk losing a motion for a required finding of acquittal by filling in the element yourself or giving the prosecution an opportunity for redirect examination.

Cross-examination should ordinarily be avoided on topics that:

--Simply reiterate the direct testimony or otherwise do not further your case. A cross that surrounds some good points with much useless questioning gives an impression of failure.

--Call for an explanation from the witness ("Why did you . . . ") thereby providing her a soapbox.

--Are insignificant. The subject must be something the jury will consider relevant and not nit-picking.

§ 32.4B. TECHNIQUES OF QUESTIONING

Cross-examination has no relationship to normal human interaction. It has nothing in common with a conversation or an interview. *Its purpose is not to obtain information from the witness, but rather to have the witness affirm the attorney's assertions. Where possible, these assertions should comprise a carefully selected and ordered series of favorable facts that the witness cannot deny without refutation.* A good cross-examination should provide building blocks for closing argument and/or reduce the force of the direct examination. Obviously, such a cross-examination must be prepared in advance, and where pretrial discovery and investigation have been adequate, it can be.

As noted above, a cross-examination checkered with useless questioning (or worse) will at least appear to be a failure. The following questioning techniques are designed to limit cross-examination to the winning points by maximizing control over the witness:

1. *Use highly leading questions at every important juncture.* These should be assertions that can only be answered by yes or no, such as "You were afraid, weren't you?" or "It's fair to say you never saw his profile?"[7] Through leading questions using carefully chosen words, the attorney rather than the witness gives the story; the witness merely affirms or denies the attorney's explanation.

2. *Use short, simple questions, "baby-stepping" the witness.* Each question should contain one fact only, using short sentences. The witness is led to the desired area through small steps. This simplifies the facts for the jury, controls the witness, permits counsel to abandon a subject early in the sequence with minimal damage, and gives the witness less ability to anticipate where he is being led.

[7] Note well that "why?" is the polar opposite of a leading question, and usually results in an unwelcome narrative by an antagonistic witness.

3. *Insist on answers from an evasive witness.* You may repeat the question, ask the court reporter to repeat the question, ask the judge to instruct the witness to answer the question, or move to strike the answer as nonresponsive. Occasionally, however, an obviously evasive witness makes such a bad impression that you may wish to encourage and underscore the evasions.

4. *Avoid arguments with the witness.* The point of cross-examination is to get ammunition for use in your closing argument, when the witness will not be present to argue back. Therefore, counsel should generally avoid confronting the witness with conclusory or ultimate points and always avoid engaging in argument with her. For example, after obtaining admissions that the witness did not see the assailant's facial features, it would be a mistake to ask the question, "So you cannot really identify him with certainty," as it is an invitation to argument.

5. *Do not show your wounds.*

6. *Listen to the witness's testimony on direct and cross-examination for additional material.* Every answer, juxtaposed against the previous record, may contain the seeds of effective impeachment. Listen not only for facts but for the *emotional tone* of the witness, which tells its own story. For example, good questioning may increasingly reveal arrogance or partisanship in a witness, as effectively damaging to credibility as factual contradictions.

7. *Close the door.* Before confronting the witness with impeachment material, eliminate the possibilities that he will escape. This requires anticipating the possible explanations and foreclosing them before the witness realizes their import. In the special case of impeachment by prior inconsistent statements, to eliminate any escape route it is important to rephrase the conflicting direct testimony in terms that exactly conflict with the earlier statement, and elicit testimony demonstrating full competence at the earlier time.[8]

8. *Build up exaggerations and inconsistencies.* When you possess persuasive extrinsic evidence, you may benefit by pushing the witness in the wrong direction, which will increase the discrediting effect of the ultimate impeachment. Suppose the alleged victim testifies that she complained to the defendant's probation officer about his threats. Counsel who has documentary evidence from the probation officer to the contrary would benefit by encouraging overstatements concerning the frequency of the complaints, the probation officer's expressed concern, where the witness was when she complained, how she remembers it so well, and so forth.

9. *Elongate important questioning.* Breaking up important points into smaller parts makes more of the material and also prolongs the questioning so inattentive jurors may catch up.[9]

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[8] For example, a witness's accident report may describe the accident without mentioning that the defendant was speeding. If you simply ask, "Your report never mentioned any speeding, did it?" the response may be that he did not include every fact. You could close the door by pinning down the witness in advance to the propositions that he was instructed to fully describe the accident, he attempted to be complete and accurate, he filled it out the same day when his memory was freshest, he was calm by that time, etc.

[9] For example, rather than ask only, "You never told the police you had been cut, did you?" you might ask: "You first saw police officer Jones fifteen minutes after the incident? You didn't tell him of any cut then, did you? You next saw him on April 12? You didn't mention the cut then, did you? And on April 15 when you were at police headquarters giving a statement, you didn't mention any cut? In fact, isn't it true that on every occasion when you were talking with Officer Jones about this case, you did not mention any wound?"

10. *Permit explanations only for good reason.* Usually permitting an explanation of impeaching facts will disrupt the force and rhythm of a cross-examination; less frequently, it may be advantageous to ask the witness to explain if he is off balance, rather than wait for a coached explanation on redirect.

11. *Comply with the Rules of Evidence.* Although leading questions are permitted, the other rules cited *supra* in § 32.3C on direct examination apply to cross as well. Additionally, cross-examiners may be likely to face objections that the question is argumentative or badgering, mischaracterizes the witness's testimony, invades a privilege, or is prejudicial.