

**New Jersey Attorney General's Advocacy Institute**

**CROSS-EXAMINATION AND  
THE SEARCH FOR THE  
TRUTH: PREPARING YOUR  
WITNESS FOR THE JOURNEY**

**March 18, 2013**

**Paul H. Zoubek  
Montgomery, McCracken**

# **Fundamental Guiding Principle Of Our Judicial System**

**‘The morals of society, the foundation of government and the confidence of the people are dependent on the skillful administration of justice.’**

**~ Jefferson**

# **THE SEARCH FOR THE TRUTH**

**Obligation to present truthful testimony and evidence.**

**The search for the truth can be an elusive journey and you can expect that the facts in your case will evolve over time.**

**Successfully establishing the “Truth” at trial depends on effective preparation and will turn on the recollection and credibility of witnesses corroborated by documents and other evidence.**

# **CROSS-EXAMINATION AND DISCOVERY OF THE TRUTH**

**“Cross-examination is the greatest legal engine ever invented for the discovery of truth.”**

**John H. Wigmore,  
quoted in *Lilly v. Virginia*, 527 U.S. 116 (1999)**

# **PREPARING WITNESSES FOR CROSS-EXAMINATION IS A TIME CONSUMING BUT CRITICAL PROCESS AND A FUNDAMENTAL ETHICAL OBLIGATION**

- 1. Witness preparation is not as exciting as cross-examination but is essential if you are to meet your obligations to your client, the tribunal, and the system.**
- 2. Ethical obligation to ensure witness is giving truthful testimony:**
  - a. RPC 3.3 candor toward tribunal**
  - b. constitutional obligation in criminal cases**
  - c. obligation to the process and the fundamental principles of our democracy**

# **KNOW YOUR CASE: DISCOVERING THE FACTS DURING CASE PREPARATION**

- 1. Thorough Knowledge of Witnesses and Documents is Essential**
- 2. The Facts Will Evolve**
  - a. Keep Open/Critical Mind**
  - b. Use Common Sense**
  - c. Be Skeptical**
- 3. Constantly Revisit Your Case Theory as Facts Develop**

# **KNOW YOUR CASE: DISCOVERING THE FACTS DURING CASE PREPARATION**

- 4. Prepare an Integrated Chronology**
  - a. Annotated Timeline**
  - b. Key Events / Key Documents**
- 5. Identify Critical Areas For Cross**
  - a. Examine From Opponent's View Point**
  - b. Prepare Your Own Points For Cross**
- 6. Include Notes of Possible Cross In Witness File And Update as You Prepare Your Case**

# **KNOW YOUR WITNESS**

- 1. What Will Work for Some Will Not Work for Others**
- 2. Do Not Attempt To “Create A Witness”**
- 3. Adjust Preparation Style To Each Witness**
- 4. Get All Prior Statements**
- 5. Gather Relevant Documents**
- 6. Avoid Surprises -- Google/Facebook**

# **INITIAL WITNESS MEETING**

- 1. Familiarize Your Witness With the Process**
- 2. Review How Memory “Works”**
- 3. Discuss How Judgments of Credibility Will be Made**
- 4. Gather Facts in a Narrative**
- 5. Exhaust All Areas of Knowledge Both Admissible and Inadmissible**
- 6. Review Critical Documents**

# WHAT IS MEMORY?

- 1. Help Your Witness Understand How Memory “Works”**
- 2. Foibles of Memory**
  - ✓ **Dates**
  - ✓ **Substance of Conversation**
  - ✓ **Important Versus Unimportant Details**
- 3. Actual Versus Reconstructed**
  - ✓ **Refreshed by Documents**
  - ✓ **Witnesses Often Have No Specific Recollection**

# WHAT IS MEMORY?

- 4. Distinguish Levels of Memory**
- 5. Distinguish Knowledge Acquired After Events**
- 6. Do Not Recall / Do Not Remember**
- 7. Actual Knowledge Versus Practice / Habit / Expectation**

# WITNESS CREED

- 1. LISTEN to Question**
- 2. PAUSE – (Allows for Objections)**
- 3. THINK About Question**
  - ✓ **Understandable?**
  - ✓ **Incorrect Assumptions?**
- 4. DIRECT, TRUTHFUL, CONCISE ANSWER and STOP**
- 5. Do Not GUESS**
- 6. Do Not Go Beyond Question Asked**

# **ESTABLISH ROAD MAP OF TIME PERIODS/SEQUENCES/MILEPOSTS**

- 1. Witness Should Always Know Time Period Being Asked**
- 2. Establish Key Sequences with Mileposts**
  - a. Case Markers**
  - b. Life Markers**
- 3. Do Not Guess on Time Period**
- 4. Do Not Guess on Frequency**
- 5. Prepare Themes and Safe Harbors**

# **REVIEW CRITICAL AREAS – OVER AND OVER AND OVER**

- 1. Identify Critical Areas**
- 2. Familiarize with Key Documents**
- 3. Develop the Key Answers in the Witness's Own Words**
- 4. Role Play**
- 5. Bring in Another Lawyer to Question Your Witness**
- 6. Give Up the Obvious and Be Prepared to Explain**

# **RED FLAG**

## **INTRODUCTORY PHRASES**

- 1. Isn't it Fair to Say . . .**
- 2. Would You Agree That it is Generally the Case . . .**
- 3. So to Summarize What You Said . . .**
- 4. In Other Words . . .**
- 5. Isn't it a Fact . . .**
- 6. Control End of Question – “Correct”**

# **BEWARE**

- 1. Hovering Cross-Examiner**
- 2. Compound Questions**
- 3. Leading Questions with Half Truths**
- 4. Yes or No**
- 5. Exact Times**
- 6. Exact Statements**

## **BEWARE – PART II**

- 7. Implied Answer (Fast Versus Slow)**
- 8. Witness Notes**
- 9. Improper Use of Documents and Demonstrative Evidence**
- 10. Cross Regarding Preparation**

# **PREPARE THE WITNESS FOR THEIR SURROUNDINGS**

- 1. Deal with Expected Anxiety**
- 2. Describe Courtroom**
- 3. Explain Transcription**
- 4. Rules of Evidence**
- 5. Take Critical Witnesses to Courtroom in Advance**
- 6. Explain How Judges and Juries Evaluate Credibility**

# **HOW TO PROTECT YOUR WITNESS WITHOUT LOOKING LIKE YOU ARE BLOCKING THE TRUTH**

- 1. Know the Critical Rules of Impeachment and Hold Your Opponent to Them**
- 2. Anticipate Cross and Be Prepared with Rule and Case Citations**
- 3. More Experienced Attorneys Object Less**
- 4. You Protect the Witness Best by Preparing Them Well**
- 5. Witness Can Control the Cross-Examiner Sometimes More Easily Than You Can**

# **HOW TO PROTECT YOUR WITNESS WITHOUT LOOKING LIKE YOU ARE BLOCKING THE TRUTH**

- 6. Use Your Peripheral Vision to Watch Judge/Jury/Witness**
- 7. Use Appropriate Objections to Break Up Cross As Necessary**
- 8. Do Not Let Your Witness Lose Their Cool**
- 9. Limits on Communication with Witness During Cross**

# **REDIRECT EXAMINATION**

- 1. Prepare for Prospect in Advance**
- 2. Limited to Subjects on Cross**
- 3. Outlet for the Yes, But I Must Explain**
- 4. Not Used to Repeat Direct**
- 5. Do Not Reopen Door – Use Sparingly**

# **10 COMMANDMENTS FOR PREPARING WITNESS FOR CROSS-EXAMINATION**

- 1. Know Your Case**
- 2. Know Your Witness**
- 3. Recognize That The Evidence Will Evolve**
- 4. Recognize The Vicissitudes of Memory**
- 5. Prepare Themes, Mileposts and Safe Harbors**
- 6. Challenge Your Witness During Prep**
- 7. Practice Anticipated Cross**
- 8. Know the Anticipated Evidentiary Issues**
- 9. Protect Your Witness But Avoid the Perception You Are Hiding The Truth**
- 10. Avoid Surprises**

**PREPARATION IS PROPER AND PART  
OF YOUR ETHICAL OBLIGATIONS**

**IT IS NOT ONLY PROPER FOR COUNSEL  
TO MEET WITH WITNESSES  
AND PREPARE THEM, IT WOULD BE  
NEGLIGENT NOT TO DO SO**

**Paul H. Zoubek  
Montgomery, McCracken  
LibertyView, Suite 600  
457 Haddonfield Road  
Cherry Hill, NJ 08002  
Tel 856-488-7731  
pzoubek@mmwr.com  
www.mmwr.com**