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

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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
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 is the greatest legal engine ever invented for the discovery of truth.”

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
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
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 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
1. Isn’t it Fair to Say . . .

2. Would You Agree That it is Generally the Case . . .


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
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
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

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