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Trial and Error

Mastering the Blind Cross-Examination

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Among the legions of mega-firm litigators, only a few actually go to trial. For this, we should be grateful. Trial lawyer wannabes, in the search of minutiae, arm themselves with stacks of deposition transcripts, torrents of interrogatory responses, and computer databases. No pebble is too small to be left unturned. No evidentiary crevice is too small to go unexplored. These lawyers think they know the answer to every question before they ask it. They should—every question they thought relevant was asked a hundred times in a tedious multi-day deposition.

But it is blind cross-examination that is the true trial lawyer's art. Blind cross means bravely taking on the adverse witness with no prior testimony or discovery. No dress rehearsal at deposition. No lengthy witness statement or interrogatory response from which to quote.

The skills used in conducting a blind cross are honed in trial by fire. The blind cross was born in the days before David Dudley Field and the Discovery Code, when lawyers like Abraham Lincoln literally rode the circuit courts on a railroad. Today, prosecutors and public defenders still are forced to master this art. So, too, are the multitude of lawyers who dwell not in the ethereal "bet the farm" case but in the day-to-day resolution of medium and small disputes in which most of us work.

But large-firm attorneys should not fear blind cross-examination. Not every witness needs to be deposed. Common sense and careful preparation can allow any skilled trial lawyer to effectively practice the art of blind cross-examination.

First, focus on the goal. Blind cross-examination should be a surgical strike. It is not an exploration of every aspect of potential testimony. You need not explore every nook and cranny of the witness's mind and history. It is almost always

immaterial where the witness went to school or where she worked for the past 30 years. Leave that frolic and detour for a deposition.

To be effective, blind cross must have a specific goal. Trials are a massive puzzle of facts, witnesses, and documents. So you must ask yourself: Where in that maze does this witness fit?

As you prepare for blind cross-examination of a witness, consider what the other side's objective must be in calling that witness. What does your opponent want that witness to achieve for her case in chief? What do you believe the witness will say on direct?

Conversely, think about your own goal in cross-examining the witness. Is there a key fact you wish to establish or to create doubt over? Or, is your goal to call into question the witness's overall credibility?

The latter is a far tougher assignment. It reaches beyond a fact or set of facts into everything about which the witness testifies. Sometimes that is necessary. Say, for example, when you're faced with the "sympathetic" plaintiff/victim.

But, more often than not, each witness is intended to lay out a specific fact or a set of key facts that help provide the premise for the other side's case. Cross-examination should be a laser beam designed to attack the other side's contention of that fact or set of facts. In short, blind cross-examination should be a stiletto, not a sledge hammer attack.

As in any cross-examination, the key to blind cross-examination is leading the witness, rather than giving the witness free rein to lead you. You cannot allow the witness to veer from achieving your goal, or to distract the trier-of-fact with extraneous evidence that you do not want admitted.

You, and not the adverse witness, need to be the master of the examination.

As a result, blind cross-examination should consist of a series of short questions, each calling for yes or no answers.

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Isn't it true? Wouldn't you agree? Isn't it a fact? All are common devices used to keep the witness's answers within a short, tight frame, with preferable yes or no responses. Generally, you do not want to give the witness a chance to give a narrative response. Ask a wide-open question on blind cross, and you lose control. The witness is free to wander hither and fro, laying out the witness's version of reality, not yours.

Another common device that allows you to try to exercise control on blind cross-examination is to ask a series of facts, leading to the penultimate punch line. The goal is to keep the witness from roaming out of the box of that yes response until the witness stumbles into the fact you want to establish. For example:

Q: It was night?

A: Yes.

Q: You were driving in this dark?

A: Yes.

Q: But your lights were on?

A: Yes.

Q: It was raining?

A: Yes.

Q: Your wipers were on?

A: Yes.

Very often, the witness becomes a "bobble head" doll, answering "yes" to each question and then you slip in the zinger—

Q: You were speeding?

A: Yes. Oops, I mean . . .

You got him. You've achieved your goal. The witness is trapped. Blind cross objective achieved.

But sometimes you are not so lucky. Sometimes the witness is either clever or antagonistic, and tries to fight being led into that yes box. The challenge for the blind cross-examiner is to doggedly keep the witness in that box of yes or no answers, regardless of how the witness tries to stray.

A common device used to control the witness who tries to go beyond the yes or no answer with a self-serving response is to continue to repeat the question until you get that yes or no. The more the witness evades, or refuses to respond directly to the question, the more the witness loses credibility with the judge and jury.

For example:

Q: You were speeding, weren't you?

A: Well, I was trying to accelerate so I could pass that car that was swerving in front of me.

Q: I apologize, sir, perhaps my question was unclear. You were speeding, were you not?

A: Well, I did accelerate; I was trying to go faster . . .

Q: Sir, I am sorry if my question confused you. I wasn't asking for anything more than whether or not you were speeding. You were going over the speed limit that night, were you not?

A: Yes.

Again, the more the witness dodges and weaves, and tries to justify unjustifiable conduct, the more the witness seems evasive, and your point is driven home. Just keep hammering away at your simple question. Eventually, you will get the admission you seek.

Another important way to keep control is to try anticipating as much as you can. Think of every possible answer to each of your questions. Then for each fork in that road, each permutation of a response, think of a follow-up question. This helps you to control the witness and steer her back to your goal, not hers.

The easiest way to control a witness on blind cross-examination is through the use of exhibits. Documents tell the story at any trial. Unlike witnesses, documents do not have memories that dim, and, unlike witnesses, documents do not lie.

Triers of fact—be they judge or jury—rely heavily on documents, especially contemporaneous ones. They are created before a party has an agenda, and, therefore, are the best indicators of truth.

Accordingly, use your documents to weave your testimony on blind cross-examination. What is the witness to do? Deny that he wrote the document? Deny that the document she wrote is a true statement? It almost doesn't matter what the witness's response is. What does matter is getting the witness's own words in writing into evidence before the judge or jury.

For example:

Q: You wrote this letter, didn't you?

A: Yes.

Q: And when you wrote that "I cannot justify paying so much for senior staff when we are missing our budget," you believed that to be a true statement, didn't you?

What is the witness to say? He lied when he wrote it? By reading the statement into the record, you are driving home its content in a far more effective way than by just authenticating the document.

This technique can be used where the witness is not the author but the recipient of the documents. For example:

Q: You received this letter, didn't you?

A: Yes.

Q: And you read it when you received it, didn't you?

A: Well, I looked at it.

Q: You looked at it to see what its contents were, didn't you?

A: Yes.

Now, the witness can vary by saying she didn't read it, but as you create your blind cross, think of each possible answer, and for each permutation, think of yet another question. For example:

Q: And when you looked at it to see what its contents were, or you read it, you saw that the letter was a notice to your company that you had 10 days to perform, didn't you?

A: Well, I'm not sure.

Q: Well, you knew this letter was important when you saw it, didn't you?

A: Well, I knew it was sent to me.

Q: You knew it was important because you signed the letter, didn't you?

A: Well, I don't know . . .

Q: Sir, the letter asks for your signature at the bottom, doesn't it?

A: Yes.

Q: And that is your signature at the bottom of the letter, where it says under the words “Agreed to”?

A: Yes.

Again, two points are made. You achieved the impact of the document, and you also exposed the fact that the witness is evasive and not credible.

The advent and indeed overuse of e-mails has made blind cross-examination through the use of documents even simpler, and the use of depositions almost superfluous. Witnesses do not talk to each other anymore. They merely e-mail each other. Hundreds of e-mails. Thousands of e-mails. We are drowning in a flood of e-mails, and they are all part of e-discovery.

The overuse of e-mails has made blind cross a much less risky task. Each witness’s testimony is set forth in his or her own words through a series of “instant messages” and endless e-mail exchanges. People are disarmingly candid in e-mails. Admissions that would never appear in a letter or a formal memorandum permeate the e-mail universe. People spontaneously write e-mails without hesitation and, more importantly, without reflection or thinking.

All you have to do for effective blind cross is have the witness repeat what he or she wrote and then merely ask if the witness believes it to be a true statement at the time he or she wrote it.

Note the way I phrase the question—a true statement *at the time* it was written. Either the witness has to confess being a liar in writing an intentionally false e-mail or the witness has to acknowledge that he believed the e-mail to be true at the time written, regardless of the fact that a different truth dawned on the e-mail author later in the litigation or in the life of the dispute.

Here is a typical exchange of effective use of e-mails in blind cross-examination:

Q: Is this an e-mail that you sent on September 2, 2007?

A: Yes.

Q: When you wrote in that e-mail you were concerned about meeting the production deadline under the contract, that was a true statement when you wrote it, was it not?

A: Yes.

Q: You knew there had been a delay in the manufacturing process, didn’t you?

A: Yes.

Q: And that—to use your words—“concerned you,” isn’t that true?

A: Yes.

Q: In fact, you anticipated that the contract production requirements were not met, isn’t that true?

A: Yes.

Q: And that was the “concern” you wrote about in your e-mail, was it not, sir?

Here, it almost does not matter what the witness says. If the witness says, “No, I do not believe my statement was true when I wrote it,” then he is admitting he is a liar. His remaining testimony is not credible because common sense tells you the document represented what was true at the time it was written. More likely, confronted with the e-mail’s memorializing

of the witness’s contemporaneous statement, the witness is bludgeoned into an admission of yes.

Accordingly, when you plot out your blind cross, go carefully through the documents, especially the e-mails. Lay them out like a long mosaic and weave them back together as you tell your story through blind cross-examination.

Too often in blind cross-examination, you do not know the answer to the question, but when you ask the obvious, you do not and should not care what the answer is.

The point of asking questions about the obvious is made with the question itself, not the witness’s answer. A common warning to witnesses is “never deny the obvious because then no one believes you on the close calls.” Keep that in mind as you draft this approach to blind cross.

For example:

Q: Now, sir, you knew there was a speed limit on that highway of 70 miles an hour, didn’t you?

A: Well, I wasn’t really sure.

Q: You knew there was a speed limit, didn’t you?

A: Well, yes.

Q: And you knew the speed limit was there for a reason, didn’t you, sir?

A: Well, I hadn’t given it much thought.

Q: And isn’t it a fact, sir, that the reason there was a limit to the maximum speed you were to drive is for the safety of not only you but everyone else on that highway?

A: I guess so.

Q: And you knew when you were driving faster than

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that speed limit you were being unsafe, isn’t that true?

A: Well I didn’t think it was unsafe. I thought I could still control the car.

Q: And you knew, sir, by exceeding the speed limit on that highway that rainy night, you knew that it exposed my client to risk of being hit?

A: I really didn’t want . . . I didn’t want to hit your client.

Q: The fact is, sir, you didn’t care, did you?

A: I did care. I just had to get there quickly.

You can see the point. By asking the obvious, it does not matter what the witness says. Everyone knows that the speed limit is there for a reason. Everyone knows it’s for the safety of not only the driver but others on the highway. And everyone knows that speeding results in a callous disregard for those around you. Point made. Cross-examination objective achieved.

No matter how much you prepare, no matter how much you review the documents and the e-mails, and regardless of how many possible answers you plot out to your questions, you will still be open to surprise in any number of forms during

cross-examination. That is true even when you have taken a lengthy deposition.

The uncertainty of trial is what creates great drama. No matter how much a witness is prepared to say the light was green as a Pavlovian response, the moment he gets on the stand, he get flummoxed, insecure, and blurts either that the light was red or he just doesn't remember.

The same is true in blind cross. Inevitably, surprises will happen. Sometimes terrible surprises.

But the key in blind cross is not to panic, no matter how tight your stomach is. No matter how much you wish you were any place but in that courtroom, you need to move on quickly to another question, another area of examination. Ask anything, no matter how trivial or tangential, but move quickly off the point.

When that surprise hits you, you cannot pause. Resist the temptation to fumble your notes or look up to the ceiling, praying for divine guidance. You only drive home that the witness has just stabbed a dagger into the heart of your case. By moving quickly, you distract the trier of fact as best as you can into some other area. Ask another question—quickly. Don't worry about whether the question flows. Ask any question—keep the pace going and preferably in a different direction. By moving quickly, you can avoid the impact of the surprise answer sinking in. Indeed, by remaining in control, you can sometimes give the impression that the surprise answer was something you expected or even wanted.

Trials are theater. And, like a good play or movie, they require a strong ending.

It is always entertaining to watch lawyers jockey with each other to get to the last question of the day, or more importantly, the last question on that Friday afternoon before a long weekend. Each side wants to have their last, distinctive impression linger in the judge or jury's mind over the evening or weekend

hiatus, and that impression needs to be favorable to the advocate's case.

Blind cross-examination is no different. Pull a series of key questions out of their "logical" order and save them for the end. Have a zinger that lets you go out on a high regardless of whether you got tagged by the unexpected adverse answer. Often, after I finish my general anticipated course of cross-examination, I have a long segment where I deal with the areas that were brought up on direct examination by my opponent. It might go on for pages and pages, but at the bottom of my pad I always save a series of closing questions.

The purpose of these closing questions is to drive home your objective or goal. They should show the theme of why you examined this witness and why her testimony is favorable to your case and not to your opponent's.

For example:

- Q: The reason you were speeding is you were late for that party, correct?
- Q: And getting to that party on time was more important than worrying about the safety of the plaintiff, wasn't it?
- Q: And that party was more important than life or death for anyone else, wasn't it?

Again, these are a series of questions asking the obvious. It does not matter what the witness answers. Your point is being made by the questions. Your questions set forth your goal in examining the witness. The theme and the objective of the blind cross have been achieved.

So throw away those deposition transcripts. Save your clients thousands of dollars of reporters' fees. Instead, cross-examine your witnesses the old-fashioned way—blindly, which, like Lady Justice herself, isn't really so blind after all. □