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CRIMINAL LAW ADVOCACY

Witness Examination

VOLUME 5E

Original Authors
PATRICK L. McCLOSKEY
Member of the New York and Federal Bars

RONALD L. SCHOENBERG
Member of the New York and Federal Bars

Updated by Alison Garfield

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Editorial Offices
121 Chanlon Rd., New Providence, NJ 07974 (908) 464-6800
201 Mission St., San Francisco, CA 94105-1831 (415) 908-3200
www.lexisnexis.com

MATTHEW BENDER

DEDICATION

To my Parents, for their guidance,
To Chris and Lynn for their patience and understanding, and
To Carol, for her love
To my wife, Judith Ann, whose love gave me meaning,
To my Parents, whose teaching gave me knowledge, and
To my Grandmother, whose spirit gave me strength
P.L.M
R.L.S.

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PREFACE

It has been said that knowledge is not power until it is employed. This volume seeks to provide the knowledge required for effective witness examination and the means by which that knowledge may be translated into the power of effective advocacy at trial. It is premised on the fact that evidence, virtually all of which is introduced by means of witness examination, is more significant to the outcome of a lawsuit than the most powerful of oratorical skills. In order for the trial lawyer to be successful, then, he must know how to shape testimony, demonstrate the significance of testimony and persuade the jury of the merit of his position with respect to testimony.

In writing this work, we sought to enable the trial lawyer to achieve this goal by demystifying the subject of witness examination by simplifying its complexities and by setting forth those principles required for effective advocacy by witness examination. The approach of the text is pragmatic. It was written for trial lawyers and for those who aspire to be trial lawyers. All theories are discussed within the reality of the trial framework; all techniques are illustrated with examples from actual practice; and all methods are analyzed with an eye toward trial strategy.

In this regard, the work seeks to provide an in-depth analysis of the critical issues that most often arise with respect to witness examination and the techniques and strategies that the trial attorney may utilize to address them. The step-by-step approach which is followed throughout serves to teach the novice how to examine witnesses, while at the same time providing important source material for the experienced trial lawyer. The text itself is supplemented by numerous practical examples that show the reader how to apply suggested techniques and how to conduct effective direct and cross-examination. After each example, a commentary is provided, highlighting the purpose of the examination, the techniques utilized to achieve that purpose and a critique of the merit of the examination. Extensive checklists are also provided, enabling the trial lawyer to gather essential information in summary fashion and to assist him or her in preparing for the examination of specific witnesses at trial.

Throughout the text we have attempted to provide a balanced approach that is relevant for defense attorneys and prosecutors alike. Many subjects are analyzed from the dual perspectives of defense and prosecution so that the trial attorney may see the entire picture as it relates to witness examination.

Although the text focuses on the criminal trial, it is not restricted to criminal practitioners. Many of the principles set forth can be followed and employed by the civil attorney as well. Indeed, the method of phrasing objection-proof questions on direct examination, provided in Chapter 5, and the methods of exposing mistaken or perjurious testimony on cross-examination, provided in Chapters 11 and 12, apply equally in civil and criminal cases.

While no text can ever substitute for actual experience, the practical information contained herein provides a basis of knowledge which, in our belief, will readily enable the trial lawyer to meet the challenges of witness examination.

In writing this work, we are thankful for the efforts of many who provided assistance. Specifically, we would like to thank Professor Abraham Ordover of Emory Law School and Professor Lawrence Kessler of Hofstra Law School for their initial encouragement and faith in our ability to complete this project. We are grateful to Michael Eisenstein and Steve Allen from Matthew Bender, who helped us throughout the project and who offered us valuable

suggestions as to the format of the finished project. We extend thanks to Kathy Donnelly, Margaret Fagan, Cheryl Indelicato, Diane Scarabino and Lynn Buckley, who types portions of the manuscript; and particularly to Susan Warren, who did so on both a regular and an emergency basis. Our deepest thanks are given to Lois Usher, who diligently typed the bulk of the manuscript and who at times literally worked through the night in furtherance of what grew to become a common goal.

P.L.M.
R.L.S.

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A COMPLETE SYNOPSIS FOR EACH CHAPTER APPEARS AT THE BEGINNING OF THE CHAPTER

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CHAPTER 10E-A

The Development of Effective Cross-Examination (Part 2)

SCOPE

No trial lawyer can succeed in court without an understanding of the component parts of effective cross-examination. This chapter dissects and explores those various parts with a view toward the attainment of excellence in the field. Principles of preparation are set forth (*See* 1 Criminal Law Advocacy, Trial Preparation for a more detailed discussion of trial preparation), as are the concepts necessary for the trial lawyer to decide whether to cross-examine in the first instance. The goals of cross-examination, clearly defined and attainable under the rules of evidence, are listed and discussed. Thereafter, the method of constructing the actual cross-examination is explained, including the various means by which the opposing witness may be reduced to the cross-examiner's control and the numerous techniques which are available to the cross-examiner to assure that his original goals are realized. Finally, the dangers of cross-examination are enumerated, so that the trial lawyer will avoid such pitfalls and end his cross-examination on a high note, with himself dominant and with his opponent defeated.

SYNOPSIS

§ 10.04E-A Constructing the Cross-Examination

It is generally the case that every witness can be cross-examined with at least some degree of success. At times, that successful cross-examination strategy is obvious and even a neophyte would succeed against the witness. More often, however, these strategies are not immediately apparent. They are not delivered to the cross-examiner, but must be shaped, fashioned and constructed from the store of knowledge possessed

by the advocate. If the cross-examiner fails to use the tools which are available to him, he may fail in his endeavor and defects in testimony which deserve to be exposed may escape unscathed. If the cross-examiner does recognize and understand the existence and use of the tools, however, he will be able to construct the proper cross-examination at the proper time and no witness who deserves to be attacked will escape his scrutiny. These tools, by which the trial lawyer may construct an effective cross-examination, are the subject of this section. They include an understanding of the logistics of cross-examination and the way in which it can be imposed upon cross-examination to assist the interrogator. They include an appreciation of the question and answer format which the law of evidence prescribes and the way in which it can, by the application of certain techniques, be turned to the cross-examiner's advantage. They include an awareness of the importance of witness control and the numerous ways to attain it. Finally, they include a full knowledge of the dangers of cross-examination, which will permit the successful trial attorney to determine exactly how far he may pursue cross-examination without himself being victimized.

[1] The Order of Cross-Examination

The construction of effective cross-examination begins with a consideration of the logistics of cross-examination order. Since the cross-examiner directs the flow of cross-examination by questions of his own choosing, it follows that he may impose any order he sees fit. This ability is something which should be neither neglected nor underestimated.

In planning the order of his questioning, the cross-examiner should give thought to the purpose of cross-examination and how it differs from the purpose of direct examination. Clearly, one purpose is the antithesis of the other. What the direct examiner seeks to build, the cross-examiner seeks to destroy; what the direct examiner seeks to prove, the cross-examiner seeks to disprove; what the direct examiner seeks to credit, the cross-examiner seeks to discredit. Because the goals of direct and cross-examination are antagonistic, the means to reach these goals are different. While direct examination generally proceeds along chronological lines, in order to allow the witness to give a credible and complete account from beginning to end, such a line of questioning is generally unsuitable for cross-examination. Indeed, following chronological order on cross-examination only affords the opposing witness a second opportunity to repeat his direct testimony and solidify his position. The cross-examiner should, therefore, studiously avoid the step-by-step chronological approach that is a prominent hallmark of direct examination. Rather, he should devise a cross-examination order that is likely to create disarray in the mind of the opposing witness and doubt as to the validity of the direct testimony in the mind of the jury.

In preparing for successful cross-examination, the cross-examiner should decide upon an order of questions which he knows and the witness does not; his questions should proceed in an order that serves his needs and interests and not those of the witness; his questions should be structured in such a way as to give himself and not the witness, control over the cross-examination; and lastly, his questions should be positioned in a way that maximizes their effectiveness. The cross-examiner can prepare such a cross-examination by following a simple, three step process:

- The cross-examiner should list all of the major points with which he would like to confront the witness. He should do this after thorough preparation but before the opposing witness testifies on direct examination.[1]
- The cross-examiner should arrange these points out of chronological order, according to what he perceives to be their greatest impact upon the jury.
- The cross-examiner should conduct his interrogation by moving from point to point, until all points are covered and the desired impression is conveyed.

A cross-examination so structured will appear to the opposing witness to be disorderly, but to the advocate it is disorderly by design. Indeed, there are many disadvantages to "planned disorder":

- It allows the cross-examiner to pick and choose his spots. He need not cross-examine the witness on every point covered in the direct testimony and his failure to do so may go unnoticed when his questions are put to the witness out of chronological sequence.
- It allows the cross-examiner to pry deeply into one area of inquiry and yet make a hasty retreat from another without adverse consequences.
- It lends itself to a strong cross-examination. By choosing to cross-examine on those points where a witness is weak or the cross-examiner is strong, it places the witness on the defensive and the cross-examiner on the offensive. This ability to select only the strong points for attack as well as the ability to position such points within the cross-examination enables the cross-examiner to build an effective cross-examination and create a favorable impression.
- It prevents the witness from repeating memorized testimony as opposed to relating independent recollections. A witness who has committed his testimony to memory is likely to have done so in chronological order. By using an "anti-chronological" technique, the witness is kept off balance. It is simply more difficult for the perjurious witness to remember a rehearsed script when he is questioned out of chronological sequence.
- It prevents the witness from anticipating the cross-examiner's line of questioning. By moving from topic to topic on cross-examination, out of chronological order, the witness does not know what question to expect next and therefore has precious little time to think and formulate his answers. Under such circumstances, the cross-examiner is more likely to catch the witness off guard. This result is frequently obtained by concealing a critical question between several harmless ones.
- It puts the witness ill at ease. When a witness does not know what questions

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[1] While it is clear that the cross-examiner cannot plan every question to be asked on cross-examination, it is equally clear that he should plan as much as he possibly can. By limiting the number of surprises, he will be better able to concentrate on and deal with those that arise during trial testimony. Likewise, by planning ahead, the cross-examiner can guarantee that proof critical to his case will be presented effectively to the jury.

he will be asked, he may become agitated and nervous. His poor demeanor may in fact lead the jury to a negative assessment of his credibility.

[a] Arranging Cross-Examination

When the cross-examiner arranges the major points with which he would like to confront the witness, he should do so in a way which is consistent with his theory of the case and consistent with his skills of analysis and advocacy. A word of caution is in order, however, with respect to the concept of "planned disorder." The cross-examiner should always endeavor to arrange his questions so that they will confound the witness but not the jury. In order to allow the jury to follow the cross-examiner's line of questioning and avoid confusion, the cross-examiner must carefully delineate the key points that he will cover on his cross-examination. A sequence of questions should then be planned for each point the cross-examiner wishes to make. While the cross-examiner may jump around within a particular set of questions on a single point, he should generally not move from one main point to another until he exhausts all of his questions with respect to the first point. The cross-examiner should then and only then question the witness on the next topic and proceed, subject by subject and point by point until he concludes.

The following example from a robbery case illustrates how such an arrangement of cross-examination might proceed. In this case, the defense attorney, called upon to cross-examine the victim who has identified the defendant as her assailant, first listed the major points of his cross-examination, without regard to order, as follows:

- The robbery took only seconds.
- The victim was afraid.
- The victim wears glasses.
- The description originally given to the police differs from that of the defendant.
- The robber wore a hat covering part of his face.
- The robber took the witness by surprise.
- The robber approached from behind.
- The robber had a gun.
- The victim did not know her assailant.
- The robber ran away.

In order to proceed to the next step (arranging his points in their proper order for cross-examination), the cross-examiner first considered his theory of the case. In this case, the theory was that the witness was mistaken in her identification of the defendant. That having been established in his own mind, the cross-examiner determined what he would like to prove in order to demonstrate his theory to the jury. Given "mistake," the cross-examiner sought to prove: (1) that the assailant was a total stranger; (2) that the victim had poor vision; (3) that the victim's state of mind was not conducive to making a reliable identification; (4) that the circumstances of the robbery prevented the victim from getting a good look at her assailant; and (5) that, as a result