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**Aspects of the Art of Cross-Examination and its
Relevance in Modern Dispute Resolution**

International Bar Association India Litigation and
Alternative Dispute Resolution Symposium

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November 9, 2024

International Bar Association



International Bar Association India Litigation and Alternative Dispute Resolution Symposium 2024

Program Details

Date & Time: November 9, 2024, Time: 11:30 a.m. – 1:00 p.m. (IST)

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Disclaimer: This lecture, along with the accompanying materials, are intended for an audience of attorneys and does not constitute legal advice. The audience should be mindful of additional case law, other authority, and legislation relating to cross-examination, as well as the rules of evidence, and other related legal concepts that exist, as well as changes in the law that might have occurred, and that might occur after November 9, 2024.

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Introduction

- What is cross-examination?
 - As defined by the Black's Law Dictionary, “cross-examination is the process of allowing the opposing party's attorney to question a witness who is testifying in court or via a deposition once they have provided their ‘direct’ testimony.”
- What is the purpose of cross-examination?
 - To investigate weaknesses in an adversary's case and utilize these weaknesses to win your case.
 - To impugn the credibility of adverse witnesses, along with their factual and legal positions.

Overarching Goals of Cross-Examination

- The adverse witness should respond to every question with “true” or “correct.”
 - Questions should be framed as statements of fact rather than inquiries.
- Make a point
 - Utilizing not only direct adverse witness testimony, but also discovery from pre-trial litigation.
 - i.e., deposition transcripts, interrogatories, documentary evidence, prior inconsistent statements, etc.

General Rules and Tips

- Use leading questions
- Cross-examination should *only* be used to advance your client's theory of the case.
 - **Example:** you are defending a client who is accused of assault and battery. The prosecution's star witness is elderly, has bad vision, and can't see well at night (the assault and battery was alleged to have occurred at night). The star witness provides a detailed description of the suspect that does not match the description of your client. You *would not* cross-examine the star witness, particularly with regard to issues relating to his or her age, poor vision, or details of the crime scene (i.e., that the incident allegedly occurred at night).

General Rules and Tips (Contd.)

- Work to further your client's theory of the case
 - Build up your client's story by getting an adverse witness to acknowledge facts that support your client's theory, or, alternatively,
 - Attack and undermine the adversary's evidence by showing that that an adverse witness is lying, confused, or made mistakes.

The Eight Most Important Rules of Cross-Examination

1. Never ask a question that does not further your client's theory of the case.
2. Never ask an open-ended question (i.e., always lead).
 - This is a *critical* point not only because it helps to mitigate the possibility that the witness may offer prejudicial testimony, but also because it trains the witness to give short answers, without volunteering any additional information, and which almost always provides a “yes” or “no” response (i.e., an answer that you know is coming and are prepared to receive).

The Eight Most Important Rules of Cross-Examination (Contd.)

3. Never actually ask questions—instead, frame these questions as statements.
 - This avoids any implication that an adverse witness has a choice about the answer. You always want the adverse witness to “agree” with you.
4. Only ask questions to which you know the answer.
5. Never ask a “loaded” question.
 - i.e., a question that operates as a conclusion, or provides for answers to something to which you do not know the answer, something that cannot be proven through impeachment, or something that may lead to potential follow up commentary.
 - Only seek out facts, keep questions short and unambiguous, and ensure that each question refers to one topic (i.e., not compound).

The Eight Most Important Rules of Cross-Examination (Contd.)

6. Never get greedy.
7. Never let the adverse witness explain.
8. Never lose (or give up) control.

Preparation

- Preparation is fundamental
 - Point to any inconsistent statement, admission, or inaccurate/incomplete statement made on direct examination.
- Things to prepare.
 - A checklist of what you want to accomplish/achieve on cross.
 - A short list of constructive and destructive facts that you would like to elicit from a witness (which will also help in framing your final argument/closing).
 - An outline of not only what you intend to ask a witness, but also the specific word choice and phrasing you plan to use during questioning on critical issues.
 - Decide whether it is best to advance your case or defense by proceeding chronologically or by themes/issues.
 - Note: proceeding chronologically can often be risky as it allows an adverse witness an easier opportunity to restate damaging testimony.
 - A theme-based approach is often the best. This approach utilizes what is a one or two sentence summary of your theory of the case that helps to point out the material facts that you need to bring out on cross-examination.
- Your presentation will prove to be effective if nothing comes as a surprise during cross.
 - i.e., everything should be anticipated and planned.

Motion *In Limine*

- In general terms, this is a motion that is made before trial seeking to either offer or exclude specific evidence during trial.
 - i.e., seeking the judge's determination on the admissibility or exclusion of specific evidence.
- Strategically, a motion *in limine* is a useful tool to help limit a client's exposure to potentially prejudicial evidence.
 - Additionally, disposing of material or prejudicial issues ahead of trial also helps to evaluate the type of risk that your client may face.
 - Objections at trial, without more (and, specifically, objections that are overruled), are generally considered to be inadequate protections against admissions or prejudicial testimony and evidence.

Organization - Structuring the Chapter Method

- The Chapter Method
 - This method is utilized to organize an attorney's cross-examination into a series of small examinations (or chapters) that focus on individual, important topics.
 - Maximizes the best evidence and minimizes any opportunity for a hostile witness to take over with prejudicial material.

The Three Principles of the Chapter Method

1. We can and should control the flow of information produced in cross of any opposing witness.
2. We can and should use the opposing witness to help prove our case.
3. We can and should package facts so that the factfinder can understand their significance at the time the chapter is performed.

A Chapter Defined

- What is a Chapter?
 - A chapter is a group of leading questions designed to accomplish a goal.
 - The facts within a chapter are presented through leading questions in a logical sequence.
 - The goal of a chapter may be to highlight a fact, to dispute or weaken a fact, to introduce a new fact, or to affect either positively or negatively the credibility of a witness (not necessarily the witness being questioned).

How to Organize Cross-Examination Using the Chapter Method

- Start with the well thought out theory of your client's case.
- Outline your ideal closing.
 - It is useful to outline (or even better, to draft) your closing.
- Identify each specific witness (and which witness will give the point you want to argue in your closing).
 - The witnesses will provide the information (or responses) that you will want to use in your closing.
- Make a list of points for each witness.
 - The points should be broken down into the narrowest concept.
- Convert each point for a particular witness into a chapter.
 - The “pages” in each chapter should be comprised of the specific questions that support the point (or chapter).
- Organize your chapters into an order that is the most persuasive for your case.
- Create transitions and/or headlines for each chapter.

Important Federal Rules of Evidence (“FRE”)

- The test for relevant evidence – FRE § 401.
 - Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.
- Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons – Federal Rule of Evidence § 403.
 - The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

FRE – Character Evidence

- Character Evidence; Crimes or Other Acts – FRE § 404.
 - This is *arguably* the most important rule to know for cross-examination, in *criminal cases*, since the credibility of the witness is usually the determinative point that needs to be probed during cross-examination.
 - Note that this rule is *mainly* concerned with criminal cases. Character evidence is prohibited in civil cases.
 - A *criminal defendant* may offer evidence of one of his or her traits, if it is pertinent to the issue that forms the basis of the trial.
- If character evidence is offered, however, the party offering this evidence opens the door to impeachment on character grounds.
- A similar carve out is provided for evidence of prior crimes or bad acts.
 - i.e., motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

Article 5 of the FRE - Privilege

- This article of the FRE governs privilege protections which prevent other admissible evidence from being offered if such evidence is protected by any applicable privilege.
- Common types of privilege include attorney-client privilege and work product.

Article 6 of the FRE - Witnesses

- This article of the FRE governs the protocol around everything that has to do with witnesses during trial.
- The most important rules to be aware of under this article speak to impeachment and character evidence.
- Under § 607 of the FRE, any party may attack a witness's credibility.
 - A witness's credibility may be brought into question through reputation or opinion evidence, or by (under limited circumstances) specific instances of conduct.
 - Note that the evidence related to a witness's truthful character is only admissible after the witness's character for truthfulness has been attacked. *See* § 608 of the FRE.

Article 6 of the FRE – Witnesses (Contd.)

- The Adverse Witness Rule – FRE § 611(c)(2).
 - (c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions: (1) on cross-examination; and (2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

Article 8 of the FRE - Hearsay

- There are many exceptions to the general rule against hearsay. The most useful piece of advice on this issue is that attorneys should memorize and be intimately familiar with each exception.
- On a foundational level, hearsay, as defined under § 801 of the FRE, is a statement that “the declarant does not make while testifying at the current trial or hearing; and a party offers in evidence to prove the truth of the matter asserted in the statement.”

Jurisdictional Considerations

- The intersectionality of jurisdictional rules invariably has an impact on the scope of cross-examination.
- For example, given that most of my practice includes litigation of matters under the scope of New York jurisdictional rules, I am most accustomed to the general New York rule (which most jurisdictions follow) that cross-examination is generally limited to the scope of matters brought up during direct examination. This majority rule closely resembles § 611(b) of the FRE.
 - However, a minority of jurisdictions do not follow this rule and otherwise allow cross-examinations to extend to matters outside of the scope of direct examination.
 - Given these nuances, it is critical that attorneys are aware of the intersections in the law and make it a top priority to raise timely objections where applicable.

Practical Takeaways on Cross-Examination

- Cross-examination is widely considered to be one of the most difficult aspects of trial practice.
 - This is mainly because during cross-examination, there exists a universe of potential unknown or confounding variables. Many practitioners feel that during cross-examinations, the advocates can easily find themselves losing control, whether by the presentation of surprising or unexpected responses from a witness or the introduction of new information that wasn't previously anticipated.
- Therefore, it is critical for attorneys to approach cross-examination with a very measured approach while focusing on intensive preparation.