DIRECT AND CROSS EXAMINATION AT TRIAL

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I. INTRODUCTION

The trial process involves several stages. Generally, these include jury selection, opening statements, evidence, closing arguments and the jury charge. Of these, the most important is the evidence. Evidence is where the truth about the case will be found. Evidence must come in through witnesses. The primary complicating factor in the search for truth which is a jury trial is the use of these witnesses. Lawyers have complete and total control over the opening and the closing arguments, some control over jury selection and the jury charges, but, at best, can only control half of the process of presenting evidence at trial through witnesses. All lawyers can do is ask questions. Unfortunately, we have to rely on nervous, amateurish, confused, and inarticulate witnesses to answer these questions and provide the facts which constitute evidence. How we go about getting those facts from the psyches of the witnesses to be effectively understood by the fact finders - jurors who are also nervous and confused - determines whether success or failure will be achieved.

This testimony which constitutes the evidence must be obtained from witnesses through the use of direct examination of our own witnesses and cross examination of hostile witnesses. This questioning of witnesses, whether on direct or cross examination, is an art which can only be mastered through a combination of preparation, practice, and good luck. "Direct examination disdained by text writers and ignored by students, is the orphan of trial strategy. Cross examination, celebrated and glorified, is the favorite of trial seminars. The cross examination is the art of destruction, direct is the art of construction." (Henry G. Miller of the New York Bar).

II. DIRECT EXAMINATION

Direct examination is the most important part of the case. "Direct examination is more important than cross examination, the opening statement or closing argument."[1] Lawyers talk about a brilliant and scorching cross examination but it is the direct examination through which the plaintiff's case is won or lost. Most of the evidence in the plaintiff's case comes in through direct examination. Direct examination is often given too little attention and time by attorneys. Instead, the focus is on preparing for, and conducting, a blistering cross examination of the opposition's experts and lay witnesses. This is a mistake! Unless the jury has been convinced by the evidence, which comes in through the direct examination of the witnesses on whose testimony the case hinges, there is no amount of cross examination which will salvage the case. Cross examination is merely damage control; direct examination establishes the prima facie case. In fact, if the case is not proven during the direct examination of the plaintiff's witnesses, it will fail by directed verdict. Simply put, for plaintiff's counsel, direct examination is the most important part of the trial and has the greatest impact on the result. "What happens during direct examination is a dynamic system of intercommunication. The lawyer asks a question of the witness and it is registered not only by the witness but also by the jury, the judge, and the opposing attorney. The witness's reply is registered not only by the asking lawyer, but also by all the above-mentioned participants in the process."[2] Direct examination is nurturing, nourishing, and supporting your witness, focusing the spotlight on him or her. (In direct, the witness is the star, the one who does all the telling.)[3]

An effective direct examination of witnesses will be achieved if there is good preparation, good pace and rhythm, and good luck.

A. WITNESS PREPARATION

One of the most important aspects of direct examination is witness preparation. In cross examination, counsel can prepare, and the witness can prepare, but they usually cannot prepare

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1 James W. McElhaney, *Trial Notebook*, p. 102.

2 Roberto Aron, et al., *Trial Communications Skills,* § 22.05, p. 258 (1986).

3 S. Hamlin, *What Makes Juries Listen*, (1995), p. 188.

together as they can for direct examination. Thus preparation is one of the most important distinguishing elements between cross and direct and it cannot be neglected.

i. Group setting

The very best way to prepare a single witness is to make that witness part of a group. When witnesses are gathered as a group, they gain strength from each other. Group preparation enables the lawyer to compare the witnesses to see how each will testify and allows each witness to have a better understanding of his particular role in the trial. The plaintiff must be present so that the witnesses will know on whose behalf they are testifying. Witnesses are often scared of the trial process because they have never testified before. Gathering all of the witnesses together at once will assure each individual that what they are about to go through as a witness is an experience shared with others. This inspires confidence in the witnesses and also makes them feel good about being part of a group in which they have an important role. Additionally, as the group shares their individual recollections, each individual's own personal recollection is improved and sharpened. A group setting also insures a consistency in the overall presentation of evidence. This is unquestionably important in convincing the jury.

Of course there must also be some degree of individual preparation for each witness. Where the group setting is an overview of the case and a roundtable discussion, the individual preparation consists of going over the proof outline relevant to each individual.

Whether prepared as group or as individuals, it is important that the trial process be explained to each witness. This guarantees comfort in the courtroom and helps witnesses tolerate the long time spent in the courthouse hallway or witness room awaiting their time to testify. In this part of the preparation, explain the process of striking a jury and the opening and why it is important to have talked to the witness so that the statements made in the opening and during voir dire will be truthful and factual. Let each witness know that in direct examination you must ask open ended questions - often called the "W" questions - who, what, when, why, where. Each witness must also be prepared for cross-examination so that they will not be scared of the process and will be able to get through this aspect of their testimony without damaging the truth they want to communicate in their direct testimony.

ii. Make sure THEwitnesses know the trial theme

When preparing the witnesses tell them the trial theme so that they will understand how their testimony fits into the total picture. With luck they will chose answers and use word pictures and phrases which incorporate the theme. If the jurors do not understand the trial theme it must be adjusted. Do not hesitate to get input from the witnesses.

iii. Make sure the witnesses know the relevant jury charges

Testimony is not given in isolation. It is meaningless without relevance to the law which governs the case. Accordingly, it makes sense for the witnesses to know what law governs the case. This way they know their role and why they are important as witnesses. Each witness must know the legal point their testimony supports. This will help the witness focus his or her testimony and make them feel more a part of the team.

iv. Do not over prepare witnesses

The lawyer must be thoroughly prepared and must know everything there is to know about the case. This is not necessarily true about the witnesses. While preparation of witnesses is imperative, it must not be so overdone that spontaneity is lost. Witnesses who are over rehearsed lose all candor and credibility. It is a judgment call as to how much to prepare, but as a general rule the witness must be thoroughly familiar with the facts but not necessarily the particular questions. Questions and answers which are rehearsed lack the rhythm and pace found in truthful conversation. Similarly, when witnesses are prepared for specific questions, if they fumble an answer, or if the questioner changes the questions in some way, the witnesses will likely be confused and answer the questions they were prepared for instead of the question actually asked. Additionally, when the lawyer and witness work from a script the lawyer loses his ability to have a feel for the jury and to adjust his questions to match the jurors' curiosity and reactions.

a. Make Sure Each Witness has Reviewed Their Deposition, Statements, and Interrogatory Responses.

A witness who has been deposed or given a statement must be very comfortable with that prior testimony. (Use Rule 26 to get copies of the witnesses' depositions. A copy of a letter we have witnesses send to defense counsel requesting their deposition transcript is attached to this paper.) Depositions and statements are the tools of cross examination and witnesses must be thoroughly prepared to have them read to them and be able to explain each and every discrepancy. There are many ways to handle testimony which differs from that given in statements or depositions. Compete candor is unquestionably the best - if a witness says

something in their deposition which they wish to change, or which conflicts with their trial testimony, they must candidly admit the difference and have a credible explanation such as confusion, additional research, or further consideration. If a significant point is going to be changed, it should be handled on direct so that the punch will be stolen from cross examination.

When preparing the lay witness for cross examination at trial, the witness who is comfortable with the trial theme and their role in the trial can use cross examination as an opportunity to re-enforce and repeat their direct testimony. However, witnesses must answer the questions and lay witnesses should be cautioned about arguing with the other lawyer.

b. Make a List or Summary for the Witness.

No one can be expected to remember every doctor bill or lost wage figure. The federal and state evidence rules allow a witness to use notes to refresh his memories so long as he is actually testifying from memory refreshed.[4] Notes can be prepared by the lawyer or the witness; however, care must be taken if the lawyer prepares the notes to insure that the witness knows how to interpret the notes. It is a good idea to have the witness take an active role in the preparation of notes they will use in their testimony so that they can testify truthfully under cross examination that the notes were prepared by them. Although notes used to refresh the witness' recollection are not supposed to be reviewed by the opposition, it is harmless error if this is allowed so be sure that there is nothing in the notes which you do not want published to the jury.[5]

A summary of the medical bills or other financial data can actually be offered as an exhibit so long as the underlying materials are available.[6] Summaries are especially helpful as the cover sheet for stacks of medical bills, lost wages, and doctor visit histories. A plaintiff who does not have to worry about this kind of detail will be much more comfortable when testifying about the really crucial aspects of the case - the human aspects of their injuries.

v. Clothing

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4 O.C.G.A. §24-6-69; Fed. R. Evid. 612.

5 *Seaboard Coastline R.R. v. Delahunt*, 179 Ga. App. 647, 347 S.E.2d 627 (1986).

6 *Tyner v. Sheriff*, 164 Ga. App. 360, 297 S.E.2d 114 (1983).

The most important aspect of clothing for witnesses is that it be courtroom appropriate **and** witness appropriate. Never put a necktie on a man who does not own one as the jury will easily see this as an effort to fool them. Witnesses who are not comfortable do not look truthful. Advise the witnesses to wear what they would wear to a job interview or to church. At a minimum, men should wear shirts with collars and women should be cautioned against too much makeup and overtly provocative clothes. All witnesses should be told not to wear too much jewelry.

vi. Demeanor

Witnesses should be advised to speak to the examiner without being rude to the jury. In other words, they should usually look at the lawyer asking them questions but should occasionally glance at the jury also. A good technique is to tell the witness that his conversation is with the lawyer but that he should occasionally glance over to the jury as if to acknowledge a stranger who joined him and the lawyer at a restaurant. Of course, if a question asks the witness to "tell the jury," the witness should look at the jurors when doing so. Witnesses should assume a truthful position in the witness box, sit up straight, with arms to the side or on the desk in front of them but not crossed over the chest, and witnesses should be warned against talking with a hand covering their mouths. They should speak loudly enough to be heard by the examiner, but should remain calm and not be argumentative.

vii. Demonstrative evidence

Make sure the witnesses know how to use the demonstrative evidence. Ask them to explain it a couple of times so that when it is used, they will be familiar with it. If a hand drawn exhibit is used, have the witness draw part of it. Make sure the witness has practiced drawing the exhibit. It is important that the witness draws at the right size and scale. Sometimes if a drawing is used, it is helpful for the lawyer to draw the entire drawing and for the witness to only add some detail. The witness can then be asked if he assisted the lawyer in preparing the drawing and they can honestly say that they did. If you use prepared demonstrative evidence, make sure the witness has seen it and is familiar with it before you put them on the stand.

B. LAWYER PREPARATION

i. Know every fact

The successful direct examiner will know every fact and be familiar with every aspect of the case. He will have read all of the depositions, reviewed all of the medical records, and met with and personally selected and prepared the witnesses. He will know the answer to every question he asks on direct just as he should on cross-examination. He will know the limitations of each witness and the areas where a witness will help and hurt the case.

ii. Know the law that governs direct examination

Knowing the law governing direct examination is essential to a successful examination. If the opponent knows you know the law, and how to lay a foundation, and how to ask a non-leading question, she will be a lot less likely to interrupt the pace and flow of the direct examination with unnecessary objections. Understand what kinds of questions open the door for the introduction of evidence that would not otherwise be admissible on cross examination and avoid them.

a. Georgia Law.

Direct examination is done with direct questions as opposed to leading questions. A direct question is one that is best described as one that does not lead the answerer to a certain response. A leading question is one that suggests the specific answer desired.[7] Leading questions are allowed only during cross examination.[8] However, leading questions can be asked during direct examination, in the discretion of the trial court, of a person of immature years,[9] or if the witness is hostile.[10] Additionally, leading questions are allowed during a party's case in chief if the witness is an agent of the opposite party. This is because an agent or employee of an adverse party can be called for purposes of cross examination under O.C.G.A. §24-9-81. This statute provides:

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7 *Lowe v. Athens Granite & Marble Co.*, 104 Ga. App. 642, 122 S.E. 2d 483 (1961).

8 O.C.G.A. §24-9-63.

9 *Daniels v. State*, 230 Ga. 126, 195 S.E. 2d 900 (1973).

10 O.C.G.A. §24-9-63.

> a party may not impeach a witness voluntarily called by him except where he can show to the court that he has been entrapped by said witness by a previous contradictory statement. However, in the trial of all civil cases, either plaintiff or defendant shall be permitted to make the opposite party, or anyone for whose immediate benefit the action is prosecuted or defended, or the agent of said party, or agent of any person for whose immediate benefit such action is prosecuted or defended, or officer or agent of a corporation when a corporation is such party, or for whose benefit such action is prosecuted or defended a witness, with the privilege of subjecting such witness to a thorough and sifting examination and with the further privilege of impeachment as if the witness had testified in his own behalf and were being cross examined.

When a witness is called pursuant to this statute, for the limited purpose of cross examination, it is within the discretion of the trial court to permit the witness to be questioned at that time by his own counsel.[11] Because it is within the trial court's discretion whether to permit examination by the witness's attorney, careful counsel will inquire from the court about its intentions before calling the witness. Certainly, it is not advantageous to have a lengthy direct examination in the middle of your case if that examination is going to hurt you. Remember, a witness can only be called for purposes of cross examination under this statute, if, at the time of trial, the witness is an agent or employee of the opposite party.[12]

b. Federal Law.

One of the most significant differences between Georgia and federal law concerning direct examination really relates to cross examination. In Georgia, the cross examiner is allowed

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11 *Jones v. Chambers*, 98 Ga. App. 433 (1956).

12 *See Mullis v. Chaika,* 118 Ga. App. 11 (1968); *Atlanta Americana Motor Court v. Sika Chemical,* 117 Ga. App. 707 (1968).

a thorough and sifting cross examination.[13] As a result, it does not matter what is or is not covered on direct as the cross-examiner can cover just about any relevant subject he so desires. In federal court, the scope of cross examination is limited by the scope of direct, and direct must be more carefully crafted if the examiner wants to limit the topics which can be covered on cross examination.

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13 O.C.G.A. §24-9-64.

C. COURTROOM PRESENTATION

i. Physical location when asking questions

On the direct examination, the witness must be the star for that witness to have credibility. One way to accomplish this is to attempt to stand behind the jury so that you are asking questions as if you were in the jury box. This naturally focuses the jury's attention on the witness, who in turn must look across the jury in order to answer the question. The focus must remain on the witness and not on the lawyer.

In many courtrooms the court assigns tables with the plaintiff nearest the jury and the defense furthest away. If you are not sure of the table assignment, get to the courtroom early to reserve the table nearest the jury. The purpose of getting the table nearest the jury is to make yourself part of the jury. Sit at the end of the table nearest the jury instead of near the middle of the courtroom. The successful plaintiff's lawyer will want the plaintiff to be in the middle of the courtroom with himself nearest the jury so that the jury can be led to believe that it is the plaintiff's lawyer who is asking questions for them. Work to create the bond with the jury at every opportunity.

ii. Organization of questions

The proof introduced through a witness must be relevant to the legal issues and trial theme or it will be a waste of the jury's time and the jury will punish you for doing so. Just as importantly, the proof must be presented in an interesting fashion. To insure that interest is maintained, preparation of the questions, or more properly the proof checklist or outline, should include not only the facts which must be introduced through each witness but also the order of those facts. The order should make sense and correlate with the trial theme.

a. Use the Trial Theme and Jury Charge.

Regardless of the order of the proof chosen, the questions must serve to prove the legal elements of the case and to "colorize" the otherwise black and white trial theme. The use of the very words of the trial theme and the jury charge are most important here. *The American Heritage Dictionary of the English Language* defines theme as "[a] topic of discussion, often expressible as a phrase, proposition, or question." "Themes link narrative and argument to show

the role of human action in producing the particular plot. These stories don't just happen, but they are caused by the actions of the parties."[14] Another author puts it this way: "[t]he theme is the 'storyline' of the case. . . . [It is] the soul or moral justification of your case. It is rooted in human behavior and sociocultural attitudes, and is sometimes more intuitive than analytical."[15] Put still another way, the "theme should be that explanation of the facts which shows the moral force is on your side."[16] "Strong themes crystallize complex concepts and arguments, fixing in jurors' memories the ideas they represent."[17]

All of the above sounds impressive, and certainly each of the sources quoted above should be read when the curious trial lawyer finds the time, (perhaps while waiting for the jury to return), but the definition which is most useful when attempting to choose a theme is this:

> A trial theme is the single phrase which lends credibility, through human experience, to your version of the facts. An effective trial theme will leave a jury with no choice but to apply the facts, presented within the framework of the legal theory of recovery, and award you a verdict.

This concept of "theme" is meaningless if not used. With a little thought and preparation, it can be incorporated into the questions just as easily as it is into the opening and closing arguments.

b. Chronological.

Presenting the case chronologically is probably the most commonly used technique for the organization of a direct examination. The problem with this technique is that it is the lazy lawyer's crutch and is used in circumstances when an impact direct will be more effective. A chronological organization of direct testimony simply follows the time line relevant to the case. Unfortunately, following a time line takes a lot of time. Jurors have limited attention spans, and

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14 Robert V. Wells, *Techniques of Expert Practitioners,* §6.08 p. 209.

15 Purver, Young, Davis & Kerper, *The Trial Lawyer's Book: Preparing and Winning Cases,* §6:3 p. 86-87.

16 Lake Rumsey, *Master Advocates' Handbook*, p.1.

17 Amy Singer, "Jury-Validated Trial Themes", *Trial*, October, 1994.

sometimes by the time the important facts are reached, so much time has passed that the jury is unable to absorb the most important testimony. The role that primacy plays in presentation of facts cannot be ignored.

c. Impact.

A more effective method than the simple time line approach is to focus on the subject of the witnesses' testimony, and create an impact with them early in the testimony. This method wastes little time in getting directly to the reason the witness was called to testify. As discussed below in more detail, an impact direct of a surgeon has the surgery described before the long history of failed conservative care is discussed. It is imperative to get to the blood and guts of the testimony while the jury is still interested and perceptive of the witness.

One of the more effective ways to use an impact technique is to get the essential fact out early, with little detail, and then after the impact is felt by the jury to then begin to flesh that testimony out with detail. This is much like creating a child's coloring book - first the outline is drawn and then the details are colored in. If the image the lawyer wants the jury to convey is the plaintiff lying bleeding on the crosswalk, this needs to be described to the jury broadly and early in the testimony and then the minutia of how the plaintiff came to be lying in a pool of blood can be added after the jury's attention has been captured.

iii. Form of questions

Direct examination questions should be in an outline or proof check list format. There must be flexibility. The questions must be short and open ended. There must be a rhythm and rapport with the witness. The lawyer must become part of the jury. By becoming a part of the jury the lawyer can establish a rapport as well which adds credibility. When asking questions, ask them as if you were in the jury box and part of the jury. Instead of "Tell the jury . . .", use "Tell **us** . . .".

One of the most important goals of a direct examination is to satisfy the jurors' logical curiosity. Accordingly, questions should be asked as if you were actually in the jury box and did not know anything about the case. Too often the lawyer knows so much about the case that he fails to include details or explanations which are essential to the jurors' understanding. It would

be easy, after handling dozens of anterior cervical fusion surgeries for example, to fail to ask the doctor to explain all of the anatomy involved and to explain the use of the various instruments used in scraping the bone down until it bleeds. This must be fought at every turn. On the other hand, counsel must be careful not to get so much detail that the pace of the examination is lost and the valuable attention span of the jurors is wasted on minor details.

There is perhaps no more important rule in questioning than to keep the questions short, clear, and precise. Many lawyers use a simple rule of thumb during direct examination. Simply put, if the question begins with a "W", it is okay. Questions beginning with "who, what, when, where, why" are almost always direct examination questions. On the other hand, questions beginning with "D" are often leading. These leading questions usually start with "did" and "do".

Questions must be short and clear. Complex questions confuse the jury and the witness. Avoid legalese. There are entire lists of words which should be avoided. Simpler than remembering a list of words is to follow this basic rule - if a bright seventh grader cannot understand the question, then the question is likely too complicated.

Control the witness by using transitional phrases as the start to questions when changing subjects. Phrases such as "Now lets move from what Mr. Smith looked like as he was lying in a pool of blood on the sidewalk and turn our attention to how he got there" let the witness and the jury know that a new topic is going to be discussed.

Make sure to cover harmful information. This is imperative to sustain the witnesses' credibility and to spoil the opponent's cross examination.

"Finally, make your direct examination brief and well organized. By making an outline of your direct examination, you will be able to go through it quickly and cleanly, avoiding the outrageously prolix repetitiveness which is the key note of the lawyer who keeps on asking questions just to make certain he has covered everything. While it would be a mistake to read all the questions to the witness, it is a good idea to work out the exact wording of the important ones in advance, making the direct examination of your expert witness a high point in the trial."[18]

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18 James W. McElhaney, *Trial Notebook*, Chapter 21, p. 166.

a. Use an Outline.

As noted above, written questions are rarely successful in presenting a candid conversation to the jury. Written questions tie the examiner and the witness to a script which is inflexible and looks exactly like what it is - a script. Scripts are used in movies. In jury trials, the questions should be the same ones the jury would ask if it were allowed to do so. A curiosity must be satisfied. Try to figure out what the jury wants to know and ask about it for them.

b. Use Buzzwords.

Not only must the theme be woven into the direct examination but the examination must also focus on key words. These key words should be taken not only from the trial theme but also the jury charge. "Reasonable care," "proximate cause," and similar kinds of key words should be repeated throughout the examination if they are important words which will be included in the jury charge. Use not only words but also entire phrases taken directly form the expected jury charge. At the end of the trial when the judge quotes the witness during the charge to the jury this gives tremendous credibility to the witness' testimony.

c. Do Not Lead.

Leading questions not only violate rules of evidence but also violate a rule of persuasion. The jury is not impressed by a witness who only answers yes and no all the time. Additionally, the lawyer who habitually leads will have one of two things happen. He will be constantly interrupted with sustained objections and admonishments from the court, a process which will ruin any chance of establishing the rhythm and pace necessary for credibility; or, he will be accused, in the opponent's closing argument, of doing all of the testifying instead of the witnesses doing so. This ruins not only the credibility of the witnesses but that of the lawyer, too.

Sometimes a witness will know something and cannot, for whatever reason, give an intelligent answer to an open-ended direct question. In these circumstances, it is often a good idea to lead the witness, even in the face of an objection, in order to bring the witness back on track, refresh their recollection, and otherwise assist them. Just because a leading question is objected to, and the objection sustained, does not mean that the subject of the question cannot be

covered by a subsequent direct question.[19] There are ways this can be accomplished without being too obvious. Sometimes these semi-leading questions are good transitions and sometimes they are simply necessary to assist a forgetful witness. An example for a witness who freezes up and can't recall why he is being called to testify would be to say: "where in the intersection did the truck hit the car?" Similarly, if the witness has trouble moving the story along, or forgets a detail shared with counsel during the preparation, a helpful leading question might be: "after the truck hit the car, what happened to the car when it was pushed off of the roadway?" The two prior examples were basically open questions with some additional facts thrown in. These next two examples are more clearly leading but can nevertheless be helpful to a stalled witness. A closed non-leading question would be as follows "which was going faster, the truck or the car?" And the last of the questions, which is actually a genuinely leading question, would be as follows: "Didn't the truck run through the red light, cross the center line, and crash into the car in the far right hand land?"

Keep in mind that "[t]he jury judges you based on how you examined the witnesses. They will accept or reject the testimony they hear based very much on how you get it."[20]

Consciously practice direct examination during discovery depositions.

i. **The witness is the star.**

The cardinal rule of direct examination is that the attorney should never do anything that will detract from the witness or diminish the impact of the testimony.[21] Using leading questions in direct examination violates this rule. When leading questions are used, the facts come from the questions and thus the lawyer is the star and witness is the yes or no man. In no way can this be allowed to happen. The witness must be allowed to connect with the jurors or they will not believe any of the facts which come in through their testimony. One of the worst mistakes made by lawyers, even experienced lawyers, is to become so familiar with the case that during direct

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19 *Heisler v. State*, 20 Ga. 153 (1856).

20 S. Hamlin, *What Makes Juries Listen* (1995), page 9.

21 Scott Baldwin, *Art of Advocacy, Direct Examination*, § 22.01 [10], p. 22-12.

examination the lawyer wants his version of the facts told to the jury so badly that he simply leads the witness throughout the entire examination. This makes the lawyer the star, deprives the witness of an opportunity to gain credibility with the jury, and moves the focus from the witness to the lawyer where it least belongs. Never forget that "[t]he part of the process called direct examination has a "star"; the witness, who is the natural focus of the performance."[22]

iv. Listen to the answers

The best questions are of no use if they do not connect to the answers being given by the witnesses. Accordingly, it is imperative to listen to the witness and study the jury's reaction to each Q&A exchange. This must be the guideline for the next question. If the witness has confused the jury on a particular matter, the topic cannot be left until the matter is cleared up. If the questioner does not listen to the witness, the jury will sense that the lawyer considers himself more important than the witness and this will prevent the witness from becoming the star. Why, after all, should the jury pay attention if the lawyer is not?

v. Pace and rhythm

Perhaps the single most important rule of direct examination is rhythm and pace. Explain to the witnesses that direct examination is like a dance in which you get to lead (albeit using direct questions). Make sure they understand that if you are interested in a topic that you will choose when to ask about it - it is lawyer who will be in control of the rhythm and pace of the examination. This may sound silly, but listening to a Motown tape on the way to the courthouse, with the witnesses, will establish rhythm which is very easy to follow in the trial. "The pace and flow of direct examination is just as important as its content and organization."[23] Rhythm and pace is established by listening to the witness, knowing the facts that witness can establish, and getting the testimony in efficiently and smoothly.

vi. Use of demonstrative evidence

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22 Aaron Fas Klein, *Trial Communications Skills*, p. 258.

23 James W. McElhaney, *Trial Notebook*, p. 104.

When a witness is referring to demonstrative evidence, or to an exhibit, it is imperative that the record be considered. This sometimes requires wallowing in detail but this can be easily resolved by simply describing, as accurately as possible, what the witness is doing. Tell the jury why you are describing the witnesses' movements so that they will not be aggravated by your commentary. Prepare the witnesses to describe what they are doing - again, it is essential that the witness know how to use demonstrative evidence before the trial and that they rehearse its use.

Do not hesitate to request that the witness leave the jury box to use the demonstrative evidence. If the witness has been carefully chosen, you will know whether they can use the demonstrative evidence to teach the jury. If you know the witness is not comfortable demonstrating the evidence, do not spend a lot of time with it. The witness will begin to lose credibility if he or she fumbles around and loses their confidence in front of the jury.

vii. Call witnesses in a logical order

In determining the order of witnesses for direct examination for the plaintiff's case in chief, it is important to start strong and end strong. Many commentators suggest that the plaintiff always be the first witness. This is not necessarily a good idea as the plaintiff's testimony, being the most important, must be given as clearly and eloquently as possible. Having a plaintiff, who is nervous and has never been in a courtroom, as the first witness is very risky. This is why I rarely call the plaintiff first. On the other hand, starting with a witness who has nothing to lose, who can be selected not for the fact that they are a party but because of their eloquence and because of the facts they add to the case, can be very effective. Additionally, by allowing several witnesses to testify before the plaintiff, the plaintiff's testimony can be more consistent with that of the other witnesses, they can correct any deficiencies in their testimony, and they will be more relaxed as they will have already seen cross examination and will be familiar with the courtroom proceedings.

While it is technically true that the defense can ask for the plaintiff to be sequestered until called, this is in the court's discretion and it is exceedingly rare for a court to prohibit the

plaintiff from participating in the entire trial.[24] If it is insisted upon, the decision to call the plaintiff first is more attractive. However, more often, the trial judge allows the party to remain in the courtroom even if they are the very last witness called.

D. DIRECT EXAMINATION OF AN EXPERT

The examination of an expert witness is essentially the same as the examination of a lay witness. The difference is that the lawyer gets to select the expert and should expect a higher level of skill and jury appeal. On the other hand, the jury also expects a higher level of testimony and will be intolerant of an ill-prepared or bumbling direct examination of an expert witness.

The best and most carefully selected expert will be of no value if they are not given the opportunity to be an effective witness. This means testifying in response to open ended, direct questions designed to make the expert the focus of the jury's attention. Cross examining your own expert with leading questions is ineffective and should be avoided at all costs. The witness must remain firmly and solidly within the confines of his or her expertise. To do otherwise not only risks the possibility that the expert will not be allowed to testify but also exposes the witness to effective cross examination by the opponent.

Tell the expert specifically what to do when there is an objection. They must know to look at the person asking them questions and not merely stare at the jury the entire time. That makes them too professional and makes it look like they are presenting a show. They should know not to look at the counsel that retained them when things get tough. For example, the entire credibility of an expert was lost when, throughout his cross-examination, which was on videotape, he almost continually looked at the lawyer who retained him instead of at the lawyer who was asking the questions. This was devastating to his credibility as it appeared that he was very concerned about his answers and was apologizing to his employer even as he spoke.

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[24] *See e.g., Walden v. Marta*, 161 Ga. App. 725; *Bowen v. National Service Industries*, 161 Ga. App. 727.

It cannot be overemphasized that the lawyer must make the expert aware of the importance of presentation techniques. The use of the actual demonstrative aids, before trial, will insure that the witness is effective. Further, the witness must be made aware that the collective intelligence and attention span of the jury is similar to that of precocious seventh graders.

The direct examination of an expert must include several topics. The expert must provide his educational qualifications, his experience, his opinion, and the relationship between his opinion and his qualifications and the work he performed in reaching that opinion. An effectively planned and implemented direct examination will present these areas in the correct sequence and with the appropriate emphasis for the particular case. Proper timing and balance is what separates an effective direct examination from a waste of time and money.

i. Expert witness examination hints

"Preparation is the most important part of direct examination in general and of direct examination of an expert in particular. It is not the only part. If the questions are not properly phrased, even the best prepared expert can have difficulty establishing a dialogue that will communicate to the jury. Conversely, a skillful lawyer can salvage the case when the expert freezes on the stand."[25] "The attorney who has become completely conversant with the scientific and medical issues in his case should take care as well, that he does not forget himself and use incomprehensible jargon in his questions, leaving the jury in the dark as to what is being asked."[26] "Good preparation means not only that the witness knows what is going to be asked, but also that the phrasing of the answers, including the choice of words, has been gone over carefully in advance. If the witness delights in arcane terminology, . . . [counsel] should consider calling some other expert."[27]

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25 Roberto Aron, et. al., *Trial Communications Skills,* § 29.16, p. 391.

26 Scott Baldwin, *Art of Advocacy, Direct Examination*, § 22.01 [10], p. 22-12.

27 *McElhaney,* Chapter 21, p. 165.

The examination technique which is chosen for any particular expert must relate to that expert's particular personality, the area about which they will testify, their qualifications, and the qualifications of opposing experts, if any. In circumstances in which there will be no other treating physicians, it is a waste of time to go into extensive testimony about the qualifications and training of the expert himself. All this does is distract the jury and waste everyone's time. With these unchallenged experts, one can get right to the meat of the case - the causal link between the injury and the event and how that injury will effect the plaintiff for the rest of their life.

When there is going to be somewhat of a fight about the credentials of experts, and their competing opinions, the expert's credentials should be discussed in more detail. Special care and attention must be given to the credentials which relate specifically to the area about which the expert is going to testify. Even a family physician can be made to look quite knowledgeable about orthopedics when he testifies concerning his orthopedic rotation and the fact that he sees people for orthopedic injuries every single day of his practice and has for the last thirty years. Sometimes, the caring family physician can be made to be even more credible than the orthopedic surgeon who merely fixes the bone and does not see the patient much for follow-up.

ii. Use a method that insures impact

"The expert must be told to control himself or herself to prevent information overload to the jury."[28] The jury should be made to see the expert as an authority independent of counsel, as well as one whose expertise, manner, and impartiality make his or her testimony both believable and important in the jury's eyes.[29]

"The expert may not think he or she needs visual aides to make a point with a jury. The expert is wrong. The lawyer should be prepared to supply visual aides for the expert and to go over them prior to trial"[30] Demonstrative evidence is essential to the effective expert witness. This kind of evidence often takes weeks to arrange; therefore, counsel should begin the steps necessary for its use very early in case preparation for trial. It does not make much sense to save $1,000.00 by not obtaining good demonstrative aids until it is too late to use them. Enlarged photographs, models, positives of MRI's and x-rays, should all be used as needed. It is important for the expert to be involved in the preparation of the exhibits so that he will be comfortable using them and so that they will be accurate. Keep in mind that some jurors learn from a visual standpoint and some jurors learn from an auditory standpoint. Counsel must present the information in ways which will appeal to both kinds of learners.

A direct examination which has real impact with the jury will focus on the plaintiff and why the expert is being asked to ***help the jury*** understand the issues which concern the plaintiff. In other words, the focus is not on the expert - it is on the opinion about the plaintiff and why the jury needs the expert to provide them with that expert opinion. Countless medical depositions are taken every week in which the focus seems to be on the doctor's medical school, board certification, and hospital affiliations instead of on the plaintiff's injuries. By the time the questions begin to focus on the plaintiff, the jury is long since beyond its collective attention

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28 Roberto Aron, et. al., *Trial Communications Skills,* § 29.12., p. 387.

29 Postal, *A Legal Primer for Expert Witnesses, For the Defendant*, February 1987, at 21, 23-25.

30 Roberto Aron, et. al., *Trial Communications Skills,* § 29.13, p. 388.

span. This is especially inexcusable given the fact that in most cases, the expert's credentials are not in dispute. Anyone who has read multiple depositions over the course of a trial knows the jury's reaction when it sees counsel pull out another one inch thick, one hour deposition. The reaction is far from welcoming!

When dealing with an expert witness who has testified on numerous occasions for a firm, it is important to establish that the witnesses is credible, that there are other witnesses available who can testify as to the same topic if the defendant chose to retain such a witness, that the witness has been allowed to testify on the subject in state courts, federal courts, in that very court house, and for both plaintiffs and defendants. This is often the case with an economist who will be used over and over again by plaintiff's counsel.

The most important questioning tool when questioning an expert witness is curiosity. Ask what the words the doctor uses mean. Too often lawyers become as familiar with anatomy as physicians and they fall into the habit of speaking in medical terms to impress themselves and the physician. Do not do this. Instead, pretend that this is the first time you have ever heard about the L5/S1 disc and have no idea where it is or what it does. Similarly, ask why a portion of the expert's resume is relevant to his testimony. Ask the questions that a very curious eighth grader would ask.

Never waive the qualifications of a witness. However, if you can get the other side to stipulate to the qualification, that is a different matter. Sometimes this can be done in a smaller case where there is only one treating physician, there is no real question about causation, and the real fight concerns either liability or the value of the damages claimed.

Many lawyers interrupt their direct examinations to ask the judge to accept the witness as an expert. This is not a good practice as it breaks the flow of the testimony and exposes the expert to the possibility that the defendant will then ask for an opportunity to voir dire the witness. Instead assume the expert is an expert and keep going until the other side stops you. When qualifying an expert, it is important that the qualifications be focused on the witness's education, training and experience in the pertinent field of study and that they not be limited to

merely conclusory statements such as "I am an expert."[31] The opinion will be out quickly and efficiently this way.

A direct examination of a treating orthopedic surgeon, which will stay focused and have impact with the jury, can follow this outline.

a. name?

b. professional address?

c. specialty?

d. what is that?

e. in this specialty, is the doctor familiar with injuries caused by (slipping and falling, or rear end car wrecks, or crushing injuries caused by unsafe machines, or injuries caused by unsafe workplaces)?

f. in this specialty, is the doctor familiar with injuries to the (neck, back, knee, etc.)?

g. is the doctor familiar with Joe Plaintiff?

h. how did Joe come into the doctor's care?

g. what history was provided?

h. was surgery eventually performed?

i. describe the surgery.

- here use diagrams, positives of MRI's, positives of x-rays, rods, pins, etc.

j. was the need for surgery consistent with having been caused by the event described in the history? (This opinion needs to be held to a reasonable degree of medical certainty in most cases.)

k. prior to surgery, what efforts were attempted to treat Joe Plaintiff by conservative means?

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31 *McDonald v. Glen-Brunswick Memorial Hospital*, 204 Ga. App. 7 (1992).

l. after the surgery, was Joe Plaintiff restored to the state of good health he enjoyed prior to the event described in the history?

j. what does the future hold for Joe Plaintiff?

A direct examination by deposition can take as little as eighteen to twenty pages of deposition and in court will be read in about twenty minutes or less. Usually count on about 55 seconds per page of testimony to read a deposition. If the transcript is read by someone other than counsel (perhaps a paralegal, or other assistant in your office), make sure they are familiar with the correct pronunciations of the often technical terminology in the deposition. The same examination by live testimony can be slightly longer as long as the expert's focus is moved around the courtroom (showing exhibits, etc.) which will keep the jury's attention.

In a case involving competing experts with diametrically opposed opinions, the direct examination has to focus more on the experience and credentials which support the opinion and which will convince the jury that this expert should be believed over the opposing party's expert. An effective outline, with impact, might follow this outline:

a. name?

b. professional address?

c. specialty?

d. what is that?

e. in this specialty, is the doctor familiar with injuries caused by (slipping and falling, or rear end car wrecks, or crushing injuries caused by unsafe machines, or injuries caused by unsafe workplaces?)

f. in this specialty is the doctor familiar with injuries to the (neck, back, knee, etc.?)

g. have you assisted jurors in other cases understand cases similar to this one?

h. have you done this at the request of both plaintiff's and defendant's counsel?

i. have you been allowed to do this in state and federal courts, even in this very courthouse?

h. what have I asked you to help **us** understand? (Never separate the jury from the plaintiff.)

g. what is that opinion?

h. what training and education do you have which helped you come to the opinion that Joe Plaintiff was injured by the defendant?

i. what materials were provided to you which helped you come to the opinion that Joe Plaintiff was injured by this defendant?

j. what other information did you rely upon which helped you come to the opinion that Joe Plaintiff was injured by this defendant?

k. with all of this in mind, is there any doubt in your mind that Joe Plaintiff was injured by this defendant?

Again, the focus has been on the plaintiff and the relevant portions of the expert's experience which are relevant to the plaintiff. Additional focus and impact can be achieved by continually referring to the opinion and how the particular expert is best qualified to render that opinion.

iii. Use the trial theme

Every trial needs a consistent theme. This theme must be a thread running through every witnesses' testimony - not just in the opening and closing arguments. For example, in a case in which the plaintiff died sixty nine days after smoke inhalation the theme was "It took 69 days for a bad locomotive to kill a good man." The expert was asked about the 69 day period repeatedly in order to stress the connection between the event and the death. Of course, the expert was aware of the theme and testified consistent with the theme regularly referring to the 69 day period.

iv. Use buzzwords

When dealing with an expert who is of a profession which requires licensure, it is important to ask, as one of the foundation questions, whether the physician, engineer, or other expert is licensed in his particular field. While not absolutely required by the law, asking

whether the expert holds his opinion to a "reasonable degree of medical or engineering or scientific certainty" is important. Many judges will listen for these "buzzwords" and it is a good idea to use them.

v. Use the jury charge

The expert's testimony should be consistent with the jury charge. This will not only insure that the elements of the burden of proof are met, but will also give the expert's testimony added credibility when the jury hears similar concepts and language from the trial judge. The expert should be made aware of the law which will governs the case.

vi. Avoid hypothetical questions if possible

Hypothetical questions immediately take away from the expert's credibility. The very word "assume" alerts the jury that the expert does not know the facts. With treating physicians the hypothetical question is rarely needed because the history has been provided to the doctor. With other experts, the hypothetical question can be avoided in a variety of ways including putting all of the evidence necessary to support the opinion into evidence before calling the expert to testify.

> The hypothetical question has long been criticized on the grounds that it is boring, confusing, too complex, repetitive of testimony, encourages bias on the part of the witness, and is time consuming because it gives counsel the opportunity to give a summation in the middle of the trial. The modern trend is to dispense with the hypothetical, subject to the approval of the trial judge. Thus, the questions calling for the opinion of an expert need not be in hypothetical form and the witness may state his opinion and reasons without first specifying the date upon which it is based.[32]

E. CONCLUSION

Direct examination is the most important part of the plaintiff's case. The evidence established thorough direct examination establishes the plaintiff's case. Care must be taken to

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32 Scott Baldwin, *Art of Advocacy, Direct Examination*, § 22.04 [1], p. 22-19.

insure that the witnesses are prepared, that the questions make sense and are logically presented, and that counsel recognizes the paramount importance of this phase of the trial.

III. CROSS EXAMINATION

Cross examination is supposed to be exciting, fast, and fun to do - and watch. With proper preparation, a carefully laid plan, and some good luck, it can be all of this and more. However, as noted above, cross examination is not as important as direct and the advocate who expects to score big points during cross examination instead of direct will be lucky to survive directed verdict. Effective cross examination, like effective direct examination, is 10% inspiration and 90% perspiration.

A. PREPARATION

The most important part of preparation for cross examination is to be prepared to "just say no" to cross-examination. If nothing can be gained, let the jury know that the witness is nothing important - not even worth questioning. On the other hand, if the witness can be *hurt*, or the case *helped* by the agreement of the witness with certain aspects of the case, or if additional helpful evidence can come in through the witness, then cross examination is called for. In determining whether or not to cross examine, the following questions must be answered:

(A) Has the witness really hurt you?

(B) Is the witness impeachable?

(C) Is the witness' testimony consistent with your version of the facts?

(D) Has the witness inadvertently helped you?

(E) Can the witness help your case?

If a witness has not hurt you, and cannot help you, do not cross examine him. The Honorable Marion T. Pope once wrote that "no matter how many books you read, seminars you attend, or cases you try, you will never be an effective practitioner of the art of cross examination until you learn to cross examine with a purpose." No rule of cross examination could be truer. A cross examination without a purpose does three bad things - (1) it wastes the jury's time; (2) it presents the possibility for the witness to inflict additional damage; and (3) it allows the opponent who may have forgotten to ask some crucial question an opportunity to do so on re-direct.

i. Know the case

There is no substitute for knowing the case inside and out. Witnesses, even experts, rarely know the entire case - they just know their part. As a result, the attorney who knows the entire case and what every witness knows, or should know, has a real edge in cross examination. Equally important to knowing the facts of the case is to know the witnesses and what they can or cannot do for your case. Prior to trial, read everything in the file - even old notes and correspondence. Read all of the depositions and witness statements. Read all of the notes taken during depositions. Read the jury charges, the pleadings, discovery responses and the pretrial order.

ii. Know the witness

Witnesses who are going to be cross examined must be familiar. Discovered how they will react to cross examination and what their strengths and weaknesses are. This can be accomplished in a variety of ways. Certainly there are formal depositions, but there are also other ways such as interviews, the use of ATLA and similar data bases, and old fashioned calling around to other attorneys and experts who may have retained or deposed them.

If you depose a witness, do not so thoroughly tip your hand that there is little surprise left for cross examination. Instead, focus on what they know, their sources of information, and their methods of formulating their opinions if they are an expert. Additionally, particularly in cases involving expert scientific testimony, determine the methodology used by the expert in formulation of their opinion because if all experts agree on the methodology, then regardless of the difference of opinions reached, your expert will at least meet the threshold requirements to testify. Impeaching an expert during their deposition will certainly take away any possibility for surprise at trial.

It is usually impossible, and certainly not practical or advisable, to depose every witness in a case. A simple interview is often preferred. Do not hesitate to interview a witness when it is ethical to do so. It is amazing how lawyers believe that the only way to talk to a witness after a case starts is by deposition. This is ridiculous! The use of a deposition to interview a witness guarantees that the other side will be there and learn what the noticing party learns. Instead,

consider having the witness come to your office and take a detailed statement, before a court reporter, without even inviting the other side. Additionally, while you must be concerned about contacting a witness represented by counsel, you should also know that just because a witness used to work for the defendant does not mean the defendant has the only access to the witness. In fact, a lawyer may interview former employees of a represented corporate opponent so long as the former employee consents after the lawyer fully explains the lawyer's purpose.[33]

> DR 7-104(A)(1) and Proposed Rule 4.2 are not intended to protect a corporate party from the revelation of prejudicial facts but rather to preclude interviewing those corporate employees who have the authority to bind the corporation. [Instead, the] clear purpose is to foster and protect the attorney-client relationship and not to provide protection to a party in civil litigation nor to place a limit on discoverable material. The comment language[34] . . . allows for communications with an agent or employee who has his/her own attorney without notice to the organization, corporate entity, or its attorney. This language defeats the purpose advanced by defendant . . . .[35]

This interpretation is consistent with State Bar of Georgia Formal Advisory Opinion No. 87-6 (87-R2) which interprets Georgia's rules of conduct. "The Code of Professional Responsibility, like a statute, should be construed so as to carry into effect the intent of the governing body

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[33] Formal Advisory Opinion Board of the State Bar of Georgia, 94-3; Opinion 87-6; Standard 47; Rule 4-102; ABA Rule 4.2 (9/9/94).

[34] The comment language referred to is the official comment to Proposed Rule 4.2. That language is as follows: "If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule." This comment was quoted in the State Bar of Georgia Formal Advisory Opinion No. 87-6 (870R2).

[35] *DiOssi v. Edison*, 583 A2d 1343, 1345, 1346 (Del. 1990) (footnote added).

which enacted it. The construction given should be in harmony with the policy of the law and must square with common sense and sound reasoning."[36]

State Bar of Georgia Formal Advisory Opinion No. 87-6 (87-R2) cites with approval ABA Informal Opinion 1410 (1978). That opinion answers the question of whether a plaintiff can interview employees of a corporate defendant to see what facts they know which would shed light on the plaintiff's claims. The opinion provides that:

> ***[g]enerally*** *a lawyer may properly interview witnesses or prospective witnesses for opposing sides in any civil . . . action* ***without the prior consent of opposing counsel*** *- unless such person is a party . . .* [and] no communication with an officer or employee of a corporation with the power to commit the corporation in the particular situation may be made by opposing counsel unless he has prior consent . . . .

(emphasis added). Thus, the general rule is one allowing communications with the employees of a corporate defendant. It is acceptable to interview the ex-employees of a corporate defendant.[37]

DR 7-104(A)(1) and Proposed Rule 4.2 only prohibit an attorney from interviewing employees of a corporate opponent, when the corporate opponent is represented by counsel, *if* the persons sought to be contacted are members of one of the following two groups:

(1) an officer, director, or other employee with authority to bind the corporation; or

(2) an employee whose acts or omissions may be imputed to the corporation in relation to the subject matter of the case. For a person to be bound by the tortious conduct of his agents and servants, there must be tortious conduct by them.[38] If the servant or employee is not

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36 *In the Matter of Dowdy*, 247 Ga. 487, 492 (1981) (citations omitted).

37 The Formal Advisory Opinion Board of the State Bar of Georgia has opined at 94-3 9/9/94 that a lawyer may interview former employees of a represented corporate opponent so long as the former employee consents after the lawyer fully explains the lawyer's purpose. Opinion 87-6; Standard 47; Rule 4-102; ABA Rule 4.2.

38 *See*, O.C.G.A. §51-2-2.

responsible for any tortious conduct, neither will be the principal unless it has independent tortious acts.[39]

An interview can even be conducted in the hallway of the courthouse. If there are two lawyers representing the plaintiff, while one is in the courtroom, there is nothing to stop the other from going out into the hallway and interviewing the defendant's next witness. If you do not have co-counsel available, have a paralegal informally interview witnesses as they wait to testify.

iii. Know the law that governs cross examination

Cross examination differs depending on the jurisdiction. Know the legal limits. Not only is it necessary to know the legal limits but each court seems to have its own rules on how aggressive a lawyer can be and how much testifying he can disguise as a leading question. If unfamiliar with the court, go and watch a portion of a trial to get a feel for the judge's demeanor. Just as rhythm and pace are essential for direct examination, rhythm and pace are similarly important to a successful cross examination. If the court and opponent both interrupt the cross examination with objections, there is no hope for a smooth rhythm and steady pace.

a. Georgia Law.

The right to a thorough and sifting cross examination shall belong to every party as to witnesses called against him.[40] This right is considered a substantive right and extends to all matters within the knowledge of the witness.[41] Of course, the subject of the cross examination must be relevant.[42]

When conducting a cross examination of a witness, it is not a waiver of any objection made during the direct examination of that witness if the objected to subject is covered. Georgia law provides that "if on direct examination of a witness objection is made to the admissibility of evidence, neither cross examination of the witness on the same subject matter doing the

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39 *E.g., Townsend v. Brantley*, 163 Ga. App. 899 (1982).

40 O.C.G.A. §24-9-64.

41 *The News Printing Co. v. Butler,* 95 Ga. 559, 22 S.E. 282 (1894).

42 *Palmer v. Taylor*, 215 Ga. App. 546, 451 S.E. 2d 486 (1994).

introduction of the evidence on the same subject matter shall constitute a waiver of the objection made on direct examination."[43]

b. Federal Law.

Whereas in state court there is a guarantee of a thorough and sifting cross examination, in federal court "cross examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination."[44] Because the scope is within the discretion of the judge, it is often a good idea to get a ruling, at the bench, before going into a topic not covered on direct to avoid having the flow of the cross examination broken by sustained objections.

iv. Listen to the answers

There are two occasions during which the answers must be considered on cross examination. First, one must carefully listen to the direct examination. Second, care must be taken to listen to the answers to your own questions.

a. Answers to Direct Questions.

The answers to the opponents direct examination questions must be carefully considered. Take notes and mark the areas which need to be followed up on in cross examination. Before beginning cross examination, number the marked topics so that the cross examination will have the most force and impact. This also serves to put together several related topics which were separated during direct examination.

b. Answers to Cross Examination.

Cross examination, like direct, is not conducted in a vacuum. There are two primary participants - the lawyer and the witness. While the answer is not always as important as the question, it must be heard, understood, and reacted to. Often witnesses begin moving in the

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43 O.C.G.A. §24-9-70.

44 Fed. R. Evid. 611(b).

direction of the questions and more open ended questions can be used if the examiner is conscious of the witness's response.

Similarly, lawyers must not allow a witness to avoid answering the question. The witness will obfuscate, vacillate, and complicate. But they will not answer. If the question calls for a yes or no insist on the yes or no before allowing the witness to explain. Do not hesitate to write a question on the board to insure that the witness and jury know the question that you want answered.

B. DECIDE ON GOALS

There must a purpose for every cross examination. If counsel is prepared, they will pretty much know what they can hope to get from the other side's witnesses before they testify.

i. Know your goals

There are several goals which are relevant to cross examination and lists of cross examination goals are legion. However, when all is said and done, there are only two basic goals in cross examination - (1) to impeach the witness or (2) have the witness help your case. If the witness is unimpeachable and cannot help your case, do not cross examine him. Just say no!

a. Impeachment.

Cross examination for purposes of impeachment is probably the most common reason for cross examining a witness. After all, if the witness can be shown to be biased, or incompetent, or to have simply made up his testimony, you not only hurt that witness but the entire case of the opposition.

The late professor Erving Younger described nine possible ways to impeach a witness on cross examination. He divided these into three groups. The first group relates to competence. Within this group, he includes the following subsets: (1) oath; (2) perception; (3) memory; and (4) communication. Oath and communication are rarely successful impeachment tools. It is the rare witness indeed who will testify that they did not understand their oath or who cannot communicate. However, perception and memory can be effective impeachment topics but only if the examiner does not ask too many questions. If too many questions are asked, there is a likelihood that the witnesses' recollection will be refreshed by the very act of the questions. The use of prior depositions and statements are used to impeach memory as well as the simple passage of time. When relying on the passage of time as a tool to show memory problems, point out details that the witness does not remember. If notes such as a police report or investigation report were created at the time of the event, confirm that the purpose of the notes was to memorialize the event to aid in memory and that if it was important, it would be included in the witness' notes. Ask the witness to recall the day before or the day after or other similarly

recorded events. However, before asking any question, make sure you already know the answer the witness will give.

The famous cross examination of the witness to a car wreck who was one mile away cannot be forgotten. After the witness testified that he was one mile away but was certain the light was unquestionably red, the cross examiner, hoping to attack the witness' perception, asked this fatal question "If you were one mile away you couldn't possible tell that the light was red could you?" To which the witness replied "Of course I could, I was in the telescope store looking through the 5000X telescope they have set up there when I saw the whole thing. I was marveling to my wife how I could even read your client's license plate numbers."

The second group of impeachment techniques described by Professor Younger includes (1) bias/prejudice/interest/corruption, (2) conviction of a crime, (3) prior bad acts, (4) prior inconsistent statements. This group is similar to the prior group except that care must be taken to insure that it does not look like you are beating up the witness. This is especially true when using crimes and bad acts as impeachment techniques. It is one thing to use criminal conduct to impeach a thug, it is another thing altogether to use an old conviction to impeach someone who has clearly turned their life around.

When cross examining company officials, a good start is often to confirm right away, that they are company officials and that if the event complained of occurred as you allege, it would reflect badly on them. This establishes a bias toward protecting themselves and their company.

Prior inconsistent statements can be found in depositions in the case being tried and in prior cases. Call around town and get copies of as many prior depositions as possible. Searching for this information can sometimes take a lot of time but is worth the effort. For example, in a toxic tort case, after reviewing more than five thousand pages of testimony, a quote was found in which the defendant's in-house toxicologist claimed the chemical at issue was as safe as milk. This ridiculous testimony contrasted greatly with his subsequent testimony that the chemical should be handled with great care. The most common method of impeachment is with

depositions. Know how to lay a foundation as to time, place, person, and circumstances before attempting to cross examine with a deposition.[45]

The last group consists of a single method which is to call another witness who testifies that the witness who is sought to be impeached is not credible. This is rarely workable in most cases unless the witness who is to be impeached has told the impeaching witness a story which is inconsistent with their present trial testimony.

b. Score Points.

Regardless of whether impeachment is attempted or not, a witness called by the defense can often be used to score points and re-enforce the plaintiff's case. There are two basic methods of doing this. Highlighting the helpful points made by the witness during their direct testimony, and having the witness agree to certain essential points necessary to the plaintiff's case, even points which are not really in controversy such as the severity of the injuries suffered, can make a witness who appeared to gut your case seem as if they were actually called by you.

Having a hostile witness agree with or confirm certain essential points in the plaintiff's case is one of the most powerful cross examination techniques available. It not only diffuses the opponent's case but it also builds, in the most credible fashion, the plaintiff's case. However, this must be done very carefully - particularly with expert witnesses.

With an expert witness, particularly when no retained expert was called in the plaintiff's case, an effective cross examination can follow an outline in which it is established that the expert is being paid several hundred dollars per hour and if you were paying them that amount, they would have agreed with the applicable standard of care, would have agreed on certain distances, would have agreed on the fact of the injury, etc. Then conclude by asking the expert if you both agree on all of the facts in the case, the only thing the defendant really bought and paid for was an opinion.

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[45] This foundation work is necessary in state court pursuant to O.C.G.A. §24-9-83. It is not necessary, at least before the impeachment is accomplished, in federal court. Fed. R. Evid. 613.

Another effective technique is to use a chart of facts on an easel. On the easel, list five or six topics and as the expert agrees with each one, check them off. This can be used quite effectively in closing.

However, never write down an agreement or statement from the expert that is not exactly what he said. Jurors will not tolerate being misled. Have the expert agree with your use of language as you write to avoid being seen by the jury as trying to twist the expert's words and ideas to your advantage.

C. COURTROOM PRESENTATION

i. Physical location when asking questions on cross examination

Now is the time for the lawyer to be the star. Stand in center stage and take the witness' thunder with questions that say it all. Look at the jury when asking a particularly important question to let the jurors know that this point is a killer for this witness. If, on the other hand, you are confident that the answer will be the key, then move to the location where direct is done so the spotlight is on the witness.

ii. Organization of questions

Any cross examination should start off strong. The jury is expecting Perry Mason-like results and wants these results right away. Accordingly, focus on the first five questions to satisfy the jury's need for primacy. Also focus on the last couple of questions, as this will satisfy the jury's need for closure. During witness' direct examination, it is essential to listen carefully and take notes. As the notes are taken, put a blank next to the portions which need to be covered in cross examination and before beginning the cross examination, number the blanks in an appropriate sequence to keep the examination tight and focused.

Always try to maintain an appearance of fairness in cross examination. In a very complex toxic tort case with multiple experts on both sides, a very well known lawyer for the defendant violated this rule and was punished for doing so by the jury. This lawyer had a habit of writing down what he believed to be the key points of his cross examination in response to the witness's answers. Unfortunately for him, he wrote down the key points in a manner which was

different from that testified to by the witness. The jury thought this unfair and did not trust him at all after this, although his case was certainly a strong one.

One of the most famous axioms of cross examination is to never ask one question too many. All of us can learn from the time worn story of the lawyer defending the man accused of biting off another man's ear in a bar fight. After the witness had testified on direct examination that the defendant had bitten the victim's ear off, the unfortunate defense lawyer asked two questions, one of which was one too many. The first question was "Did you see my client bite off the victim's ear?" to which the witness said "no." The question which violated the maxim was "How then do you know my client bit off the victim's ear?" to which the witness said "I saw him spit it out."

a. Use an Outline.

Writing out specific questions makes more sense for cross examination than it does for direct. However, if cross examination is to have rhythm and pace, the examiner must be able to move rapidly and specific written questions usually tie the examiner to his notes instead of to the particular focus of his attack on the opponent's witness.

b. Use the Trial Theme and Jury Charge.

An effective trial theme will be used throughout the trial. This includes the voir dire, the opening argument, the direct, and yes, the cross examination of the opponent's witnesses. Having the opponent's witnesses describe the scene in the words used in the trial theme is incredibly effective. Incorporate the theme into the questions and get the witnesses to agree to its relevance. The theme can be considered the mantra of your trial. It should be repeated, referenced, illustrated, and expanded upon at every turn. This continually repeated theme will, if used throughout the trial, including in cross examination, like an effective advertising jingle, will "echo in the Jury's mind when they retire" to decide your client's fate.[46]

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46 Lake Rumsey, *Master Advocates' Handbook*, p.4.

When possible, ask the witness questions that incorporate buzzwords contained in your anticipated jury charges. This will make another connection for the jury when they deliberate the witnesses' testimony as it relates to the jury charges.

iii. Control the witness

Do not allow the witness to take control of the courtroom. In direct, the witness is the star. In cross-examination, the lawyer must control the courtroom - both by physical presence and mastery of the witness. Insist on answers. Do not allow speeches. While it is important to control the witness and keep him focused on the question, do not bullying and do not be rude. Instead, gently remind the witness that the process is one of questions and answers and that the lawyers are required to ask the questions and the witnesses to give the answers. Speeches are not part of the process.

iv. Pace and rhythm

Cross examination must be kept moving or the jury will believe that the witness is winning. It must be quick and well-paced. It cannot be allowed to drag. In the face of a terrible answer, one must ask the next questions so fast that the terrible answer will have no time to float like a battle ship. It must be sunk immediately with a flurry of quick questions with known answers. At the same time, when cross examining a witness, always look for a good place to stop. This is consistent with one of the cardinal rules of cross examination which is to keep it short and effective. Stop on a high note. In fact, it is sometimes better to eliminate an entire line of questioning if the answer to a question presents a particularly high point for stopping.

D. CONCLUSION

There is no substitute for preparation. Both direct and cross examination can be practiced during depositions. This is particularly true of direct examination. Awareness of the courtroom and the jury can only be obtained by trying cases. Knowledge of the rules can only be learned by study.