Preface

CEB published *Essentials of Cross-Examination* by Judge Leo R. Friedman (deceased) in 1968. It is one of CEB's most popular publications. A generation of new lawyers was introduced to the art of cross-examination by way of that book.

Many lawyers have requested that CEB publish a more comprehensive book covering both cross-examination and direct examination. *Effective Direct and Cross-Examination*, by William A. Brockett and John W. Keker, is such a book. Their discussion of examination also covers depositions and voir dire, as well as trial and witness preparation, evidentiary matters, and strategy.

The authors have written a fundamental guide for trial lawyers that can be read from cover to cover, perused as a source of trial ideas, or used as a refresher of advocacy skills.

The content of the book is derived in large part from the experiences of the authors. William A. Brockett and John W. Keker are not simply successful and experienced civil and criminal trial lawyers. They are scholars of advocacy who have pondered their trial experience as well as that of other trial lawyers in order to distill the essence of effective witness examination in civil and criminal cases.

In contrast to most CEB books, the smaller format of this book is modeled after the 1968 book. The tone of the presentation, like that of the 1968 book, is more personal than the tone of the standard CEB practice book, resulting in an entertaining as well as useful book.

Herbert Gross, CEB Assistant Director, supervised the project. Special research assistance was provided by Robin A. Dubner, David Fuller, Lorraine Hirsch, R. Lane Parker, Mary Bruce Reid, Mindy Spatt, Linda Stoick, and Janette L. Tom.

Sheila Elphick, CEB Senior Editor, edited the manuscript and handled production. The book was designed by Grier Thornburg. Grace Angerman prepared the index.

The cut-off date for the book is December 31, 1985.

William A. Carroll

Director

Foreword

EFFECTIVE DIRECT AND CROSS-EXAMINATION is the best trial practice book I have read. It is a credit to its authors and CEB and a benefit to our profession. Drawing upon their extensive trial experience, John Keker and William Brockett have written a book that not only thoroughly and effectively analyzes witness examination but serves as a primer for the entire trial. It dissects trial strategy and tactics. It offers insight into the taking of depositions, organization of documents, selection of jurors, recurring examination of witnesses, and how and when to make objections. It has a detailed outline of evidentiary rules for both state and federal courts. It provides many sample questions and examples from actual trials. The appendix contains invaluable lists of the mechanics of and other suggestions for preparation and trial, a number of time schedules and check lists, and a compilation of books, publications, and other materials dealing with trials.

Those seeking an easy answer, a quick fix, or some secret to trial work and examination of witnesses will be disappointed. There is nothing in the book which is novel or surprising. Its basic theme is well known to all who have any familiarity with trial work: preparation, organization, and hard work are the foundation for successful trial practice. What is unique about *EFFECTIVE DIRECT AND CROSS-EXAMINATION* is that its authors have practiced what they preach. Through painstaking preparation and organization centered around witness examination in a single volume bursting with suggestions and supporting examples, they have created a work that will serve as a standard. Anyone who follows its mandate will be a more effective trial lawyer, regardless of prior experience.

EFFECTIVE DIRECT AND CROSS-EXAMINATION will be a vital part of every trial lawyer's library. It will also be of interest to all lawyers, judges, and legal scholars who are concerned with or who follow trials.

Charles B. Renfrew

Director and Vice-President

Chevron Corporation

San Francisco

Judge (Retired)

U.S. District Court

San Francisco, California

Introduction

Trials are fun. Reading this book will not teach you this. Only trying cases will.

Trials are not fun if you approach them like a mathematics test, rather than an adventure. Do not attempt to follow all of the suggestions in this book. Neither of us ever has, or ever will.

Do treat this book like a smorgasbord: pick up a voir dire suggestion here, an impeachment idea there, a repeating pattern examination elsewhere. Do not overeat, or you will never feel ready to go to trial.

President Truman asked in exasperation for "one-armed advisors" after hearing his fill of "on the one hand this, on the other hand that" advice. We have given much "one-armed" advice in this book. The book is crisper and easier to read for it.

You should take our firmly expressed views like the Unitarians take Moses: they believe Moses came down from the mountain with the Ten Suggestions.

Many of our directives will be wrong for you; some may even be wrong for us. We have tried to provoke thought and spur creativity by challenging conventional wisdom and by proffering occasionally risky ideas for direct and cross-examination. If you are afraid to take occasional risks, you should look for some line of work other than trial lawyer. This does not mean you should take our risks without independent thought.

"Blessed are the forgetful, for they get the better of their mistakes." The same can be said of authors of books on trial techniques. We are neither omniscient nor preternaturally polished, whatever this book implies. Most of the model examinations here have a basis in our own experiences. But, the rough edges have been smoothed out, additions have been made, and failures airbrushed out. Most of the illustrative mistakes have been our own.

We tell you this to encourage you to get to trial. Recognize how imperfect the best of trial lawyers are, how inadequate and frightened the best of them feel, and you will be able to press through the anxiety and stress of pre-trial preparation into the existential and vibrantly alive world of Effective Direct and Cross-Examination in trial.

John W. Keker

William A. Brockett

About the Authors

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1

Strategy and Tactics

I. STRATEGY

§1.1 A. Theory of Case

To Update

Trials are stressful, fact-filled, and laced with legal issues. Counsel must not become so obsessed with detail as to miss the essential case.

The lawyer should be able to write down the main themes of the case in 50 words or fewer, and to hammer those themes home to the jury. Each of those themes must be humanized for the jury.

A successful advocate should be able to pick out from hundreds of pages of unfavorable deposition testimony two or three major themes. If counsel can then parade those points before the jury every day of the trial, they will weigh more heavily in the scales than the background noise of unfavorable details.

Typical case themes are:

1. Plaintiff is greedy and a teller of tall tales.
2. Defendant is a heartless corporation with no regard for human values.
3. The opposing party is relying on a mass of virtually incomprehensible technicalities.
4. The client is a nice person who could not have done the things charged.
5. Defendant has done so many bad things that she must have committed the crime charged.
6. We harmed the defendant, but she is exaggerating her injuries beyond credibility.
7. The other side is dishonorable and lying.
8. A deal is a deal.
9. The facts of this case are too confusing to justify finding for plaintiff.
10. Technically plaintiff may be right, but it would be terribly unfair to give them what they ask for.
11. The victim deserved it.
12. They were out to get us for improper reasons.

One or more of these themes adequately describes most cases, however complex. Some of the themes, strictly speaking, are irrelevant, *e.g.:* "Technically they may be right, but it would not be fair to give them what they ask for." Those themes must be presented ethically, between the lines.

Before beginning any examination, single out "slogans" or catch phrases. In a civil case, for example, if an expert has used "quick and dirty" to describe his initial opinion, use that phrase over and over again. If an executive has described a dangerous condition as of "no concern to Acme," return to that characterization as often as possible. The advocate aims to have the jury, in deliberation, seize on these phrases as descriptive of an entire issue.

For another example, in a criminal case, the prosecution depended on a felon and proven liar as their chief witness. Defense counsel asked each government agent about the extent of this informer-witness's misdeeds. Then, counsel established the agent's reliance on the informer, followed by the question: "And Jones was an honorable man?" The agents were forced to admit that Jones was not an honorable man, but must be trusted in this case. The phrase was then naturally interwoven into a hard-hitting closing argument.

Ideally, the catch phrase used will come from the mouths of adverse witnesses. If a witness excuses error by describing it as "an innocent blunder" counsel should inquire of that witness, and other hostile witnesses, about every additional error or misjudgment: "Was that an 'innocent blunder'?"

If a government police agent excuses sloppy practices by claiming to have been in a "hurry," use that word again and again in asking about other careless practices. If a defendant in a criminal case defends some of his actions by claiming that "Charlie forced me," the prosecutor should ask over and over whether Charlie "forced" defendant to do other bad acts the witness admits.

Counsel should not lapse into sarcasm when using these catch phrases on cross-examination. The jury may be put off by heavy-handed questioning; the judge may find the questions argumentative.

The lawyer must step back from the case, and realistically evaluate the chances of winning. If counsel is fighting against the odds, she must prepare to take risks that would normally be unwise. In a weak case, counsel will need to: ask more questions without knowing the answer; cross-examine dangerous witnesses; put the defendant on the stand in a criminal case; and generally attack more aggressively.

§1.2 B. Flexible Use of Theory of Case

The trial lawyer must remain flexible and not be wedded to any theme. If a theory of the case develops obvious weaknesses, abandon it. Conversely, if potential new theories arise during trial, recognize and develop them. If counsel finds himself bogged down in details in some line of questioning, he should finish quickly and move on to another area.

In a first-degree murder case, self-defense was defendant's initial theory. During the trial, a prosecution toxicologist testified about the probable effects of the victim's ingestion of barbiturates on his behavior just prior to death. Since it had been proven that defendant had also taken large quantities of barbiturates before the murder, defense counsel made the toxicologist his own witness, and established the factual basis for a verdict of voluntary manslaughter, based on diminished capacity.

In another criminal case, the defendant postal carrier was charged with stealing money from letters, while he sorted them. Three postal officers testified that they observed him through binoculars. After the first case resulted in a hung jury, the prosecution built a scale model of the entire post office, including the vantage points for the postal inspectors. During lunch break of the second trial, defense counsel worked with the model and discovered that one could not even see the desk where the defendant had sorted his mail from the supposed vantage point. The theme changed from "they were out to get us" (because of defendant's union activities), to "they are lying."

Strategy extends even to clarity of presentation. In virtually all cases it is essential to simplify issues for the jury. Clarity is a virtue.

§1.3 II. TACTICS

Most trials are like great literature in one respectthey will be structured chronologically or by cause-and-effect. In order to decide on the most effective organization of the client's case, counsel must decide: (1) what is the theory of case; (2) what tone to set; (3) what facts must be presented; and (4) how to keep the jury's attention. Above all, the attorney must not lose the essence of the case in an effort to master detail.

Most cases fall into one of four categories:

1. *Emotions.* Human feelings are central to the case. Counsel must arouse emotions in the jury, or blunt them.
2. *Intellect.* Complex issues, difficult scientific questions, or voluminous facts must be communicated effectively to the jury. See chap 7.
3. *Law.* Court rulings on evidence and issues are more important than other aspects of the case. See chaps 11-12.
4. *Unpopular client or cause.* Either counsel's client or the facts of the case are outside mainstream experience. Representation of an accused mass-murderer or defense of a corporation charged with vindictively firing an aging employee share this aspect, in differing degrees.

With experience, counsel will develop other case categories. Once a general theme is established, counsel can begin to think about details: (1) which friendly witnesses should appear briefly; (2) which should be showcased; (3) which hostile witnesses must be confronted and cut down to size; (4) which ignored; (5) how to hold the jury's attention during dry stretches of factual exposition; (6) how to minimize that one very damaging piece of evidence; and (7) how to be effective despite a limited case budget.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/1 Strategy and Tactics/§1.4 A. Case Atmosphere

§1.4 A. Case Atmosphere

To Update

At every trial, whatever the chances of winning, counsel should project confidence.

The lawyer should work out a trial style which fits his true personality. If counsel has a blunt personality, he should not try to become an English barrister with a cultured Oxford manner on cross-examination. If counsel is methodical and low-key, that style should be used at trial. Whatever counsel's natural style, to successfully try cases, counsel should strive for:

1. *Good humor.* Judge and jury will appreciate it. Counsel should not wisecrack at the wrong times, but should remain cheerful in trying circumstances.

2. *Control.* Witnesses, documents, and facts should be where counsel can reach them in a hurry. If a document cannot be quickly located, the attorney should hand the file to the witness, and ask "please find the letter of November 30 and read it to yourself." Let the witness do the fumbling.

3. *Exude confidence.* No one will believe counsel's case if he does not. Confidence is transmitted by tone of voice, body language, and by the ability to maintain a bored countenance while opposing counsel scores mercilessly on a key witness during cross-examination.

When cross-examining, good cheer and confidence are invaluable. Even awkward attorneys who often ask many foolish questions can be effective. The ever-cheerful examiner will never be wounded too badly when an answer backfires. For example:

> Q. Why then did you believe that Joe Smith was violent?
> A. He strangled my cat.
> Q. [With the utmost good cheer.] Oh, *that's* your story, is it? And that story is the *only* reason for your so-called belief that Joe Smith is violent?
> A. Well, yes, I suppose so.

A cold transcript cannot convey the force of a confident tone in persuading a jury that a cause is right, a fact is so. Counsel must consciously work on confidence, keeping in mind that *every* attorney, however debonair in appearance is internally seething with insecurity during trial.

Finally, the lawyer should treat courtroom personnel and witnesses with unfailing courtesy. The attorney's courtesy toward a witness can lapse, if and only if the witness has given the jury good cause to dislike or distrust the witness. The jury will reach such conclusions long after the examiner. Good relations with the court clerk and court reporter help keep your exhibits in order and your transcripts ungarbled.

> PRACTICE TIPS
>
> Treat the courtroom like a stage. Before trial, plan placement of the actors and stage props. You are most effective operating six to ten feet from the jury box. If your client has a pleasing manner, seat the client to have constant good eye contact with the jury (and with the judge if possible). If your client is shifty-eyed, put him behind some exhibit boxes.
>
> Be sure your audio-visual displays are clearly visible to all jurors and to the court. If this is impossible talk to the court in advance to see if you can provide the jurors with a clear view, and the judge with a scaled-down copy of the exhibits. Explore other alternatives, such as the judge moving from the bench to watch a motion picture with the jury.

Traditionally, in almost all courts, the prosecution or plaintiff is seated at the table closest to the jury, and the defense sits at the farther table. If defense counsel believes there is benefit to the closer table, a motion to move may be made. It will amuse the judge, and may sometimes succeed.

Too much has been written about dressing for court. Counsel and witnesses should dress to excite admiration without attracting attention. It is almost impossible to dress too conservatively for trial. But, a witness should not strike a false note: an expert rodeo cowboy should wear blue jeans, not a three-piece suit. Counsel, client, key witnesses should not flaunt flashy jewelry or other evidence of wealth.

Finally, counsel should prepare the client, and himself, for inevitable out-of-court encounters with jury members. Lawyer and client should have no whispered, angry, or laughing consultations in the hallway, where it can be observed by jurors. Counsel and client should have no conversations with jurors, beyond a friendly greeting in the morning and afternoon. Verify with the judge the acceptability of the simple greeting. If a juror attempts to talk to the client, tell the client to say: "I would like to talk to you, but the judge says I cannot during the trial. I am sorry."

§1.5 B. Making the Case Comprehensible

To Update

Most attorneys, when planning case strategy, focus on cross-examination, opening statement, and legal questions. Overarching all of these, and fundamental to any case, is this question: "How am I going to make a jury *understand* my case?"

The lawyer has been living with the case sporadically for at least a year before trial, and intensively during the weeks or months just prior to trial. What is clear to counsel will not be clear to the jury. Therefore, in planning for clarity, remember:

1. *Cut, cut, cut.* The jury should look forward to the lawyer's appearances, because he will be succinct where others have been rambling.

2. *Speak plainly.* A subject never "exits a vehicle," a man "gets out of a car." Things never "transpire," they "happen."

3. *Repeat key points.* Irving Younger claims that every other question asked by the Russian prosecutor at Nuremburg was: "*Now* do you confess that you are a fascist beast!?" Repeated sledgehammer blows eventually strike home.

4. *Be interesting.* Use graphics, summarize lengthy and dull evidence, do not be afraid to joke at the right moment.

5. *Carefully plan timing of testimony.* In most cases, counsel should present witnesses in the order which naturally tells the story to the jury. There are exceptions. Important impeachment evidence must be reserved until after the stage is set for impeachment. Some important witnesses may be held in abeyance until other witnesses have testified (to avoid unnecessary contradiction). Key witnesses should be presented early in the morning, if possible, while the jury is still alert.

6. Cross-examination should go for the jugular, not the capillaries. If an adverse witness is dragged through all the minutiae applicable to that witness, counsel will lose the jury on both minutiae and the main points. The same is true of direct examination: Stick to the main points.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/1 Strategy and Tactics/§1.6 C. Demonstrative Evidence

§1.6 C. Demonstrative Evidence

To Update

Demonstrative evidence is valuable for both direct and cross-examination. It breaks the pattern of the trial, clarifies issues, and maintains jury interest. See generally Dombroff, Dombroff on Demonstrative Evidence (1983), a comprehensive text covering practical and legal aspects of demonstrative evidence. Another valuable source is California Personal Injury Proof chaps 8, 15-19 (Cal CEB 1970). For a discussion of the logic and effectiveness of demonstrative evidence, see Gross, Exhibiting the Facts, 4 Cal Law 16 (Nov. 1984).

The following is a checklist of potential demonstrative evidence:

1. *Demonstration.* Get the witness off the stand and have him show what happened or the results of what happened. This will give counsel the opportunity to move around also. For example, if the defendant claims to have been scarred by the accident, have the defendant exhibit the scars to the jury.

2. *Bring real life into the courtroom.* In a labor embezzlement trial, one of the defendants walked through the courtroom carrying bricks in a hod, to show the jury graphically how he spent his days as a laborer, not a pencil pusher.

3. *Graphics.* Posters, blackboards, overhead projectors, slides. Generally, bigger is better, and color is better than black-and-white. Even in a low-budget case, the lawyer can afford the chalk for the blackboard present in every courtroom. A blackboard can be very valuable in cross-examining, to highlight witness points, for jury comprehension. If the opponent is using graphics, counsel should not let him leave key charts lying around in view of the jury, as continuing silent testimony.

4. *Summaries.* These can be combined with graphics. Time lines, summaries of accounting data, even deposition summaries, can be reduced to chart form. Consider use of summaries for any recitation of facts which will take more than 30 minutes on the stand.

5. *Models.* Models of structures, scale models of the positions of aggressor and victim in criminal cases, working models of malfunctioning machinery, automobile models on scaled-down roadways.

6. *Videotape and motion pictures.* A "day in the life" of an accident victim, a dashboard camera re-enacting a crime or an accident, or a video-taped tour of a scene important to the trial. Videotape is economical and practical today, given the wide availability of reasonably priced videotape equipment. The taped clip should be kept brief, to persuade the judge to allow its use. Lighting conditions in the courtroom should permit clear viewing of the screen or television monitor. If videotape is used, multiple screens, if practical, may help make the point.

7. *Photographs.* Virtually any case can use a few photographs to clarify some point or other. Photographs are easy to put into evidence. As with other visual demonstrative evidence, counsel need only establish with any witness that the photograph is a fair representation of what it purports to depict. In criminal and personal injury cases, counsel should try to have a photographer take photographs of key scenes, and re-enactments, as soon as counsel begins work on the case.

8. *Wiretaps and transcripts.* Wiretaps are turning up more frequently in litigation. Counsel should always prepare their own transcript of important sections of the taped conversation. Transcripts are normally provided to the jury only for their assistance in following the tapes, and are not evidence. Evid C §§250, 352; Fed R Evid 403, 902. But see Evid C §1519; *People v Fujita* (1974) 43 CA3d 454, 117 CR 757; *People v Kageler* (1973) 33 CA3d 738, 108 CR 235. If each side has differing transcripts, the jury should be given both sets of transcripts, and will listen to the tape and judge for themselves which is more accurate. If counsel's transcript is more accurate, it is a telling point in counsel's favor. For a more detailed discussion of transcripts, see 1 Jefferson, California Evidence Benchbook §22.1 (pp 611-613) (2d ed CJA-CEB 1982); 2 Jefferson, Evidence Benchbook §31.1 (pp 1088-1089).

PRACTICE TIPS

If your opponent presents a demonstration, uses graphics, or provides photographs, think hard about how you can convert that demonstration into your own. The jury likes nothing better than to see the tables turned on

someone who has used sophisticated demonstrative evidence. See the postal carrier example in §1.2. Do not hesitate, unless the court stops you, to take chalk or marker pencil in hand and make alterations to the opponent's charts or diagrams, to make a point.

Demonstrative evidence must be tested and re-tested before being used in court! This advice applies not only to working models, but also to re-enactments. Few things are more embarrassing than an overhead projector that won't project, or a slide machine that clicks off one slide after another, nonstop, when the wrong button has been punched.

§1.7 D. Logistics

To Update

Any trial strategy should incorporate the mundane. Not only must counsel get to court on time; all of the material needed to try the case properly must be there too, at counsels fingertips.

Counsel must arrange for:

1. Transportation of all exhibits, depositions, demonstrative evidence, and trial books. In a simple case, counsel may be able to carry everything in one large briefcase. In a larger case, counsel must be sure that assistants, or a messenger service, have explicit directions about time and place of delivery. Those items needed to get through the first day of trial should be set aside and carried to court by counsel (*e.g.,* jury book, pre-trial brief, opening statement, anticipated trial memoranda).

Arrangements must be made for all audio-visual gear and demonstrative evidence to be transported to court. The lawyer should find out in advance from the court clerk whether there is a secure place where these items can be kept during the trial. Many judges will permit counsel to keep bulky, voluminous, or valuable items in the locked courtroom overnight while the case is being tried. If machines requiring electricity are to be used, counsel should find out where the courtroom outlets are, and always take extension cords.

2. Line up support personnel. Consider:

a. An investigator, either on telephone standby or instructed to visit counsel in court at the end of each day. The investigator can follow-up on new leads developed during trial, and check the veracity of some witnesses quickly.

b. Another attorney at the office, available to do swift legal research on points of evidence or other controversies which come up during trial. A night secretary (usually a day secretary, ready to work overtime) to type up emergency legal memoranda and jury instructions.

3. If the trial is going to be long, counsel should bring to court whatever else will make court life smooth and comfortable and will not offend the judge. For example, a portable lectern to put on top of the counsel table, and a box full of extra supplies, *e.g.,* paper clips, legal pads, witness notebooks, staplers, magic markers.

4. It is sensible to have blank subpenas made up, with only the witnesss name and date and time of appearance left blank. Very often, counsel will be able to use these subpenas to secure the attendance of people who come to court, and have not previously been identified as witnesses. And, if the trial judge refuses to excuse a witness subject to further recall, the blank subpena gives counsel the power to keep control over that witness by immediate subpena.

PRACTICE TIPS

One caution: if your court of trial is informal and not used to complex cases, do not move a vast amount of material into the courtroom until you have spent a few hours with the judge, acquainting him with the nature of the case, and soliciting his advice on courtroom etiquette and placement of back-up materials.

To see sections added to this chapter since publication of the book, click To Update

2

Direct Examination

I. BASICS OF DIRECT EXAMINATION

§2.1 A. Purpose of Direct Examination

Direct examination is the trial lawyer's easiest way to prove what must be proved: as plaintiff, the elements of the case; as defendant, the contradiction of the plaintiff's case or some different way of looking at the facts that negates plaintiff's case.

Direct examination must be logical and compelling to the jury, which is hearing the evidence for the first time. One of the biggest problems lawyers have is that they believe that "facts speak for themselves." The lawyer has spent months (if not years) mastering the facts; he is persuaded by them before the trial begins. The jury has never heard those facts. The lawyer must bring the jury along by using direct examination to build, brick by brick, the foundation parts to the case. Most of that building takes place on direct examination.

§2.2 B. Presentation of Direct Testimony

To Update

Direct testimony should be presented as narrative, in marked contrast to the more abrupt format of cross-examination. Witnesses should tell their story in their own words, with little obvious stage-managing by counsel. The client must be *carefully* prepared to give a complete and seemingly artless recitation of relevant facts.

Counsel should interrupt the witness from time to time to break up the monotony of an uninterrupted narrative. Interruption, however, should not occur so often as to distract the jurors' attention from what the witness has to say. The pacing of a direct examination should be varied, *e.g.,* several short questions and answers followed by a question and a long narrative answer, followed by a return to the short format.

There are two primary ways to organize direct examination: chronological and cause-and-effect. The first is most easily used: it is natural for a witness to recall events in chronological order. The examiner's questions often need be no more than the punctuation "and what happened next?"

Some events may require a cause-and-effect presentation for coherence and dramatic impact. If a business decision in 1967 causes a bankruptcy in 1969, the two events ought to be placed side by side in examination. When constructing a cause-and-effect direct examination, remember:

1. The "why" question, almost always a mistake on cross-examination (see §4.8), is frequently effective on direct.
2. Let the jury infer cause-and-effectthe witness should not belabor the obvious by explaining how event A caused event B.
3. Mix up cause-and-effect examination with chronological narrative. If the narrative is secondary to cause-and-effect, keep the narrative short. Lengthy direct examination is usually ineffective direct examination.

Direct examination should be long enough to cover the subject, and short enough to maintain interest. Direct examination must tell a story, humanize the witness, and transmit emotion. All parts of counsel's trial presentation benefit from heavy editing and cutting. Direct examination, particularly direct examination of counsel's client or a critical witness, however, should not be ruthlessly edited. This will be the best opportunity the jury has to get to know the witness and the central facts of the case. The examination should be prolonged, if it can be done without being artificial.

PRACTICE TIPS

If your client does not wear well, is too glib, too unctuous, tries too hard, or is obnoxious, ignore this rule and get the client off the stand quickly. Some people make a grand first impression and go downhill quickly after that.

§2.3 C. Witness Presentation

The attorney should talk to the witness explicitly about the emotional tone of their testimony. Anger and tears may be honest witness reactions to some questionsthey are not natural unless well-warranted or provoked. Jurors will soon lose sympathy with a witness who dissolves into tears shortly after being asked his name and residence, or one who flies into a rage when first confronted with inconsistent testimony.

Proper preparation should make the witness comfortable, but not glib. No juror likes a cocksure, arrogant, or slick witness. The witness should be encouraged to be humble and ready to confess fallibility.

The client should dress appropriately. Dress should not be artificial, but should take into account jury tastes. If the client works in a coal mine, there is no reason for him to wear a banker's three-piece suit on the stand. Have witnesses shed diamond rings, gold collar bars, ostentatious watches, and showy necklaces and bracelets. Observe the way the jury dresses after they are impaneled, and be guided by their tastes. If the client is going to be subjected to a long grueling examination, a dark outfit will hide nervous perspiration.

§2.4 D. Counsel's Role

During a good direct examination, the jury should focus on the witness, not counsel. To that end, counsel should:

1. Ask open-ended questions, which may be answered by detailed narrative;
2. In state court, examine while sitting down, or, with a shy witness, move to the end of the jury box away from the witness. This helps the witness make eye contact with the jury. In federal court, the attorney will usually be required to examine while standing at a fixed position.
3. Minimize eye contact with the witness after the question is asked. This will encourage the witness to look at the jury, not at the attorney;
4. Be subtle if you must help a foundering witness. See §2.15.

§2.5 E. Order of Witness Presentation

To Update

The time of a witness's appearance can be nearly as important as *what* the witness testifies. The client is probably the major witness. Unless there is a need to downplay the client's testimony, he should be presented early in the morning, when the jury is fresh. If the client can be proffered early, opposing counsel may be forced to cross-examine without an overnight recess.

If defending a civil case, counsel may have little control over when the client is first called: opposing counsel has a right to call the defendant client as an adverse witness during plaintiff's case-in-chief. Evid C §776; see Fed R Evid §611(c). Defending counsel's in-state party witness may be compelled to appear at trial by notice under CCP §1987(b). In federal court, a subpena is required.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/2 Direct Examination/§2.6 F. Starting Direct Examination

§2.6 F. Starting Direct Examination

To Update

Usually the witness will be nervous initially. Counsel should start by asking questions about the witness's background, undisputed facts, and simple facts. The witness's background should be used to paint the client's human qualities. Questions about family, work, and service experience are generally proper. Some courts, however, resent counsel overpersonalizing a witness. And, if background information amounts to swaggering self-promotion, the testimony may put the witness's character at issue, permitting cross-examination about bad character traits. Evid C §1102.

After the ice is broken, counsel should elicit narrative testimony in the manner discussed in §2.2.

The direct examination can often best end with an emphatic denial or affirmation of a key issue. This conclusion may sum up or repeat earlier testimony, but should be permitted by the court.

The following is a simple condensed direct examination in a civil case.

Q. What is your full name?
A. Richard Maurice Taylor.
Q. Tell the jury something about your background.
A. I was born and raised in Oakland, graduated with a degree in Business Administration from the University of California at Santa Barbara in 1974, and worked for Arthur Andersen & Co., an accounting firm, for five years after graduation. Since 1972, I have operated my own small business, an accounting firm, headquartered in Redwood City, California. I am married and have two young children.
Q. Do you know Victor Brown?
A. Yes, I do.
Q. How long have you known him?
A. Ten years.
Q. How did you meet him?
A. Mr. Brown was on the same intramural football team as I was at the University. I socialized with him, and our wives became friends, in the years after graduation. Although we lived in different parts of the Bay Area, I would see him and his family four or five times a year. In 1975, I invited him to join our accounting firm and he did.
Q. How many years did he work with you?
A. Until last year.
Q. In what position?
A. Originally as an employee, and between 1979 and 1983, as a partner. He left us in 1983.
Q. Why did he leave the firm in 1983?
A. Myself and my other partner, Charles Smith, asked him to withdraw.
Q. Why?
A. [Long narrative answer, spelling out the misdeeds which are the subject of the lawsuit. There should be little interruption by the attorney here, except for occasional clarifying questions, or questions breaking up an especially long narrative.]
Q. Let me be sure this is clear to the jury: why did you and your partner ask Mr. Brown to withdraw from your accounting firm?
A. In a nutshell, we were convinced by all we had learned that he had stolen $150,000 from the firm during 1979-82.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/2 Direct Examination/§2.7 G. What Not To Do

§2.7 G. What Not To Do

Proper direct examination is deceptively simple because all of the effort has gone into the preparation. The examiner is "present everywhere, visible nowhere."

Generally:

1. Do not address the witness by his first name or nickname. In *some* situations, counsel may be able to call the client "Vic," rather than "Mr. Brown." Juries prefer formality, however. *Never* use a first name or nickname in a condescending way.

2. Do not be over solicitous or unctuous to a witness.

3. Avoid "lawyers' words." Never ask a witness "what transpired at that point in time'?" when you mean "what happened then?"

§2.8 H. Friendly Non-Party and Neutral Witnesses

Friendly witnesses will be prepared and examined much like clients or parties. Counsel may have difficulty persuading a friendly non-party to spend days preparing testimony. Counsel should press for as much time as he can get, emphasizing the importance of preparationit will minimize embarrassment or confusion for the witness in trial. If a witness will not grant much time to prepare, counsel must be ready to refresh recollection and correct errors in trial, by using documents, prior testimony, and the attorney's own knowledge of the case.

Few things are as persuasive as a neutral witness who strongly supports counsel's theory of the case. Neutral witnesses will know facts:

1. Favorable to the case, readily testified to if asked;
2. unfavorable to the case, readily testified to if asked;
3. favorable or unfavorable, but embarrassing to the witness, and not readily testified to.

The witness should be asked first *all* facts favorable to the case, and unembarrassing to the witness.

Next, *if necessary,* the witness should be asked about matters unfavorable to the case. Whether the witness should be questioned about material unfavorable to the case, in an effort to confront it, soften it, and lessen its dramatic impact, is a hard choice. Generally, unfavorable matter should be asked only if counsel believes that it will be picked up anyway by the adversary during cross-examination.

Last, if counsel must ask questions which will embarrass the witness, they should be saved for the very end of the examination. The embarrassing questions may make the witness hostile or flustered, and therefore no longer neutral.

II. PARTY-WITNESSES

§2.9 A. Preparation

The attorney should rehearse but not over-rehearse the party-witness or any witness who is directly identified with the client (*e.g.,* an officer of a corporate party). Rote recitation sounds mechanical and unconvincing. Classic cross-examination texts cite the example of the cross-examiner who leads a witness into repeating word-for-word a richly detailed direct narrative, exposing the artificial quality of the original testimony. Whether such a hard-to-pull-off cross-examination ever really worked is for court historians to debate. If it ever did succeed, it still remains a very high risk examination.

But, the point is still valid for the direct examiner. Don't over-prepare the witnesses. Once counsel and witness both have a firm overall factual picture, one dress rehearsal of the direct testimony two or three days before the actual courtroom testimony will suffice.

Detailed question's (and even suggested answers) should be written out by counsel. Detailed lists of questions may hamstring the attorney when cross-examining. However, there is no such danger during direct examination because there should be no surprises on direct.

There are risks in providing the client with a detailed question-and-answer list, or a shorter list of "Ten Things You Are Sure Of." The witness may be asked on cross-examination about preparation, including such lists. Opposing counsel may successfully characterize the witness as a parrot, repeating words put in his mouth by the attorney.

However, it is better to prepare most witnesses with written aids, and take this risk. The extreme alternative would be to present a rambling, imprecise, and unconvincing witness who can honestly say on cross that he has not spent one minute preparing direct examination with counsel.

The witness must be cautioned that, although it may be effective for a witness to give a "closing argument" answer during cross-examination when the examiner has asked for it, the witness should not do so during a friendly direct examination.

§2.10 B. Use of Video

To Update

Every witness has bad habits which may detract from credibility. The witness can be shown these bad habits on videotape. This is less demoralizing (and more convincing) than being lectured about bad habits by counsel.

If asked about videotape on cross-examination, the witness (if prepared) can explain as follows:

Q. Have you prepared your testimony with your lawyer?
A. I have reviewed it with him, yes.
Q. How much time have you spent reviewing testimony with your lawyer?
A. Three or four hours.
Q. Have you rehearsed your direct testimony before testifying in court today?
A. No.
Q. Well, have you gone over the general details of your direct testimony with your attorney before testifying today?
A. Yes.
Q. Has your attorney used videotape in preparing you on these major details?
A. Yes.
Q. Have you gone over these main details of the testimony more than once?
A. Yes.
Q. At least twice?
A. Yes.
Q. And what was wrong with the first version that required you to go over it for a second time?
A. Nothing was wrong with it.
Q. But your attorney wasn't satisfied with the first version? He made you repeat it?
A. Yes, but not because he wasn't satisfied. He told me I had to learn to get the truth across effectively.
Q. And he made suggestions to you about ways in which you could improve your effectiveness?
A. Yes. But the truth never changed.

And so on. The client can also counter such cross-examination by explaining that he has rehearsed on videotape to reduce nervousness, since the case is very important to the witness. The client might also point out that the videotape rehearsal was designed to help him hold his own with the sophisticated and sometimes unfair techniques which the client was told the cross-examiner might use.

§2.11 C. Body Language; Visual Aids

To Update

Jurors have been bombarded with information about "body language." This information is joined by common folklore about tell-tale signs of falsehood. Counsel must work with the witness to develop effective behaviors which do not conform to juror stereotypes about liars.

1. The witness should make eye-contact. A second person (or a hatrack) should be used when the witness is rehearsed. Make the witness look at that second person or object as though looking at the jury. Instruct and rehearse the client to turn and look at the judge whenever the court asks questions.
2. The witness should keep arms apart, not crossed.
3. The witness should be neither too glib nor too labored. Immediate, polished answers sound rehearsed and artificial. On the other hand, dramatic hesitations, and knitted brows are also artificial.
4. The witness should not lower his voice, swallow words, or mumble during important testimony.
5. The witness should lean forward, toward the jury, and use hand-gestures.

PRACTICE TIPS

Practice with visual aids, if you are going to use them with a witness. Few things are as nerve-wracking as a witness who cannot make heads or tails of a critical diagram, has not previously read the blow-up of a letter, or is unfamiliar with photographs being shown on a slide projector.

§2.12 D. Preparation During Trial

Preparation does not end when the trial begins. The client's testimony may well carry through several recesses, a lunch period, or even a daily adjournment. These breaks should be used to make gentle course corrections (begin by asking the witness how he thinks he is doing). Remind the client about body language. Remind the witness what will be coming up next. Do not be overly critical. A witness wants a cheerleader at this crucial time, not a drill-instructor. Self-confidence is essential to effective testimony. The client will benefit from repeated assurances that he is doing fine.

III. THIRD PARTY WITNESSES

§2.13 A. Preparation

To Update

Preparation of third party witnesses begins when counsel takes on the case. All humans have a memory retention curve that drops off sharply a week or two after the events to be recalled. Thus, counsel should interview third party witnesses early, and pin down their testimony.

Normally, witness interviews should not be tape recorded. The tape recording process often discourages a witness from discussing the facts of the case openly. Tape recording a witness interview without the witness's knowledge may violate state law. Pen C §632; *Warden v Kahn* (1979) 99 CA3d 471, 160 CR 471; *People v Wynch* (1978) 77 CA3d 903, 144 CR 38.

Given recent amendments to the federal crime of obstruction of justice, counsel may consider recording interviews with third party witnesses in federal criminal cases to protect himself from charges of unethical or criminal actions. 18 USC §§1501-1515.

Begin a witness interview without pencil or paper. Once the ice is broken, counsel should request permission to take notes. Those notes may later be transcribed and made into a formal statement, which the witness can review and correct. Counsel should ask for initials on each page, so that no claim can be made that different pages have been substituted. For a sample cover letter to a witness, information sheet, and advice to witnesses, see Appendix at §§6.16-6.18.

The attorney should not hesitate to refresh or reinforce a third party witness by reminding him of facts others have attested to. A witness's memory will often need refreshing, and he will give favorable information more readily if he believes other witnesses back him up.

Once the interview is finished, and a written statement has been taken, counsel will need to have at least one refresher session before trial. At this refresher, counsel should prepare with the witness using their written and signed statement.

The attorney may, in some instances, wish to take a stenographically recorded statement from a witness, or a signed affidavit or declaration. A typed statement, corrected and signed by the witness, is probably just as effective with a jury as these more formal methods.

> PRACTICE TIPS
>
> You are an advocate: prepare third party witnesses (both before initial interview and during trial preparation) by giving them a short forceful version of your view of the case. Buttress it with facts and supporting witnesses.

In the weeks just prior to trial, counsel should prepare the testimony of third party witnesses as though they were party witnesses. If a witness is reluctant to provide preparation time, counsel should promise to take no more than thirty minutes with him, unless he wants more time. Normally, once the preparation session has begun, the witness will realize the value of preparation, and will give as much time as counsel and witness both need. Make suggestions to third parties about dress and body languagebut do so tactfully.

Do *not* provide a list of written questions to a third party witness. If revealed to the jury, it may appear manipulative in a way preparation of a party-witness will not. Instead, review all the important points with the witness enough times to be sure that the answers given in court will not be a surprise.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/2 Direct Examination/§2.14 B. Witness Briefing

§2.14 B. Witness Briefing

Give third party witnesses complete information about courtroom procedures. This includes:

1. The physical appearance of the courtroom;
2. the functions of the judge and jury;
3. the purpose of objections, including the witness's duty to remain silent until objections are decided, and to obey the court's ruling;
4. courtroom hours and location; and
5. expected length of examination, and the expected date and time the witness will be called. This will change as the trial proceeds. Witnesses should be kept up to date on the expected date and time of their testimony. A neutral witness will be converted to a hostile witness if he spends a long time in the courthouse waiting to testify.

> PRACTICE TIPS
>
> You should keep in mind that a truly neutral witness owes nothing to either side. Whatever is said to a neutral witnesswhatever material is provided to the neutral witnessmay be given to opposing counsel. You should ask third party witnesses about their contacts with opposing counsel, as well as any written materials provided to the witness by the adversary.

§2.15 IV. CRISIS CONTROL

To Update

Sometimes, despite careful preparation by counsel and the witnesses, direct examination unravels. The following are useful suggestions for recurrent problems:

1. Forgetful Witness

The witness can barely remember his own name, much less the detailed events of April 23, 1982. You should:

a. Jump to more routine parts of the examination, hoping the witness will relax.

b. Ask the witness about nervousness. A witness who admits he is confused because he is terrified and has never testified in court before, strikes a responsive chord with the jury.

c. Ask for a recess. The judge may be sympathetic.

d. Ask leading questions to refresh memory. This is permissible if a witness has exhausted his recollection of a topic. If the judge doesn't believe leading questions are called for, try asking "whether or not" a described fact is so. Some judges think this form is not leading.

e. Use past recollection recorded. If the witness has subscribed or ratified a contemporaneous writing accurately stating the facts sought, introduce the writing into evidence in lieu of the witness's evaporated recollection.

2. Mistaken Witness

Ask the witness immediately, after repeating the question, if the witness meant to say "yes" when he said "no." Follow up by establishing the witness's nervousness, or other reason for error (fatigue, confusion, carelessness).

3. Nonresponsive Witness

Sometimes even the client will not answer his own attorney's questions forthrightly. If the client is eccentric, curmudgeonly, high-strung, or otherwise uncontrollable, keep calm. Counsel should not hesitate to treat the client as if hostile. The client should be directed to listen closely to the question, and to answer that question and not another question. The client should be told not to argue his own case but to trust counsel to do that. The court's help can be enlisted in controlling the client.

If the case is otherwise sound, counsel can firmly control the client without much damage. The jury will understand that the attorney wants to get facts to the jury fairly and succinctly, and that the client's passions need to be checked to do this.

4. Unsympathetic Judge

Some judges are supernally patient all of the time; many have occasional lapses from grace. The attorney, client, or one of the witnesses, may rub the judge the wrong way. Counsel should spot this problem before it develops, and take damage control measures:

a. Prepare the witness for questioning by the judge. The witness should swivel around and answer the judge's questions directly eye-to-eye.

b. If the judge begins to actively examine, it is often a signal that the witness is testifying nonresponsively or the attorney is becoming repetitious. The witness should listen very carefully to questions from the judge, and answer those questions precisely. The attorney should evaluate his own performance objectively, to determine if the judge might have good reason to be interjecting questions.

c. If the judge is unfairly taking over the examination, act. Politely and firmlyand out of the jury's presencepoint out how the court's examination, comments, or tone of voice jeopardize a fair trial. *Hart v Farris* (1933) 218 C 69, 76, 21 P2d 432, 435; *People v Rigney* (1961) 55 C2d 236, 243, 10 CR 625, 629 (judge should examine witnesses only when it appears that counsel will not elicit relevant and material evidence).

3

Preparing To Cross-Examine

§3.1 I. COMPLEX AND SIMPLE CROSS-EXAMINATIONS

Preparation for cross-examining a witness depends on who the witness is, the complexity of the trial, and the time counsel has available.

Following are suggestions for preparing a detailed cross-examination, and suggested limited preparation for a simple cross-examination. The principles are the same for both kinds of preparation.

Chapter 1, Strategy and Tactics, should be read before the suggestions below are followed. For a good discussion of planning cross-examination, see Hartje, *Cross ExaminationA Primer For Trial Advocates*, 8 Am J of Trial Advocacy (Fall 1984).

Source: Civil Litigation/Effective Direct and Cross-Examination Book/3 Preparing To Cross-Examine/§3.2 II. PREPARING FOR COMPLEX CROSS-EXAMINATION

§3.2 II. PREPARING FOR COMPLEX CROSS-EXAMINATION

When preparing for complicated cross-examination, counsel should begin with a broad general review of all facts and law which relate to the witness; develop general principles; and move from these principles to framing specific questions. Then, moving from that general review, test the outline examination against the trial goals, and the facts that have been initially gathered.

§3.3 A. Mastering the Details

When preparing for cross-examination, the attorney should devote at least one hour to reviewing what he knows about the case for the purpose of identifying major trial problems and major trial strengths. Counsel must decide what the probable outcome of the trial will be, and pinpoint the troublesome areas. Part of the process is trying to foresee surprise witnesses or unexpected evidence. The two or three key points to be repeatedly stressed to the jury should become fixed in counsel's mind. See §1.2.

Once the major issues of the case have been identified, those issues should be labeled with a single "key" word. Many attorneys use "key words" to code documents and transcripts.

The next step is a review of specifics. All of the documentary evidence of importance must be reviewed. In a civil or criminal case, this will include:

1. The witness's deposition, which counsel is going to cross-examine (be sure to have the witness's corrections to the deposition).
2. Depositions of witnesses who support or contradict the witness counsel is preparing to examine.
3. Grand jury and preliminary hearing transcripts (both for the witness to be cross-examined, and other witnesses who support or contradict that witness).
4. Investigative reports.
5. Interrogatory questions and answers; requests for admissions and the admissions.
6. All important documents, whether they are exhibits, or will be used only to refresh recollection, impeach, or for counsel's own reference only. For instance, counsel should read the contract at issue over and over again, until every nuance is understood.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/3 Preparing To Cross-Examine/§3.4 B. Preparation for a Particular Witness

§3.4 B. Preparation for a Particular Witness

To Update

Before beginning the actual preparation of cross-examination questions or topics, the attorney should review one more time the best approach to this particular witness. The review should cover:

- How aggressive must counsel be with the witness?
- How long should the examination take?
- What are the risky areas of the proposed examination?
- Must risks be taken with the witness?
- How can the witness surprise counsel? If the witness confounds reasonable expectations, how will counsel react?

PRACTICE TIPS

In your planning, heed the advice former Watergate prosecutor James Neal gives to himself:

"I try not to stretch whatever I'm doing into making a mistakenot to try too much on cross-examination, not to put on a witness who might be great but also might be a disaster. If someone is going to win a case against me, they are going to beat me. But I don't beat myself."

The review should also include a mental check-off of the normal purposes of cross-examination:

- To reinforce the client's case.
- To impeach a hostile witness for bias.
- To impeach a hostile witness by showing error or dishonesty.
- To show the witness as an incompetent, because he is unable to properly observe events or recollect them, or unqualified as a witness, because of a lack of knowledge or educational qualifications.

If the deposition or preliminary hearing transcripts are lengthy, the attorney should prepare summaries. The most useful deposition summary is one dictated by counsel close to the time of trial, but practicality may require a reliance on summaries prepared by others.

As the depositions are reviewed, counsel should circle with red pen all important questions and answers, printing in red ink the key word for the issue or theme covered. A paralegal can then photocopy all circled extracts, and put them in a three-ring binder, tabbed by issue.

As deposition transcripts for issues are coded, counsel should make other notes: facts to be further checked; possible closing argument themes; questions for other witnesses; exhibits to be assembled.

The same red-pen issue coding system can be used for exhibits and investigative reports.

Interrogatories and admissions. Make separate typed pages for "trial" interrogatories and admissions. Most federal judges require this (*e.g.,* ND Cal Local R 235-8(c)), and state judges appreciate it.

Before reviewing and coding exhibits, the attorney should arrange them chronologically, and pre-mark them. Many judges require exchange of pre-marked exhibits before trial, with one complete set being filed with the court; see, *e.g.,* ND Cal Local R 235-8(d).

If counsel pre-marks exhibits before he reviews and codes them, counsel can write out cross-examination questions or areas with notations referring to the trial exhibit number. Also, in the personal index of exhibits, counsel should mark with a "T" exhibits to be made into transparencies for projection; and mark with a "D" those exhibits to be blown up for use as demonstrative evidence.

Chronological arrangement of exhibits, with an accompanying exhibit index, is normal, and makes it relatively easy to find any given exhibit. For a typical exhibit index, see §13.12.

For cross-examination, if there are many exhibits, counsel should arrange the exhibits by issue. For example, all exhibits relating to "formation of contract" should be put in one expanding wallet, documents relating to "breach" in another, and documents relating to "oral modification" in yet another. Each exhibit so organized will bear its pre-marked

trial exhibit number. This permits the introduction of a specific exhibit in the "breach of contract" wallet, to be designated by number, allowing the trial judge and opposing counsel to refer to it immediately in their copy of the pre-marked exhibits.

§3.5 C. Blocking Out Questions

Many attorneys write out cross-examination questions on a yellow legal pad. However, yellow legal pads can get lost or misplaced easily. It is safer to use lined sheets placed in a three-ring binder.

A new trial lawyer should write down virtually all of his questions, and make notes about anticipated answers where necessary. See §§13.10-13.11. A page of cross-examination questions contains the following:

1. Questions placed under the heading of a single issue, *e.g.,* good faith. If the questions are arranged by issue, counsel is able to change the order of examination by simply shifting around issue pages.
2. Detailed questions.
3. Underneath proposed questions, in brackets, some anticipated answers, or other reminders.
4. To the right of the question, the examiner has entered cross-references to exhibits which relate to the questions, deposition extracts which impeach or support, and the symbol "T" to remind the examiner that there is a transparency of a relevant document.
5. Reference to Evidence Code sections which relate to admissibility of answers sought.
6. To the left of the proposed questions, the examiner notes questions which are optional (depending on the course of the examination), risky, or to be dropped.

The examiner should write out a list of the "props" needed for the witness. This includes depositions, demonstrative evidence, interrogatory extracts, blackboard and chalk, and other materials. This list is put in the three-ring binder as the first page for the witness.

The second page lists the main points to be made with the witness. This will include important exhibits which can be introduced only through the witness. The list of main points should be used to check against the final examination questions. In trial, before counsel completes examination, he should glance through the list to make sure nothing crucial has been missed.

Begin the examination strong, and finish strong. The written-out questions should be arranged so that there is a strong beginning sequence that will grab the jury's attention, and a closing sequence that will allow counsel to exit on a strong conclusion.

With experience, counsel may find that writing out detailed questions constricts flexibility and dampens spontaneity. Many attorneys write down only general topics of examination. If this works best for counsel, he should still write down references to key exhibits and impeaching deposition testimony.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/3 Preparing To Cross-Examine/§3.6 D. Witness File

§3.6 D. Witness File

After completing the proposed written examination, the attorney will put together a witness file. Placed in this file are the following:

- The three-ring binder, containing the proposed examination. The binder should contain, in the proper sequence, copies of critical deposition extracts and key exhibits. If these extracts are placed adjacent to the questions to be asked, counsel will increase the ease of his examination style.
- Complete depositions (or other transcripts) of the witness.
- Complete depositions of other witnesses that relate to the cross-examination.
- Exhibits to use with the witness.
- Memoranda of evidentiary points which counsel anticipates may come up. Photocopies of key Evidence Code sections may be sufficient.

The witness file for a minor witness may take up a manila folder. For major witnesses and lengthy trials, the witness file may fill up many fileboxes.

§3.7 E Final Preparation

Final preparation consists of another review of the original overview of the case, including the main points counsel needs to make with the witness to be sure that the planned cross-examination covers them sufficiently. Counsel should also consider whether the examination is too risky. Can the points be made with more safety with other witnesses or other evidence?

The last stage of preparation is ruthless editing. Counsel has lived with the case for months or even years, and knows too much about it, from the standpoint of a juror. Most examinations are too long by half. The lawyer must pare down areas which will bore or confuse the jury. Questions need not be discarded; brackets should be put around them, with an "optional" note in the margin. If the jury is hanging on counsel's every word, he can add other questions to the examination.

Even if counsel is experienced, he should:

1. Read the entire federal or state Evidence Code, marking for photocopying sections which may apply to the examination.
2. Make specific plans for anticipated objections by opposing counsel.
3. Purge the examination of all legalese and "weak" language in favor of simple, short sentences.
4. Plan for the unexpected. The trial judge may refuse to let counsel ask a key question. The witness may refuse to take counsel's lead, or may answer "no" to a question to which counsel was sure he would answer "yes." Anticipating these problems will not solve them, but will permit them to be minimized, and allow counsel to keep cool under fire.

Another attorney working on the case, or a paralegal who knows the facts, should now play the part of the witness during a mock examination. The mock witness should try to frustrate the examiner at every turn, and should try to surprise counsel from time to time. Counsel should practice keeping the witness on a short leash, and developing alternative lines of examination if some of the answers are surprises.

During the practice session, counsel should work with demonstrative evidence, any real evidence to be shown the witness, and the documents and depositions extracts to be used as evidence or to impeach the witness. Particular attention should be given to machines. Run the slide projector, overhead projector, or mechanical or electrical demonstrative evidence exhibit through their paces in the office, and again in court before presentation to the jury.

§3.8 III. PREPARATION FOR SIMPLE CROSS-EXAMINATION

Few attorneys have the time or budget to prepare for cross-examination of every witness in the detailed manner described above. And even if the budget makes it possible, time spent on other aspects of trial preparation will force counsel to take shortcuts. This section of the book suggests the bare minimum necessary for cross-examination.

1. Counsel should read the deposition of the witness to be examined. Skim over disputes between counsel and routine background material, but read line-for-line all substantative sections of the deposition. Photocopy the three or four pages of deposition which are central to the proposed examination, and put them in the witness book.

2. Photocopy and put in the witness book the documents which *must* be discussed with the witness. There have been few cases tried which had more then ten documents critical to the jury's decision. Pick those ten (or fewer), and let the opponent concentrate on the other ten thousand.

3. During review and coding of the depositions, exhibits, and other documents, many valuable ideas will occur to the attorney. He should jot them down to insert later in the trial or witness book.

4. The attorney should develop a simplified chronology of the case while working through depositions and documents. In order to control the case it is vital to master the chronology. If there are numbers, names, technical points, or dates that are difficult to remember, counsel should make a memory aid list and use it as a prompter during trial.

5. If possible, the attorney should personally prepare the chronology-and-issue coding. Nothing helps memory more than doing the detail work yourself.

6. If the cross-examination is going to refer to a locality, an object, or a document, counsel should become familiar with it, *e.g.,* visit the suite of rooms where a contract was drafted, look at the counterfeit bills seized by the agent to be examined.

7. Forget about interrogatory answers and responses to admissions. It is hard to use them smoothly during an examination. The witness will usually testify consistently with his earlier interrogatory answers or admissions, making the discovery material superfluous.

8. Block out the proposed examination by topic only, keeping in mind the two or three major themes to make with the witness. See §1.1. If unable to master details, don't forget to keep coming back to those main themes.

9. Make transparencies for the two or three documents which are to be reviewed in detail with the witness. The jury will get restless if they are forced to guess at the contents of a document being testified about.

10. Mentally review the main evidentiary points (including objections). Refer to the Evidence Code as necessary. Psychologically prepare for surprise answers and hostile rulings from the trial judge.

11. Be sure that the proposed examination does not require taking undue risks with the witness. On the other hand, consider whether it is too timid if some risk-taking is necessary to win a difficult case. Be sure that the proposed examination covers the critical issues with the witness, and that it furthers one or more of the main aims of cross-examination: supporting the client's case, impeaching for bias, showing falsehood or error, or undercutting the witness's competence.

12. The witness's deposition transcript, counsel's blocked-out areas of examination, and the key exhibits and transparencies should be put into a wallet labeled with the witness's name.

4

Time-Honored Rules of Cross-ExaminationAnd When To Break Them

§4.1 I. CONTROLLING WITNESSES

To Update

The goal of cross-examination is to control what information the jury gets from the witness. If the witness is controlled, the jury will hear the points the cross-examiner wants to make. Without that control, the witness will present his own version of events to the jury.

Control starts with planning. Until the attorney decides what points to bring out on cross-examination, he cannot possibly figure out what questions to ask. See §3.2.

Books on cross-examinationand their excerpts of trial testimonycreate the illusion of cross-examination in a vacuum. But what matters is the outcome of the case, not how counsel performs with any given witness. Too often, lawyers cross-examine inconsistently with their theory of the case, *e.g.,* by hammering at a witness about identification of the client, in a case in which presence at the fight is admitted. Or in a business case, cross-examining to show what a fool the plaintiff is when one of the plaintiff's theories is breach of fiduciary duty. That kind of cross-examination, no matter how good, destroys counsel's credibility as an advocate. The jury will view counsel as a total skeptic whose only role is to challenge every fact without having any coherent theory of the case. Worse yet, the cross-examiner acts as a virtual assistant to the opponent, making points for him. Edward Bennett Williams worries about the "truth seekersthey just shake the Christmas tree and hope something good falls off. Usually more bad stuff than good falls off."

Having decided what points to make with the witness, next plan how to make them without losing control. The tools for eliciting information from the witness are questions. To control a witness, counsel must control the questions. With that understanding, it is not hard to avoid the most common mistakes made on cross-examination.

II. PHRASING THE QUESTION

§4.2 A. Clarity

Rule 1

Use clear questions calling for simple answers.

Clear questions calling for short, simple answers enhance control of a witness on cross-examination. Some lawyers claim that every cross-examination question should call for only one of three answers: "yes," "no," or "I don't know." Counsel need not be that restrictive to keep control. Short, easily understandable questions will force the witness to answer the question asked, not one he would prefer to answer. On the other hand, convoluted, unintelligible questions let the witness interpret the question, and answer whatever he wants. Compound questions are not only objectionable under the rules of evidence, but permit the witness to exploit the examiner's lack of clarity.

Clear questions calling for short answers help control the pace, build the points counsel wants to emphasize, create suspense, and persuade the jury. When a lawyer is using legalese, a witness who does not speak legalese can waffle around with justification. He (and probably the jury) cannot understand what is called for. If the witness *does* speak legalese, and responds in kind, only the jury is left in the dark.

§4.3 B. Brevity

Rule 2

Keep cross-examination short.

A very successful evangelist once said about his sermons: "Nobody ever got religion after the first twenty minutes." His time estimate may be wrong, but every evangelist and trial lawyer has wrestled with the short attention span of their audiences.

At trial, counsel and client are fascinated by everything that goes on, almost never bored. Most jurors will nod off from time to time (or wish they could) during a trial.

Because counsel wants to take advantage of the jury's most attentive moments, cross-examination must be designed to keep jurors alert and awake at key moments. Usually that leads to planning shorter examinations, emphasizing important points, and not mentioning or touching only briefly on less important points.

> PRACTICE TIPS
>
> A jury will resent it if you belabor the obvious. In the DeLorean case, the ex-automaker, on videotape, referred to a suitcase of cocaine as "good as gold." The prosecutor used that statement in opening and closing, and also presented it to the jury at least five times during testimony. Several jurors later said they were offended by this overkill.

This rule holds true most of the time. Try hard not to get bogged down in nonessential details, and do not waste time impeaching a witness on petty or collateral matters.

Still, there will be many occasions when lengthy cross-examination is necessary. The most obvious instance is when vast ground *must* be covered on cross. Less obvious examples are:

1. Cross-examination of the witness who makes a good first impression, but wears out that impression once the jury gets to know him better. Many witnesses are impostors on the stand, pretending to be someone they are not, *e.g.,* the mean, venal, and pompous businessman masquerading as First Citizen of the Community.

2. If one of the main points to make to the jury is that things were complicated (knowledge of regulations, confusion versus fraud, difficult medical decisions), counsel may deliberately provide the jury with so many difficult-to-understand facts and documents that they become as bewildered as the client claims to be.

3. People tend to believe statements which are constantly repeated. The attorney should ask a witness to repeat strong points more than once. The judge may find this technique objectionable, but the attorney should at least be able to ask one repetitive sum-up question, "to clarify things for the jury."

§4.4 C. Asking a Question Without Knowing Answer

Rule 3

Never ask a question if you don't know the answer.

This rule assumes that counsel can take a low-risk approach to the case. In many cases, counsel must throw this rule out of the window, and take chances to retrieve a weak or even middling case.

Counsel will need to take chances more frequently in criminal cases. If pessimistic about the strength of a civil case counsel should have settled the case short of trial.

If forced to ask questions to which counsel doesn't know the answer, hoping to be pleasantly surprised, counsel must be prepared to handle damaging responses. Try to have a "cover question." One of the best methods of dealing with an unwanted answer is to show polite disdain for it. For instance:

> [Breaking two ironclad rules (§§4.4, 4.8) at the same time.]
> Q. Why did you believe the lathe was dangerous?
> A. Because Eddie Smith told me that it had nearly taken his fingers off the day before.
> Q. (Incredulously) That's the *only* reason? Because Eddie Smith told you something almost happened?
> A. I thought that was plenty.

Many times the attorney is safe in asking a question to which he does not know the answer, because it is a "can't lose" question. *Whatever the answer*, counsel's case will be advanced. A classic opportunity for a "can't lose" question arises when a witness has behaved unfairly or carelessly by any reasonable standard. After establishing the bad behavior, counsel may ask a question to which he does not know the answer which he does not worry about, because any answer helps. For example:

> Q. After your assistant had taken Mrs. Smith's body out of the morgue without her relatives' permission, didn't you refuse to return the body to the family?
> A. No.
> Q. Well, didn't you demand that the family pay fees for an embalming they had never asked for before you would return the body?
> A. The embalming was necessary, whoever did the funeral, and we had a right to be paid.
> Q. Isn't it a fact that you wouldn't release the body to the family until you were paid?
> A. Yes.
> Q. [The question to which you don't know the answer.] Tell the jury, Mr. White, was that *fair*?

If the witness condemns his own behavior as unfair, he *admits* malice. If he insists that palpably unfair practices *were* fair, he *demonstrates* malice. The last question is argumentative, but most courts would permit it to be asked.

Other occasions when counsel may ask questions to which he does not know the answer include:

1. If the witness is rattled, and has been giving testimony damaging to the other side.
2. If the witness's answer must support counsel's version of the facts, or will be solidly impeached by another witness or other evidence.
3. If the gain of getting a right answer far outweighs the loss of getting a wrong answer.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/4 Time-Honored Rules of Cross-Examination--And When To Break Them/§4.5 D. Leading Questions

§4.5 D. Leading Questions

Rule 4
Control the witness with leading questions.

A leading question tells a witness how to answer by suggesting an answer. See Evid C §764. An example from 1 Jefferson, California Evidence Benchbook §27.8 (2d ed CJA/CEB 1982) is: X is prosecuted for robbery of A. On direct examination, the prosecutor asks A: "As X approached you, he had a gun in his right hand, didn't he?" It suggests to the witness that he should give a "yes" answer to the question.

The circumstances in which leading questions are permitted are set out in Evid C §767. It is the main tool of the cross-examiner. Evid C §767(a)(2); Fed R Evid 611(c).

The unremitting use of leading questions can bias a jury against the attorney using them. A sophisticated cross-examiner will seek to appear as an information-seeker rather than someone out to damage a witness. Counsel can intersperse leading questions with open-ended questions calling for a narrative answer and by questions that require the witness to (1) select the one true alternative, (2) list all the possible alternatives, or (3) give any one of the true alternatives.

For example:

> Mr. A and Mr. B testified that they were 40 feet from the accident when it took place and that you were closer. How far from the accident were you?
>
> Mr. Expert, you stated that in your opinion the death of A was caused by [state cause] but that the wound is consistent with death by other causes. Tell me, in your opinion, what are those other causes?
>
> Mr. Economist, you testified that the lost profits for X Company in March 1983, depended on different accounting techniques. Select one of those techniques and tell the jury what figure you arrive at for lost profits in March 1983?

Controlling the witness with leading questions is a good rule, but not absolute:

1. Some witnesses may be so hostile to counsel that they will have a knee-jerk reaction when asked a leading question: they will figure out the answer desired, and try to give the opposite answer. In this situation, counsel may even deliberately ask leading questions with "reverse English," *i.e.,* questions which sound as though they call for an answer different from the answer really wanted.

2. From time to time, one of the adversary's witnesses will provide testimony which helps counsel. On cross-examination, counsel should further develop helpful testimony by asking gentle open-ended questions.

For example, in a first degree murder case, a witness was called by the prosecution to establish the effect of certain drugs, found in the *victim's* blood, on the victim's ability to think and function. The expert was impressive, and knew precisely what levels of barbiturates would impair an individual's ability to think clearly. On cross-examination, defense counsel carefully led the expert to expand this testimony, creating the factual basis for a diminished capacity defense for the defendant who had ingested substantial barbiturates before going to the victim's house.

3. If counsel knows from prior examination (or senses during direct examination) that a witness is long-winded and unpleasant, counsel may not want to control the witness closely. The lawyer should *encourage the worst* in the adversary's witnesses. If one of the adversary's key witnesses is a rambling blowhard, counsel should give the witness room to show his character to the jury.

A crisp and disciplined examination, particularly with a judge who insists on keeping the witness in bounds, may hurt counsel in two ways. The witness's bad side will not be exposed; and the jury may think counsel is trying to hide something, because counsel is reining in the witness with the court's assistance.

Finally, the attorney should not be surprised if his best-laid plans for carefully controlling the witness fail. Most judges will let a witness explain his answer. In some courts, counsel can insist on a "yes" or "no" answer, but an explanation will always be permitted. Counsel should not feel discouraged if he is not able to tightly control a witness. If counsel makes an effort, and asks honest, short questions which call for honest, short answers, the jury will resent the witness's evasiveness.

§4.6 E. Repeating Direct Testimony

Rule 5

Do not repeat direct examination testimony.

This is a good rule to remember, particularly if the attorney has not tried many cases. Many lawyers work through their nervousness by beginning their cross with taking the witness step by step through previous direct-examination testimony, before turning to the hard job of true cross-examination. The jury will be more likely to believe (and remember) statements they hear two, three, or four times. Counsel should not provide the witness the chance to give direct testimony twice, unless:

1. The witness has a terrible memory, and is likely to vary from prior testimony. The attorney should go over previous material to test the witness's memory, and expose narrative shortcomings.
2. If the witness has set himself up for impeachment by lying in direct, counsel may want to pin the testimony down, and get it repeated, before showing it to be false. This is safest if the witness has testified from notes, or some written records, which should guarantee that the perjured testimony will be repeated again.
3. If a witness has been force-fed lines by opposing counsel, and repeats them in rote fashion, taking the witness through the testimony again on direct examination could emphasize the memorized quality of the testimony to the jury.

One of the most famous stories of this phenomenon is the examination many years ago, by Max Steuer, of a seamstress who escaped the deadly fire at the Triangle Shirtwaist Company. According to the story, which appears in many cross-examination treatises, Steuer had the witness repeat her detailed direct examination word for word, and when she changed a preposition, had the witness admit that she had made a "mistake," showing that the district attorney made her memorize her testimony. The story is hard to believe, and the technique hazardous at best. Some attorneys may find merit in the approach.

§4.7 F. How To Listen to a Witness

Rule 6
Listen to the witness.

This rule should be followed *almost* without exception. If counsel is able to listen to a witness, the cross-examination will be vastly improved. Listening means more than hearing words. Ideally, a good listener will:

1. Hear tones of voice or hesitations, and follow up:

> Q. I noticed you hesitated before answering, Mr. Smith. Was that because you were in doubt/remembered something else/were afraid the answer was going to harm you? or
> Q. You chuckled as you gave that answer, Dr. Brown. Do you find something humorous in Mrs. White's loss of her left arm?

2. Compare answers at one stage of the examination with answers at an earlier stage. If counsel believes that he has discovered an important discrepancy, it should be pointed out:

> Q. You testified this morning that you caught the train at 4:00 p.m. Now you say you caught it at 6:00 p.m. Were you right earlier, or is it that you just don't know what time you caught the train? (Objectionable, as compound, but worth trying.)

Counsel should not be too quick to challenge a witness about variations in testimony. Counsel will discover through experience that his memory, shaped by detailed knowledge of the case, may be wrong. If in doubt, get a daily transcript, make a comparison, and use the discrepancy in closing argument.

3. Note answers which are totally unexpected, but which help the case or provide opportunities for unexpected additional cross-examination. An unexpected helpful answer is the most common benefit to be gained from listening to a witness.

If, during a lawyer's first few trials, he finds himself too nervous to listen to the witness and formulate the next question at the same time, don't be surprised. In fact, plan for it. No rule forbids standing at the podium silently reviewing the checklist of important ground to cover with the witness, to make sure nothing significant is overlooked before sitting down.

§4.8 G. "Why" Questions

Rule 7
Never ask "why?"

Of course the lawyer should not let a witness have a chance to make a speech during examination. Asking "why" or "how can you say that" or "please explain" provides a witness the chance to launch into a poignant, self-righteous, or injured monologue. The attorney should usually honor the "no why" rule, but not always.

1. Counsel should not hesitate to ask the question "why?" if he knows that the witness's explanation will be unconvincing, and possibly even irritating to the jury. Counsel may have learned from deposition that this particular witness has a singularly unimpressive answer to the question "why?"

Many witnesses are glib and convincing for a short time on the stand, but wear out their welcome as they spend more time talking to the jury. Asking "why" questions gives this witness room to show his unpleasant side.

2. Some "why" questions are without risk, because there is no plausible explanation. In general, if a witness has been backed into a corner so that the question "was that fair?" cannot be answered, counsel will be safe in asking "why?"

3. If counsel *knows* that the answer helps the case (because the question has been asked earlier during deposition, or there is a signed statement or grand jury transcript as a back up), counsel should ask a "why" question. This, incidentally, provides a good reason to ask "why" questions often *during* depositions.

Asking "why" regularly at trial is dangerous and should be done sparingly. The attorney should be particularly wary of professional witnesses (police officers, medical experts, litigation veterans). But asking "why" at the right time is a valuable weapon in the arsenal of a confident examiner.

What about the witness who says: "May I explain?"

Trial lawyers disagree on the effectiveness of refusing to let a witness explain an answer on cross-examination. Some believe that if a good explanation exists, and since it will likely come out on re-direct, the cross-examiner looks tricky, nasty, and overbearing if he forces what ultimately seem to be misleading answers to narrow questions. Other lawyers dogmatically proclaim "never let the witness explain on cross-examination." They attempt to bluff the witness into forgoing an explanation by telling him: "Your lawyer (or the lawyer who called you) can ask you that if he wants to. I just want to know... (go on with questioning)."

As always, the answer lies with the jury. If the jury believes the witness is being treated unfairly, the points a cross-examiner' scores will be disregarded or minimized. On the other hand, if the cross-examiner has exposed the witness as shifty and evasive, forcing him to answer questions without permitting explanations of the answers will seem reasonable.

§4.9 H. Superfluous Questions

Rule 8

Never ask one question too many.

The rule is often illustrated by the "biting off the ear" story. As the story is told, it paints dramatically the unhappy fate of one who asks one question too many. But does the story make sense? Here is the way the "biting off the ear" examination would go, if the examiner followed the rule and did *not* ask one question too many.

Q. Where were Mr. Jones and Mr. Smith when the fight began?
A. On the sidewalk.
Q. Where were you?
A. In a phone booth nearby.
Q. What where you doing?
A. Making a phone call.
Q. Were you looking at the fight?
A. No.
Q. Was your back to the two people fighting?
A. Yes.

[Counsel, well aware of the dangers of asking one question too many, sits down triumphantly.]

The prosecutor rises and asks:

Q. How do you know, Mr. Jones, that the defendant bit off the victim's ear?
A. When I turned around, I saw him spit it out.

In other words, unless opposing counsel is a dunce, he will immediately ask counsel's "one question too many." This may have greater effect than if counsel had asked the question on cross-examination, since the jury may believe counsel was trying to hide something from them.

In deciding whether to ask the additional question, the lawyer must determine:

1. Is there a need to take chances to win the case?
2. How smart is the opponent; how likely is he to fill in blanks left by counsel?
3. Can counsel, after getting a damaging answer, soften its effect by further questioning or by other testimony?

Counsel will often be required to ask the so-called one question too many. Counsel should not, however, ask one question too many more than once, if the case has not been badly damaged by the first answer. In a notorious sting case in Alaska, the Strike Force prosecutor was facing the informant's ex-wife, who had testified that the informant had concocted the illegal scheme on his own. The examination went as follows:

Q. Mrs. Rossi, you dislike your husband don't you?
A. Yes, I do.
Q. Indeed, you hate your husband, don't you?
A. Yes.
Q. In fact Mrs. Rossi, isn't it true that you detest your husband?
A. Wouldn't you, if he had raped your twelve-year-old daughter?

The judge's instructions to the jury to disregard the testimony about the informant raping his daughter did little to rehabilitate.

§4.10 III. IRRITATING THE JURY

To Update

Rule 9

Don't irritate the jury.

If the examiner irritates the jury, he loses control of the cross-examination because the jury focuses on counsel, not the witness. That irritation has many sources. One common source is the cross-examiner's verbal tics, *e.g.,* saying "O.K." or "all right" after every answer and before every question, or beginning every question the same way, *e.g.,* "Now let me ask you this...." New lawyers and old war horses develop these tics. Listening for them in reviewing transcripts of counsel's trials or depositions is an excellent way to spot verbal tics.

Another way to irritate jurors is to bore them. Jurors expect some showmanship, and consider dullness at least a misdemeanor. A cross-examination which runs at one speed is dull. In a long examination, totally indiscriminate use of leading questions can be dull. Usually, there are areas of questioning where counsel can safely drop the leading question form (although not for too long). Give the witness some room to hang himself. For example, instead of leading the witness through a conversation about which he has been thoroughly deposed, ask him to "Tell us what was said." Since counsel has the deposition testimony about his conversation already, and plans to use it, perhaps the witness will add to his plight by giving a different version at trial, which can then be impeached. Instead of a witness candidly admitting a fact harmful to the side that called him, counsel has that same admission, plus evidence of evasiveness.

§4.11 IV. BEHAVIOR TOWARD WITNESS

Rule 10

Do not quarrel with or browbeat a witness.

The lawyer knows far more than the jury about the facts of the case (some of which will never be presented to the jury for evidentiary or logistical reasons) and the character of a specific witness. It is important to remember that outrage is not readily shared. Counsel should not be harsh or sarcastic to a witness unless the jury has ample reason to want to see the witness attacked.

If a witness has been discredited, or has consistently refused to give a straight answer, or has treated counsel with contempt in the jury's presence, counsel may be justified in breaking this rule.

Temper, however, must be displayed sparingly and cautiously. A jury's natural sympathies always lie on the side of the witness. A point can best be made by being moderate, and allowing the facts to speak for themselves.

Nonetheless, one of the most important things that must be conveyed to the jury is that counsel genuinely cares about the client and the case. This concern cannot be communicated if counsel is constantly detached, even-tempered, and above the battle. That is the judge's function. An advocate should not shrink from attacking a witness with fervor, reacting with heat to an unfair gambit by opposing counsel, or forcefully questioning a wrongly decided ruling from the bench.

As long as counsel does not approach the *entire* case in high dudgeon, occasional flashes of temper show commitment.

§4.12 V. CLOSING ARGUMENT AND CROSS-EXAMINATION

Rule 11

Save something for closing.

Attorneys should always save something for closing support because:

1. If a hostile witness has made a damaging admission, counsel does not want to highlight it during the trial, for fear that it will give the adversary a chance to explain it away or otherwise repair the damage.

2. Some testimony may be ambiguous, and counsel may not be able to improve it by detailed examination. This is especially true if the other side bears the burden; counsel should leave ambiguous testimony alone, and argue about its significance in closing.

3. A jury prefers to work things out for themselves. Some attorneys believe that some of the theories of the case should not be explained in detail even during closing argument. Rather, they say, you should count on a juror shouting "Eureka!" during deliberations, discovering the point on his own, and bringing the rest of the jury along. There are risks in this approach.

4. Jurors may be insulted if obvious points are made overly explicit.

Saving something for closing has merit, but only rarely should it limit your cross-examination. More often than not, the rule *should be broken.*

a. Most jurors have their minds at least half-way made up by the time closing argument begins. Counsel wants their initial inclination to be to vote counsel's way. If the true strengths of the case are saved for closing argument, counsel may be arguing to closed minds.

b. As more research is done about jury decisionmaking, it becomes increasingly apparent that attorneys must present their main points simply, clearly, and repeatedly. A juror is more likely to accept a statement if he has heard it at least three times: once during opening statement, once during testimony, and again during closing argument.

c. In a long trial, if counsel does not make some of the important points early, the jury may preliminarily decide that the client does not have a case, and not pay sufficient attention to counsel's subsequent presentation.

> PRACTICE TIP
>
> The suggestion that you break this rule frequently does not mean that you should never follow it. If you are able to paint your main themes with bold strokes during examination, you should not hesitate to save details for closing argument. Nor should you strain to develop complicated arguments through cross-examination. Efforts to get hostile witnesses to admit to your complicated theories of the case usually fail dismally. Reserve complicated theories for closing argument.

§4.13 VI. FRIENDLY WITNESS AND CROSS-EXAMINATION

Rule 12

Don't cross-examine if a friendly witness will cover the area.

This rule should *usually* be broken.

1. Telling a jury something twice is almost always better than telling it to them once. If the cross-examined witness and a friendly witness substantiate one another, counsel will have strengthened his point emphatically.

2. Jurors give greater weight to admissions of a hostile witness in cross-examination than they will to friendly testimony from one of the witnesses identified with the client.

3. If counsel can bring out important facts on cross-examination, he may be able to avoid calling a friendly witness to establish those facts, and therefore avoid cross-examination of that friendly witness, which may produce material adverse to the case.

The rule does apply if counsel must cross-examine an adverse witness with a strong expectation that damaging answers will result, and if there is the alternative of direct examination of a friendly witness. In other words, do not take unnecessary chances with cross-examination, but do not hesitate to cross-examine when it will probably produce more of a gain than a loss.

§4.14 VII. USE OF STRONG QUESTIONS

Rule 13

Begin and end your examination with your strongest questions.

This rule should rarely be broken. Many lawyers begin cross-examination of witnesses with the verbal equivalent of clearing their throats. They ask routine questions about employment, or other peripheral matters. A good way to begin your examination with flair is to open with the question that may elicit an answer that will damage the witness and the adversary's case: "Mr. Jones, didn't you overstate the net worth of your company by $5 million when you sold it to my client, the ABC Corporation?" "Mr. Smith, haven't you made most of your money the past three years by being a paid informant for the government?"

PRACTICE TIPS

Ideally, you will end your examination with a question and answer showing the witness to be a deliberate liar, so biased as to be unworthy of belief, or completely supportive of your client's case. If you are not fortunate enough to have the materials to so end, try anyway to go out on a high note. Carefully draft a set of safe "exit questions," and reserve them until the end of your examination.

Rule 13 should be disobeyed at times:

1. Counsel should not sit down after a strong question if there is still important other material to cover. If good exit lines have been prepared, counsel will still have a strong question to conclude with after covering other areas.

2. Before asking important questions, whether at the beginning or end of examination, counsel should gauge the time of the day, the attentiveness of the jury, and the total length of the anticipated examination. If an examination is begun at 4:00 p.m. after a long, wearying day, counsel should not leap into important areas immediately. Rather, he should go over less important matters, and begin the meat of the examination early the next morning, when the jury and judge are fresh.

§4.15 VIII. WHEN NOT TO CROSS-EXAMINE

Rule 14

If the witness has not hurt the client's case, the attorney should not cross-examine the witness.

Whether this injunction makes sense depends on several things. Is counsel's case weak, requiring him to take risks to succeed? If the witness hasn't hurt the case, can he *help* it?

Competent opposing counsel rarely call a witness to testify without believing that the witness will help some part of their case. If true, most witnesses called by the opponent will hurt counsel's case, if only slightly.

The above Rule should be modified: If the risk of examining a witness who has not significantly hurt counsel's case outweighs the potential gain, counsel should stay seated.

Here are some specific examples showing when it is wise to examine a witness, even though counsel's case has not been hurt during direct:

a. The witness has been called to discredit one of the client's co-parties, but knows nothing implicating the client. This situation sometimes occurs in civil cases, and often comes up in criminal trials. A typical low-risk examination of such a witness follows:

> Q. Mr. Smith, isn't it true that you met over ten times with the Green brothers, and each time you discussed the sale of heroin?
> A. Yes.
> Q. Isn't it a fact that Charlie Green paid you each time you delivered uncut heroin to 312 Orchard Street?
> A. That's true.
> Q. Would you please look over toward the table where I have been sitting during your examination. Do you recognize the man in the brown suit?
> A. No.
> Q. Never saw him before in your life?
> A. Not until this trial.
> Q. Isn't it also true that neither of the Green brothers ever mentioned the name of my client, Charles Rogers, during any of your meetings with them?
> A. That's true.

b. In a civil case (with a deposition transcript), counsel may be certain that the witness will provide helpful testimony on cross-examination. Counsel should in that case cross-examine. A jury will be impressed by testimony favorable to the client's case coming from the mouth of a witness called by the opponent.

c. If counsel has a sound intuition that cross-examination might be beneficial, he should risk cross-examination. Experienced attorneys will sense when an opponent's witness is not running true to plan. However, counsel should not be over confident or take foolish risks on a hunch. If a victim bank teller has been unable to identify the client (a jail-garbed defendant) as the stick-up man, counsel should not try to drive home the point through further cross-examination.

5

Conducting Cross-Examination

§5.1 I. CROSS-EXAMINATION PURPOSES

Counsel should review the purposes of cross-examination before examining each important witness. The important purposes are:

1. Strengthening counsel's case by bringing out favorable information (or reinforcing favorable testimony of friendly witnesses);
2. previewing closing argument;
3. demonstrating the witness's lack of ability to perceive events testified to, lack of ability to remember those events, or lack of ability to recount the events accurately to the jury;
4. attacking the witness by showing bias or personal interest in the outcome of the case;
5. impeaching the witness by demonstrating prior inconsistent statements;
6. impeaching adverse witnesses by a witness testifying to their prior inconsistent statements or bad character;
7. demonstrating that the witness has suppressed evidence, or has manufactured evidence (even by such innocuous means as preparing testimony with another witness);
8. showing the bad character of the witness (in limited circumstances); and
9. getting fresh discovery (particularly in criminal cases).

§5.2 II. PRINCIPLES OF CROSS-EXAMINATION

To Update

The examiner will know something in advance about the witness. In civil cases, counsel will usually have a deposition of the witness; in criminal cases, the witness may have testified at a preliminary examination. Counsel will know, or quickly sense, the "type" of witness being examined. Types include:

1. The evasive witness;
2. the hostile witness;
3. the flippant witness;
4. the "professional" witness;
5. the very old or very young witness;
6. the timid witness;
7. the lying witness; and
8. the sympathetic and truthful witness.

Of course, most witnesses display characteristics from several of these categories. Others will change their "type" during cross-examination. If a witness has been exposed as a liar, the examiner should take a far different tone than with a mistaken witness. Counsel should be certain that the jury believes the witness is a liar before attacking aggressively.

In advance of examination, counsel should review the following important principles of cross-examination:

a. Use short, non-technical, positive, strong language. Asking a witness if he saw "the" broken street light will often get a different answer than asking the witness if he saw "a" broken street light. So will asking for the speed of two vehicles when they "smashed" (rather than "bumped") into each other. "How short?" will often get a different estimate than "how tall?"

b. Lead, lead, lead.

c. If the witness is evasive, at a minimum the examiner should repeat the question until a straight answer is given.

d. Listen to what the witness is saying. Nervousness or preconception can stop up hearing, causing counsel to lose important information.

e. Expect the unexpected. No examination goes according to blueprint. The examiner should have alternative lines of questioning available if surprised, and should never, never look surprised.

f. Have some "can't miss" questions to ask each important witness. Begin the attack on a high note; end on a high note.

g. Keep in mind the purposes of each cross-examination. Decide whether risks must be taken in examining a particular witness.

h. Appear confident and self-possessed. If the attorney assumes a confident airwhatever he feels internallyand maintains a positive tone, a good effect will often be made on the jury even if the examination falls short of plan.

For other pattern examinations for problem areas that tend to recur, see chap 8.

§5.3 A. Model Cross-Examination

Following is an idealized cross-examination of an Internal Revenue Service agent. The agent has testified for the government in a money-laundering "sting" operation. The witness is a conglomerate of two or three actual witnesses. Much of the examination comes from real cases, with rough edges removed. The examination illustrates techniques attorneys will find useful over and over again during cross-examination. The illustration is from a criminal case, but almost all of the techniques apply equally to civil cases.

The examination is broken up by comment on important points. Some objections are also presented for illustration.

The defendant in the case is Masa Nakata, the Japanese manager of a branch bank located in Los Angeles. The Internal Revenue Service, including the witness, Agent White, has set up a sting by arranging for a small group of individuals to use the bank to send $2 million in currency to the parent bank in Tokyo, for further transfer to Switzerland.

Defense counsel has taken testimony from another agent at a preliminary examination, but not from this witness. The prosecutor has provided investigative reports prepared by the Internal Revenue Service during the course of the investigation.

The examiner represents the defendant, Masa Nakata. Mr. Nakata, the bank manager, has been accused of laundering $2 million in cash, by transferring the funds to Tokyo, without completely filling out required currency transfer reports.

Co-defendant Adam Lee introduced the undercover agent to Mr. Nakata. He has entered a plea of guilty in return for a promise of leniency, and has testified against Mr. Nakata. The prosecution also used an informer named Mark Jones, who made initial introductions, and urged violation of the law.

§5.4 1. Beginning With Force

To Update

Q. Agent White, the United States government spent over $500,000 on this case, from the time of investigation until now, correct?

A. How would I know that?

Q. You might know it because you were told so by your supervisor; you might know it because you filled out expense reports; you might know it because you reviewed the expenses log kept during the investigation. So I will ask you the question again: The United States government spent over $500,000 on this case, from the start of investigation until today, didn't it?

Prosecutor: Objection. What the government spent or did not spend has nothing to do with the crime charged in this case.

Defense counsel: It certainly does, Your Honor. If the prosecution has spent hundreds of thousands of dollars in investigating this case, they may be tempted to cut corners to get a conviction, creating bias.

Judge: Objection overruled.

Comment: The examination starts strongly. The questioner opens with a topic which interests the ordinary juror: possible squandering of government money. The objection gives the cross-examiner a chance to preview his closing argument in part. Note that the cross-examiner did not complain when the witness asked him a question. The witness's question gave the examiner an excellent chance to make a point before repeating the original question.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/5 Conducting Cross-Examination/§5.5 2. Evasive Witness

§5.5 2. Evasive Witness

Q. I'll ask you again, Agent White: Did the government spend the $500,000?
A. It's not my job to keep track of investigation expenses.
Q. You missed my question. I did not ask you about your job description, but whether or not the government spent over $500,000. Didn't it?
A. There were a lot of expenses. I didn't keep track of it all, but we spent no more than was necessary.
Q. Is that a long way of saying yes?
A. I don't really know how much we spent.

See also §8.11.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/5 Conducting Cross-Examination/§5.6 3. Business Record

§5.6 3. Business Record

Q. Do you have custody over the investigative files in this case?
A. I do, with a few other agents.
Q. It is correct, isn't it, that you can request any of those documents and get them for review?
A. Yes.
Q. Will the clerk mark as defendant's Exhibit "A" a three-page document labeled "Expense Summary."
[Clerk marks exhibit.]
Q. Is this Expense Summary part of your case file?
A. Yes, it is.
Q. Haven't you made some of the entries yourself?
A. Yes, it appears so.
Q. Is an Expense Summary a regular record kept by the Internal Revenue Service during a criminal investigation?
A. Yes, it is.
Q. It's important that you keep the record accurately, isn't it?
A. I don't know what you mean.
Q. Isn't it true that the Expense Summary is used in estimating budgets, and in making reports to the IRS headquarters?
A. I think so.
Q. And so it is important to keep an accurate expense summary, isn't it?
A. Yes.
Q. Are the entries normally made within thirty days of the time the expenses are incurred?
A. Yes.
Q. Your Honor, I move Exhibit "A" into evidence as a business record.
Judge: Exhibit "A" into evidence.
Q. Agent White, please read to the jury the bottom line of Exhibit "A," on the third page, next to the line saying "total expenses."
A. $524,385.26
Q. I'll return to my original question. Isn't it true that the government has spent over $500,000 on this investigation, from its beginning until today?
A. It appears so.

See also §8.9.

§5.7 4. Witness Falsehood

Q. You adopted the false name of Don White for your undercover role, didn't you?
A. Yes.
Q. Didn't you tell Masa Nakata, my client, that your name was Don White?
A. Yes, I did.
Q. Didn't you tell him you owned a fleet of garbage trucks in the Bronx?
A. Yes, I did.
Q. When you gave him that name and that occupation, you were lying, weren't you?
A. I was adopting the undercover role necessary for me to carry out my duties.
Q. I believe you missed my question. When you told him those things, you were lying, weren't you?
A. I was conforming with normal IRS practices in carrying out an undercover operation.
Q. Your Honor, I move the court strike that answer as nonresponsive.
Judge: The answer is stricken.
Q. Agent White, please listen carefully to my question, and answer "yes" or "no" if at all possible. The prosecutor can ask you for any explanation he thinks may be later necessary. When you told Masa Nakata that you were a man named Don White who owned a fleet of trucks in the Bronx, you were lying, weren't you?
A. If you want to call it that.
Q. Indeed, in carrying out what you call your proper role as an undercover agent, you frequently misrepresented yourself, didn't you?
A. Yes, I did.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/5 Conducting Cross-Examination/§5.8 5. Buttressing the Case

§5.8 5. Buttressing the Case

Q. The prosecutor has charged Mr. Nakata with helping to transfer more than $2 million in cash to Tokyo, without filling out proper forms. Isn't it true that Masa Nakata didn't receive one red cent personally from these transactions?

A. I don't know whether he did or he didn't.

Comment: The examiner is using plain language: "not one red cent" rather than "received no remuneration."

Q. Agent White, I hand you the thirty five pages of Case Reports prepared in this case. Are you familiar with those reports?

A. Yes.

Q. Are these reports a complete summary of all important developments in the case?

A. Yes, they should be.

Q. Would you point out to me anywhere in the thirty two pages of single-spaced typed case reports a single reference to Mr. Nakata receiving one thin dime in connection with the transfer of funds to Tokyo?

A. I don't think it is there.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/5 Conducting Cross-Examination/§5.9 6. Prior Inconsistent Statement

§5.9 6. Prior Inconsistent Statement

Q. Would you please turn to the report of September 30, 1983. Was that prepared by you?
A. Yes.
Q. Would you please read to the jury the second complete paragraph on the second page.
A. "I told Mr. Nakata that we would take care of him for his help. He said he wanted nothing for himself, but simply appreciated us as good customers."

Comment: The prior statement is not directly in contradiction of the witness's testimony. However, lack of memory often permits use of prior inconsistent statement. See *People v O'Quinn* (1980) 109 CA3d 219, 167 CR 141; *People v Burcidgo* (1978) 81 CA3d 151, 146 CR 236; 1 Jefferson, California Evidence Benchbook §10.1 pp 342-344 (2d ed CJA-CEB 1982).

Source: Civil Litigation/Effective Direct and Cross-Examination Book/5 Conducting Cross-Examination/§5.10 7. Hostile Witness

§5.10 7. Hostile Witness

Q. Masa Nakata told you he did not want to violate the law, didn't he?
A. I don't remember that.
Q. Didn't he tell you he wanted no trouble with the authorities?
A. I knew that he thought he was breaking the law.
Q. Agent White, I don't mean to be sarcastic, but are you telepathic?
A. What do you mean?
Q. Do you have some ability to read minds?
A. No, I don't.
Q. Then, let's stick to what you heard, rather than what you believe somebody might be thinking. Isn't it true that Mr. Nakata told you he wanted no trouble with the authorities?
A. I don't remember that.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/5 Conducting Cross-Examination/§5.11 8. Refreshing Recollection

§5.11 8. Refreshing Recollection

Q. I show you a transcript of the July l3, 1983, conversation in the Hyatt Hotel, previously marked as Government's Exhibit 13 for identification only. You were present at that conversation, weren't you?
A. Yes, I was.
Q. Please look at pages 3 and 4, and read them silently to yourself.
[Pause for reading]
Q. Does that refresh your recollection as to whether Mr. Nakata told you that he wanted no trouble with the authorities?
A. Yes, he did say that.

Comment: The examiner in this illustration may be too forceful too early with this witness. The general evasiveness and hostility of the witness probably justifies the examiner's aggressiveness to the jury.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/5 Conducting Cross-Examination/§5.12 9. Memorized Testimony

§5.12 9. Memorized Testimony

Q. Indeed, Agent White, Masa Nakata didn't have the slightest idea he was breaking the law, did he?
A. That's not so. His boss, Mr. Abe, indicated that the subject Nakata had the requisite knowledge of the illegal nature of the money transfer.
Q. Are you telling the jury that Mr. Abe said to you, "I would like to indicate that the subject Nakata has the requisite knowledge of the illegal nature of the money transfer"?
A. Or words to that effect.
Q. He certainly didn't use those exact words, did he?
A. I don't remember.
Q. Have you memorized any of your testimony today?
A. What do you mean, "memorized"?
Q. For instance, I'll show you your Case Report of May 13, 1985. This discusses your meeting with Mr. Abe in Tokyo. Would you read to the jury the next to the last paragraph.
A. "Mr. Abe indicated that the subject Nakata had the requisite knowledge of the illegal nature of the transfer of funds."
Q. Your Honor, could the court reporter read back Agent White's recent testimony on this same point?
[Court reporter reads back testimony.]
Q. I'll ask you again. Haven't you memorized some of your testimony word-for-word from your case report?
A. No, I don't see why you say that.

Comment: This line of cross-examination seldom works so neatly. If counsel has read and reread critical reports, and can stay relaxed during examination, from time to time he will be able to expose a witness parroting written material.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/5 Conducting Cross-Examination/§5.13 10. Joint Preparation of Testimony

§5.13 10. Joint Preparation of Testimony

Q. Isn't it true that you have reviewed all the case reports, yours and the other agents', preparing for your testimony?
A. Yes, that's true.
Q. I'll bet you spent several hours going over them, to be sure you would be a good witness, didn't you?
A. One or two hours.
Q. You've also checked your memory against Agent Peterson's, haven't you?
A. We've talked about our testimony.
Q. Indeed, the two of you were in the hallway talking about it this morning, weren't you?
A. We may have been.
Q. You reminded him of some things he'd forgotten, and he reminded you of some things you'd forgotten?
Prosecutor: Objection. Compound.
Judge: Overruled.
Q. You can answer the questions. Didn't each of you remind the other of things they had forgotten?
A. No.
Q. Well, didn't he remind you of some things you had forgotten?
A. I don't think so.

§5.14 11. Bias

Q. Are you a partisan, Agent White?
A. What do you mean, a "partisan"?
Q. A partisan is someone who favors one party over another, someone who, so to speak, has a "rooting interest" in the outcome of the case. Are you a partisan?
A. No.
Q. Didn't I send you a letter two weeks ago, asking if you would sit down and talk with me about this case before trial?
A. Yes.
Q. You refused.
A. I refused.
Q. Didn't I ask you in the hallway this morning whether you would talk about the case with me?
A. Yes, you did, and I refused to then, too.
Q. You spent over ten hours working with the prosecutor getting ready for your testimony, haven't you?
A. I spent over ten hours with the prosecutor, but not getting ready for my testimony.
Q. Over two hours getting ready for your testimony with him?
A. Perhaps.
Q. And you have spent much of the past six months working on this investigation, haven't you?
A. Yes.
Q. And you admit now that the government has spent over $500,000 in the investigation?
A. Yes.
Q. Isn't it fair to say that it would be a blow to your reputation if you didn't get a conviction after all that time and all that money?
A. My reputation will stand.
Q. I'll ask you again, Agent White: Are you a partisan?
A. No.

See also §8.2.

§5.15 12. Selective Memory

To Update

Q. In any event, Mr. Nakata told you he wanted to stay out of trouble with the authorities, didn't he?
A. Well, now that I think of it, he told me the second or third time I met him that he would transfer all the money I wanted, if it wasn't for his concern about bank authorities.

Comment: The examiner had no need to ask this question again, since he already had a good answer. Coming back to the question, after the witness has had a chance to think, was a mistake.

Q. Just a second, Agent White, do any of your Case Reports show that conversation?
A. No, but I still remember it.
Q. When you prepared the Case Reports, you tried to include all of the important facts you turned up during the case, didn't you?
A. As much as possible.
Q. You knew that you would be using the reports to prepare for trial?
A. Yes.
Q. Isn't it true that your Special Agent Manual instructs you to note all important details in a case report?
A. I think it does.
Q. But your Case Reports don't have this conversation anywhere, correct?
A. It is not there, but I remember it as clear as a bell.
Q. That conversation took place over six months ago, if it ever happened, didn't it?
A. It did happen, and it was about six months ago.
Q. Do you have an exceptional memory?
A. I have a trained memory.
Q. Please look straight at me, if you will, Agent White, and describe to me the third juror from the left in the back row.
A. That's not a fair question.
Q. You have been looking at the jury as you answer questions, haven't you?
A. Yes.
Q. What was the third question I asked you during our cross-examination?
A. I don't remember.
Q. Whose picture is on a $10 bill?
A. Alexander Hamilton.

Comment: Two out of three isn't bad for the examiner. The jury should get the point.

Q. Have you remembered my third question during cross-examination yet?
A. No, I haven't.
Q. Nor do you remember a conversation you had over six months ago, which appears nowhere in your case report, do you, Agent White?
A. Yes, I do.

See also §8.4.

§5.16 13. Demonstrative Evidence

Q. Isn't it true that Mr. Nakata refused for five solid months to transfer funds without proper forms?
A. He wouldn't transfer funds for a while, because he was suspicious of us.
Q. Agent White, you want to see a fair trial, don't you?
A. Of course.
Q. Then please concentrate on my questions, and answer my questions, and not some other question. Didn't Mr. Nakata refuse to transfer funds without proper forms for five solid months?
A. He transferred funds without the form in the sixth month.
Q. I take it then your answer is yes. He refused for five solid months?
A. Yes.
Q. During those five months, you and Agent Peterson badgered him to help you in your supposedly illegal scheme, didn't you?
Prosecutor: Objection. That is argumentative.
Q. Let me rephrase the question. Didn't you and Agent Peterson constantly take the initiative in asking Masa Nakata to break the law?
A. I think it was a two-way deal.
Q. Please mark as Defendant's Exhibit "B" a chart, summarizing phone calls between Mr. Nakata and the undercover agents. Your Honor, this summary will be authenticated by a later witness. With your permission, I would like to use it in questioning Agent White further.
Judge: Go ahead.
Q. Please take a look at Exhibit "B," Agent White. I am going to put a transparency of the exhibit on the screen so that the jury can follow along. The exhibit is a timeline, showing vertical strokes when you or Agent Peterson called Mr. Nakata, or he called you. Please concentrate on the first five-month period. Isn't it true that you and Agent Peterson called Mr. Nakata 35 times, and he called you only twice?
A. I don't know.
Q. You deny that you called him 35 times and he only called you twice?
A. I don't deny it, I just don't know.
Q. Isn't it true that Mr. Nakata only called you those two times in response to your requests for a call from him?
A. It might be.
Q. Then, Agent White, isn't it fair to say that during the first five months you and your fellow undercover agent constantly took the initiative in nudging Mr. Nakata to break the law.
A. He did nothing he didn't want to do.
Q. Move to strike as nonresponsive. Please instruct the witness to answer my question, Your Honor.
Judge: Motion granted. The jury will disregard the Agent's answer. Agent White, please answer the question.
A. What is the question?

Source: Civil Litigation/Effective Direct and Cross-Examination Book/5 Conducting Cross-Examination/§5.17 14. Pinning the Witness Down

§5.17 14. Pinning the Witness Down

Q. During that first five-month period, didn't you and Agent Peterson constantly press Mr. Nakata to break the law?
A. No.
Q. It is true, isn't it, that you called him 35 times or so?
A. Yes.
Q. And during many of those phone calls, which we will hear on tape later, didn't you urge him to transfer funds without filling out the required paperwork?
A. Yes.
Q. That transfer of funds without paperwork violates the law, doesn't it?
A. Yes.
Q. So, it is perfectly fair to say, isn't it, that you repeatedly urged Mr. Nakata to break the law during that first five months?
A. I guess so.

Comment: The transparency, graphically showing the frequency of the calls, has remained on the screen throughout the examination. Favorable documentary evidence should be exposed to the jury as often as possible, and for as long as possible.

§5.18 15. Witness Misconduct

Q. In June, 1985, you and Agent Peterson traveled to Tokyo to meet with Mr. Nakata's boss, Mr. Abe. Correct?
A. That's right.
Q. Did you travel first class?
Prosecutor: Objection. What does that have to do with anything?
Defense counsel: The jury might decide that the agents were more interested in having a tax-paid junket than catching law violators.
Judge: Please save those remarks for closing argument. The objection is overruled.
Q. First class, Agent White?
A. No, we traveled business class.
Q. You did stay at a luxury hotel in Tokyo, didn't you?
A. What do you mean, "a luxury hotel"?
Q. I mean a hotel that charged you $125 a night.
A. That's what we paid.

§5.19 16. Ability To Perceive

Q. I understand from your direct testimony that you had one critical meeting with Mr. Abe, that lasted about four hours. Is that right?
A. Yes.
Q. You met in the lounge of the Imperial Hotel, didn't you?
Q. It was at that meeting, according to you, that Mr. Abe indicated that Mr. Nakata had the requisite knowledge of the illegal nature of the funds transfer?
A. Yes.
Q. What time of night did he tell you that?
A. About 11:30 p.m., just before the meeting broke up.
Q. Please mark for identification Plaintiff's Exhibit "C," the hotel bill for your stay at the Imperial. The Prosecutor has stipulated that it may be admitted into evidence as a business record, and I so move.
Judge: Admitted.
Q. Did you drink liquor in the lounge?
A. Some of us did. Agent Peterson doesn't drink. Mr. Abe and I drank about the same amount.
Q. I assume that you had both finished most of your drinks by 11:30 p.m., shortly before the meeting broke up. Is that right?
A. That's right.
Q. Agent White, the hotel bill shows that you were charged for 27 mixed drinks that evening in the Imperial lounge. Had you had 13 or more drinks by the time Mr. Abe got down to brass tacks?
A. I don't remember that many drinks, but if the hotel bill shows it, it is probably true.
Q. Do you have normal capacity for liquor?
A. Average.
Q. Wasn't there a band playing disco music in the lounge?
A. There was a band.
Q. Agent White, by 11:30 at night, when you had been drinking steadily for three hours, with a rock and roll band blaring in the background, you weren't able to have any coherent conversation with Mr. Abe, were you?
A. I certainly was.
Q. You had about thirteen drinkswhat kind of liquor were you drinking?
A. Seagram's and 7, probably.
Q. I take it that your thirteen drinks didn't have the slightest effect on your ability to carry on a serious business discussion?
A. No.
Q. And you were able to get Mr. Abe's remarks down letter perfect despite the rock and roll band in the background?
A. Not letter perfect, but well enough.

Comment: The examiner has done the best he can to discredit the witness's recollection, and preview some of his own closing argument. The examiner is making many strong points, even though the witness's answers, if taken literally, are not helpful. See §8.14.

§5.20 17. Incomplete and Altered Notes; Destroyed Evidence

To Update

Q. After you left the hotel, I assume you made notes of your conversation. Did you?
A. Yes.
Q. That very night, correct?
A. No, I made notes of the conversation with my partner the next day, on the return flight to the United States.
Q. What time the next day?
A. Between 10:00 in the morning and 2:00 in the afternoon.
Q. Nearly twelve hours after the conversation, right?
A. Right.
Q. You were hung over, weren't you, Agent White?
A. Not so as to notice.
Q. What did you use to make the notes?
A. A yellow legal pad, like you lawyers carry.
Q. Those notes no longer exist, do they, Agent White?
A. No. Once we made up the smooth notes, we could throw away the rough notes.
Q. How many pages did the rough notes take up?
A. Four or five pages.
Q. When you made up your rough notes, did you work with your partner, Agent Peterson?
A. What do you mean?
Q. Did you fill in part, and did he make corrections and additions?
A. Yes.
Q. When you made up your rough notes, you crossed out some parts and made corrections while you were doing the work, didn't you?
A. Yes.
Q. I am sure you underlined some parts, didn't you?
A. Yes.
Q. Looking at your smooth notes, we have no way of knowing where you crossed out items, where you underlined items, and added items. Isn't that true, Agent White?
A. That's true.
Q. You dictated your smooth notes, to be typed by a secretary, right?
A. Yes.
Q. It's true, isn't it, that you did not dictate those notes until a week after you returned to the United States?
A. That's about right.
Q. When you dictated the smooth notes, didn't you add a few items which you left out of your rough notes?
A. I don't remember.
Q. You don't deny adding items, do you, Agent White?
A. I don't deny it.
Q. You don't deny leaving some items out of your smooth notes, that appeared in the rough notes, but seemed unimportant, do you?
A. I just don't know one way or the other.
Q. So you don't deny it?
A. No, I don't deny it. But I don't like what you're implying; I tried to be fair to your client.
Q. I imply nothing, Agent White. The jury will draw their own conclusions from the facts. Wouldn't it have been fairer to my client if you had kept the rough notes?
A. No, I don't see that.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/5 Conducting Cross-Examination/§5.21 18. Prior Bad Act

§5.21 18. Prior Bad Act

To Update

Q. Agent White, isn't it true that you have been reprimanded in two other trials for destroying rough notes?
A. That's not true.

Comment: The questioner in federal court probably has to accept the witness's denial of this prior specific bad act and cannot prove the prior act by extrinsic evidence whether offered to prove the witness's character trait, to impeach the witness, or to contradict him. See Fed R Evid 608(b). Under Evid C §787, however, the witness cannot even be cross-examined about specific acts if the purpose is to impeach by showing a character trait, e.g., dishonesty. However, if the evidence is relevant on the matter of credibility, other than to prove a character trait, e.g., bias or prejudice, or to contradict part of the witness's testimony, the witness can be cross-examined about a prior specific bad act and his denials countered by extrinsic evidence of the act. See 2 Jefferson, California Evidence Benchbook §28.5 (2d ed CJA-CEB 1982).

Source: Civil Litigation/Effective Direct and Cross-Examination Book/5 Conducting Cross-Examination/§5.22 19. Bias of Another Witness

§5.22 19. Bias of Another Witness

Q. Agent White, you were present, weren't you, when Adam Lee testified?
A. Yes, I was in court.
Q. Adam Lee was originally named as a defendant in the indictment charging currency transfer violations, wasn't he?
A. Yes, he was.
Q. He made a deal with you, didn't he?
A. Not with me.
Q. He made a deal with the prosecution then, didn't he?
A. The government has arrived at an arrangement with him.
Q. An "arrangement" is another way of saying that you made a deal, isn't it?
A. Perhaps.
Q. As part of that deal, didn't you personally recommend to the court that he be permitted out on a low bail bond, and be allowed to travel back to Vancouver, where he was a businessman?
A. Yes.
Q. Then, didn't you promise him that the prosecutor would recommend a probationary sentence in return for his plea of guilty and his testimony?
A. In return for his plea of guilty, and his honest testimony.
Q. You are going to be the judge and jury as to whether his testimony is honest, aren't you?
A. I will have a role to play in that decision.
Q. On the original indictment in this case, Adam Lee was facing a possible jail term of 20 years, wasn't he?
A. I accept your mathematics.
Q. Now, you are going to suggest to the Judge that he get no time? Go scott free? Correct?
A. Correct.
Q. And after you made him an offer he couldn't refuse, he changed his story, and pointed the finger at Mr. Nakata, didn't he?
Prosecutor: Objection. The remark about an offer that couldn't be refused misrepresents the witness's testimony and the jury can't understand what is meant by "pointing the finger."
Judge: the witness never used the phrase an "offer he couldn't refuse." The question is improper in part. I think the jury knows what Mr. Smith means by "pointing the finger." Rephrase the question.

Comment: The question was probably too colloquial. But, the only penalty is an opportunity to ask the question again, more fully. See also §8.2.

§5.23 20. Prior Inconsistent Statement by Third Party

Q. I'll rephrase the question. After you told Mr. Lee that, although he was facing a twenty-year sentence, you would recommend straight probation, didn't he give you a statement which differed from his earlier statement?
A. Yes.

Comment: Whenever a defendant agrees to "turn," and testify for the government, defense counsel has a unique opportunity to educate the jury about the maximum prison term faced by that defendant. Otherwise, it would be improper for defense counsel to refer in any way to the length of any prison term faced by any defendant (including, presumably, his own client).

Q. Let me take you through the different statements I suggest Mr. Lee has made. First, at the time of his arrest, didn't he tell you: "We didn't think we were breaking the law at all. We'd even talked to lawyers"?
A. May I refer to my Case Report?
Q. Yes, you may.
A. Yes, that's right. He said that.
Q. Then, after he was offered the deal, you interviewed him in your offices, didn't you?
A. That's right.
Q. He told you there, didn't he, that originally everybody thought they were complying with the law, but after the third or fourth month, they realized that they were probably breaking the law?
A. Yes, that's what he said.

Comment: The examiner can go on to compare statements made before the grand jury, and the testimony given by Mr. Lee in this trial. Use of a chart, put together by "cut-and-paste" techniques is invaluable to pinpoint discrepancies in testimony of important witnesses. In separate columns of the chart, the discrete events testified to by the witness are arranged in the chronological order given by the witness. A final column is left open for the witness's trial testimony. By lining up the testimony in the chart, the cross-examiner can see not only changed facts, but changed testimony about the order of events. A capable paralegal or secretary can prepare the chart, and keep track of the witness's testimony during trial, for comparison. The chart can also be made into a transparency for closing argument.

§5.24 21. Discovery

Q. Agent White, when you came to court this morning, I saw you carrying a large maroon briefcase. Was it your briefcase?
A. Yes.
Q. What did you have in it?
A. Some of the notes and materials which relate to this trial.
Q. May I look at those notes to see if they give a more complete picture of what happened?
A. I don't know. I guess it is up to him [pointing at the prosecutor].
Q. Your Honor, can I have a brief recess, to examine the contents of the briefcase?

Comment: This is a shot in the dark. In a criminal trial, most judges will not permit an attorney to examine a case agent's briefcase. If the agent refuses, he seems to be hiding something. Counsel should argue that, if given an opportunity to look at the contents of the briefcase, he may discover previously undisclosed evidence. If so, he should have access to it. If it is material already turned over, the prosecution is not prejudiced.

In a civil case, employees of a party will sometimes bring new material to court. Custodians of records, or employees of parties who have been subpenaed, should be asked to "open up their briefcases."

Source: Civil Litigation/Effective Direct and Cross-Examination Book/5 Conducting Cross-Examination/§5.25 22. Admission of a Party Representative

§5.25 22. Admission of a Party Representative

Q. Agent White, isn't it true that Mr. Nakata told you after the first currency was transferred that he thought it was perfectly legal to transfer your $20,000, and list only a corporate name as a transferor?
A. No, that's not true.
Q. I turn now to your Case Report for July 13, 1985. Do you have it before you?
A. Yes.
Q. You prepared that Case Report after you met face to face with Mr. Nakata, didn't you, Agent White?
A. Yes.
Q. On page 2, toward the middle, doesn't your report say: "Subject says its okay with Bank authorities if we fill out just the corporate name on this transfer of $20,000."
A. Yes, it says that.
Q. You filled out this Case Report in your capacity as an Internal Revenue Service agent, working for the government, didn't you?
A. Yes, I did.
Q. Your Honor, I move the statement into evidence as a party-representative's admission against interest.
Judge: Granted.

Comment: The jury can now consider this statement as direct evidence, rather than just impeachment.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/5 Conducting Cross-Examination/§5.26 23. Principle of Completeness

§5.26 23. Principle of Completeness

Prosecutor: Your Honor, I demand that Mr. Smith read the next sentence of the report, to provide the full context of the statement.

Judge: Let me see the report. [Pause.] Your request is granted.

Agent White [reading]: "He seemed nervous when he said this, and I believe he may have just been saying it because he feared I might be a government agent."

Comment: By the principle of completeness the prosecutor has a right to demand any "context" statements be given to the jury immediately. Fed R Evid 106 (limited to writing or recorded statement). Under Evid C §356, it is up to the adversary to do the completion (covers "act, declaration, conversation, or writing," oral statements, and conversations). It is questionable whether this statement was admissible, as argued below.

Q. Your Honor, I move to strike that statement. It is Agent White's total guesswork, and an impermissible opinion. The jury ought to be able to make up their own minds by listening to Mr. Nakata's words, without reference to Agent White's imagination.

Judge: Motion denied.

Q. Agent White, I want you to look now at your Case Report for September 2, 1985. On that day, you met with Mr. Nakata again face to face, didn't you?

A. Yes.

Q. And you asked him directly, on tape, to transfer $20,000 to an account in Tokyo, and put a false name in the report, didn't you?

A. Yes.

Q. He refused, didn't he?

A. He danced around the topic. He never refused.

Q. Let's look at your report. Don't you say: "Subject wouldn't say yes or wouldn't say no to my request. It seemed like typical Japanese mentality to me."

A. Yes, that's what I say.

Q. Are you an expert on what you have called "Japanese mentality"?

A. Not an expert. I know something about them, though.

Q. How?

A. I saw Shogun on T.V.

Q. Is it fair to say that the basis for your expertise on the Japanese mind is Richard Chamberlain's miniseries?

A. Plus what I picked up in the newspapers.

Q. Agent White, isn't it true that this case never would have been brought if your target had been an American bank vice president who did and said the exact things done and said by Mr. Nakata?

A. Absolutely not true.

Comment: This question previews closing argument, and may make it unnecessary to argue prejudice during closing. Exposing racial prejudice is difficult. It should be attempted in a low-key manner.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/5 Conducting Cross-Examination/§5.27 24. Bad Character of Informer

§5.27 24. Bad Character of Informer

Q. Agent White, the government has paid over $15,000 to Mark Jones, your undercover informer, correct?
A. Yes.
Q. And you still owe him $10,000, don't you?
A. I don't know the exact amount.
Q. Approximately $10,000, right?
A. Yes.
Q. Isn't it true that the first time you ever heard of Mr. Nakata was when Mark Jones came to you and told you that Mr. Nakata was interested in laundering money?
A. I don't think he used those exact words. Mark Jones was the first person to mention Mr. Nakata to me.
Q. Mr. Jones has been insisting on his final $10,000, hasn't he, Agent White?
A. Not really.
Q. Let me show you three letters written by Mr. Jones to the Internal Revenue Service, asking for money due. Do those refresh your recollection?
A. He has written some letters, yes.
Q. Asking for his $10,000, right?
A. Right.
Q. Early in the investigation, Mr. Jones promised that he would lead you to five different bankers who were laundering money, correct?
A. Yes.
Q. He didn't keep that promise, did he?
A. He only found Mr. Nakata.
Q. Isn't it accurate to say that the only evidence you have that Mr. Nakata was willing to break the law during the first five months of your investigation was what Mr. Jones told you about his conversations with my client?
A. We relied upon Mr. Jones.

§5.28 25. Failure To Follow Written Guidelines

Q. You are familiar with the IRS Agent's Handbook, aren't you?
A. Yes.
Q. Internal Revenue agents are required to review the book regularly, and stay familiar with its contents, aren't they?
A. Yes.
Q. And it is true, isn't it, that the book provides guidelines for agents conducting investigations?
A. Yes.
Q. Are you familiar with guidelines called "Monitoring Conduct of Informants"?
A. Yes.
Q. I'm sure you referred to that from time to time during this investigation, didn't you?
A. I might have.
Q. Let me give you an extra copy of the Handbook, and ask you to follow with me at page 125. Doesn't the book require agents to, quotemaintain particularly close contact with informers during the early stages of an investigation, to avoid the possibility of entrapment. Whenever possible, if an informer is to meet with a suspect early in an investigation, he should be accompanied by a regularly employed Internal Revenue Service agent, or provided with electronic recording equipmentclose quote. That's a requirement of your Handbook, isn't it?
A. Yes, it is.
Q. You ignored that rule totally in this case, didn't you?
A. I don't know what you mean.
Q. Didn't you permit Mark Jones to meet alone with Mr. Nakata at least five times, before he was accompanied by any regularly employed agent?
A. Yes.
Q. And you didn't provide Mark Jones with an electronic recording device, did you?
A. We didn't give him one. It's very dangerous to do that in the early stages of an investigation.
Q. Did you have any information that Mr. Nakata had ever been violent in his life?
A. No, we didn't.
Q. Mr. Nakata, would you please stand up and move over here by the jury. Agent White, is it fair to say that Mr. Nakata stands about 5'6" tall and weighs less than 130 pounds?
A. I suppose so.
Q. Do you feel threatened by him today?
A. No, of course not.
Q. If you had provided Mr. Jones with a recording device, you wouldn't have had to take his word about what Mr. Nakata said, would you?
A. True.
Q. Wouldn't it have been fairer of you to have followed your Internal Revenue Service guidelines?
A. Not necessarily.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/5 Conducting Cross-Examination/§5.29 26. Prior Convictions; Other Adverse Matters

§5.29 26. Prior Convictions; Other Adverse Matters

Q. So you felt you could trust Mark Jones, did you?
A. I felt he was always honest with us.
Q. When you agreed to pay Mr. Jones to be your informer, you knew he had been convicted of felony arson in 1969, didn't you?
A. I knew his record.
Q. Knew about the arson?
A. Yes.
Q. Knew he had also been convicted of armed robbery in 1977?
A. I knew his record.
Q. Did you know that he had filed for bankruptcy the year before he came to you looking for money?
A. No.

Comment: The bankruptcy question should not be asked unless the examiner has a reasonable belief that the bankruptcy occurred. If there is substantial danger of prejudice from the mere asking of the question, the examiner must have sufficient information so as to ask the question in good faith. 1 Jefferson, California Evidence Benchbook §27.18 (2d ed CJA-CEB 1982). In an entrapment case, most courts will permit wide-ranging cross-examination of an agent's knowledge of informer traits.

§5.30 27. Examination as Argument

Q. Mark Jones borrowed $5000 from Mr. Nakata's bank, didn't he?
A. Yes.
Q. And as far as you know, he hasn't paid that money back to this day, has he?
A. No.
Q. Isn't that a federal crime?
A. I don't know.
Q. Agent White, isn't it fair to say that a major part of your case against Masa Nakata rests on the shoulders of a two-time loser who was desperate for money when he came to you, a convict who even stole from Mr. Nakata's bank?
Prosecutor: I object! Argumentative and compound.
Judge: Sustained.
Q. Mr. Jones had been convicted of two felonies, hadn't he?
A. Yes.
Q. Mr. Jones did write you at least three times urgently pressing for payment of money, true?
A. I don't know about urgently. He did write three times.
Q. Mark Jones, your reliable informant, did borrow the $5000 and as far as you know never paid it back, true?
A. True.
Q. Do you continue to ask the jury to believe that Mr. Jones is an honorable man?
A. Yes.
Q. And if the jury does not believe he is an honorable man, you don't have much of case, do you?
Prosecutor: Objection. That's final argument, and has no place during examination.
Judge: Sustained. Please do not ask that kind of question.
Q. Yes, Your Honor, I will leave it up to the jury to answer that question for themselves. No further questions.

Comment: The question was argumentative, but was warranted by the facts of the case. The question is risky: the experienced witness may respond by giving a narrative account of all the strengths of the case, speaking convincingly on the importance of countering money laundering by vigilant law enforcement. Defense counsel has finished examination on a strong note.

To see sections added to this chapter since publication of the book, click To Update

Source: Civil Litigation/Effective Direct and Cross-Examination Book/5 Conducting Cross-Examination/§5.31 B. Routinely Helpful Questions

§5.31 B. Routinely Helpful Questions

The following questions are virtually always safe to ask and often elicit pleasantly surprising answers:

Q. Have you talked about this case with the lawyer for Mr. Jones? How many times?
Q. Didn't Mr. Jones's lawyer remind you of some of the facts you had forgotten?
Q. Did you give any statements to anyone about the facts of this case?
Q. Have you talked with other witnesses about what their testimony has been? Or is going to be?
Q. Did you ever make any notes about the facts of this case?
Q. Do you have any social or blood relationship with Mr. Jones, or any of the witnesses if called by him? Or with any of his lawyers?
Q. Have you prepared for testimony with videotaping equipment? Why? How many repetitions of your testimony did you shoot?
Q. Did you read the deposition you gave earlier in this case?
Q. Have you helped any other witnesses refresh their recollection about what happened?
Q. Have you talked to other witnesses to be sure that your stories are consistent?
Q. Are you being paid anything to reimburse you for your testimony? For time you have had to take off from work? For time spent preparing your testimony?
Q. Will you be any better off financially if Mr. Jones wins this case?
Q. Has the lawyer for Mr. Jones showed you any writing or diagrams to help you prepare for your testimony?

6

Preparing Favorable Witnesses for Cross-Examination

§6.1 I. GOALS OF CLIENT PREPARATION

Most cases are won by witnesses and evidence, not by attorneys. Preparing the client to tell his own story effectively is an important aspect of trial. Preparation for the direct examination of counsel's client is discussed in chap 2. Preparation of counsel's client or cross-examination should:

a. Fix facts;
b. emphasize honesty;
c. minimize stage fright;
d. increase credibility; and
e. prepare for tricks and traps.

These points also apply to other preparation of other friendly witnesses for their cross-examination.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/6 Preparing Favorable Witnesses for Cross-Examination/§6.2 II. DECIDING TO HAVE CLIENT TESTIFY

§6.2 II. DECIDING TO HAVE CLIENT TESTIFY

To Update

If the client is not going to testify, the attorney, obviously, need not prepare the client. However, the client should always testify in a civil trial. The opponent has a right to insist on an in-state party's testimony by subpenaing the party (or noticing the party's presence under CCP §1987(8)) and designating him as a hostile witness. Evid C §776.

If there is no logical flesh-and-blood party, counsel must find one. If the true plaintiff is deceased, the next-of-kin may be the logical party. If representing a corporation, counsel should make sure it is not a "faceless corporation." A corporate officer who cares about the case, has a stake in it, and will testify, should sit at counsel's table throughout the trial.

In a criminal case there may be sound reasons to keep the client off the witness stand:

a. The client's three prior convictions for armed robbery, admissible for impeachment, will certainly bias the jury against the client, especially if he is accused of armed robbery. The weighing process used by the court to decide whether or not prior felonies may be used to impeach is increasingly tilted toward admitting the priors. See Evid C §§352, 788; *People v Barrick* (1982) 33 C3d 115, 187 CR 716 (admission of prior conviction held reversible error); *People v Duran* (1983) 140 CA3d 485, 189CR 595 (use of prior conviction upheld); Fed R Evid 609. Proposition 8 will reinforce this tendency. Counsel may persuade the court to "sanitize" the prior convictions (so that the jury learns of the felony conviction, but not the nature of the crime). See *People v Hall* (1980) 28 C3d 143, 167 CR 844 (element of prior conviction cannot be given to jury if accused stipulates to it). Counsel's case will, however, still be damaged.

b. If the client has confessed to counsel, it may be ethically impossible to place him on the stand to deny the accusations. But see, M. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich L Rev 1469 (1966); *Whiteside v Scurr* (8th Cir 1984) 744 F2d 1323 (opinion on rehearing, 750 F2d 713).

c. The client's race or educational level may be so different from the jury's that the client's testimony will harm more than help.

d. The client may be faced on examination with a factual contradiction counsel can ethically and effectively explain away during closing argument, without the client's testimony.

e. The client may not be quick-witted enough to withstand a robust cross-examination, even though he is honest and telling the truth.

Many criminal cases can be won without the client testifying. In deciding whether the client should testify, counsel should weigh the following factors:

a. Can the client's story be presented to the jury without his testimony? For example: through statements the client made to the police; through videotapes or other surreptitious taping; or through co-defendants or other third parties who will testify to essential facts.

b. Does the case rest on reasonable doubt? That is, does counsel intend to spend most of the case attacking the prosecution rather than presenting defendant's own version of facts?

c. What is the trial judge's attitude toward defendant testimony? Many judges penalize a defendant who testifies and is convicted, reasoning that they must punish perjury by adding time to the sentence. This threat is less important today as federal and state courts move to determinate sentencing.

As a general rule, the client should testify in a criminal case unless impeachable by a prior felony conviction. If the court, after a motion in limine, announces that it will admit the prior felony, the client should not testifyunless the case cannot be won without the client's testimony.

In state court, the trial judge is required to advise in advance whether or not he will permit impeachment by a prior felony. See *People v Sumstine* (1984) 36 C3d 309, 206 CR 707; *People v Coffey* (1967) 6 C2d 204,60 CR 457. This is not a requirement in federal courts. See *U.S. v Rivers* (8th Cir 1982) 693 F2d 52, 54 ("It is only after a defendant takes

the stand that a court has a duty to rule on a pretrial motion regarding the admissibility of... prior convictions.")

§6.3 III. FIXING FACTS

If properly prepared, the client will be relaxed, confident, naturaland a master of pertinent facts. But no one can behave naturally on the stand while trying to keep in mind 50 different facts.

Counsel's job is to isolate a few important facts in the case and drive them home by repetition. Do not force-feed detailed narratives to witnesses: they will freeze up on the stand or sound rehearsed.

The attorney should remind the client that it is no sin to forget details. The confession "I don't know" sits well with most jurors most of the time. The client should be told to qualify answers ("probably," "I believe") as necessary, as long as the answers are not central to the case.

However, the client must be sure of major events. A criminal defendant, asked whether or not he stabbed his wife 85 times, should not answer "probably not."

Most cases can be reduced to a limited number of key questions. If possible, they should not exceed five. The five central questions should be answered firmly and without qualifiers.

The client should be prepared as if he were a juror who was to be persuaded. Trial diagrams should be provided to the client for review. Counsel should visit the scene of important events with the client and prepare physical evidence with the client. For example, if the client's primary witness is the police officer who was first on the scene of a vehicular manslaughter, counsel should visit the site of the accident with the officer. Opposing counsel may well visit the site before trial. The witness will be far better prepared to respond to a knowledgeable cross-examination if the witness has refreshed recollection.

The client should be prepared to relive important emotions. If he was wrongfully discharged, he should visualize the room where he was fired, his emotions on receiving the news, the facial expressions and gestures of the employee delivering the news.

Several weeks in advance of the first preparation session the client should be given his deposition, and the depositions of those agreeing with or contradicting his testimony. The most important sections of those depositions should be marked and reviewed carefully several times with the client. If there are deposition summaries, they should be given to the client.

Finally, the evening before testimony the attorney should check again with the client to see if he has firm mastery of the five important questions.

§6.4 IV. ENCOURAGING HONESTY

Counsel should encourage the client and witness to be honest. Many witnesses, however, think that their testimony is a school test; they must have all the "right" answers, true or not, or they fail.

A jury will almost always forgive a witness who has erred in the past and who gives answers that are inconsistent with his litigation claims, as long as the witness admits error on the stand. This should be impressed on the client. He must:

a. Admit bias. A plaintiff in a multi-million dollar lawsuit should not tell the jury that the outcome of the case means nothing to him.

b. Admit deposition errors, without embarrassment.

c. Admit mistaken testimony as soon as it is pointed out. It is simple to do: "I'm a bit nervous, and I got confused a moment ago. The truth is..."

d. Not cling to peripheral details. It may matter very much whether the light was red; it rarely matters whether or not a bystander's tie was red. Many clients assert as incontrovertible truth minor facts which are contradicted by other reliable evidence. They should not. The client should stick to the truth as he recalls it; but, he must admit the possibility of error, or qualify an answer which conflicts with other reliable testimony or physical evidence.

§6.5 V. MINIMIZING STAGE FRIGHT

Cross-examination is not the last word: the client should be reminded that counsel will be able to re-direct (or conduct direct if the client has been called as a hostile witness). Redirect is a safety net. The client need not get his testimony letter perfect during cross-examination, nor need he make speeches or volunteer information to fill gaps. Counsel will do any necessary repair work during re-direct. Repeat this until the client believes it.

The client should be told that nervous witnesses are good witnesses: the jury sympathizes with their anxiety and will listen more carefully to them. This may not be entirely true, but it will make the client less nervous.

Key issues should be driven home to the client and counsel should conduct mock cross-examination to lessen the fear of the unknown. However, counsel should not rehearse the client so often that testimony sounds rehearsed.

The client should be reminded that counsel will be monitoring the cross-examination carefully, protecting him by objections, and deciding what needs to be left in or left out on re-direct. In short, the burden of cross-examination falls equally on client and counsel.

The client should visit the courtroom where the case will be tried in advance to observe other trials. If counsel knows who the trial judge will be, the client should be encouraged to observe the judge's habits and mannerisms in unrelated cases.

Counsel should encourage the client to use effective relaxation methods: deep breathing; refusing to let the mind dwell on the trial; and exercise. Discourage relaxation through liquor, tranquilizers, or passivity.

§6.6 VI. INCREASING CLIENT CREDIBILITY

To Update

Counsel should impart important credibility boosters. The client should:

a. Use confident body languagelean forward, make eye contact, use hands for illustration, and keep the head up.

b. Dress conservatively and neatly (but not out of character).

c. Use a "power" vocabulary: no hesitation words ("you know," "actually"); use meaningful qualifiers ("very," "most," "least"), and short answers.

d. Not give rambling, evasive answers. Few answers are as powerful as a simple "Yes" or "No"; short answers make the cross-examiner work harder.

e. Not show hostility or sarcasm to opposing counsel.

f. Not make closing argument during cross-examination. If speeches are necessary, counsel will give them in closing or on re-direct.

g. Not stake his credibility on some unimportant side issue. The client should stick to an assertion in the face of strong contradictory evidence only if an assertion is critical to the case.

§6.7 VII. AVOIDING TRICKS AND TRAPS

To Update

Cross-examiners have many tricks in their repertoires to score off a witness. Below are some of them, with suggested remedies:

Q. Have you discussed your testimony with anyone?
A. Yes, my attorney, Joe Brown. (Counsel should stress to the client that preparation with counsel is the most normal thing in the world. Questions about witness preparation are usually evidentiary in character and not about attorney's work product. CCP §2016; Jefferson's Synopsis of California Evidence Law §41.1 (CJA-CEB 1985). See also §8.6 on the attorney work-product privilege).
Q. How many hours did you spend preparing your testimony?
A. Seven.
Q. And did your attorney suggest to you some of the questions I might be asking?
A. Yes, in a general way.
Q. And he told you what to say in response to these questions?
A. No, I told him what the truth was and he told me how you might try to twist it around.
Q. Mr. Jones, you have worked for the ABC Company for 25 years, haven't you?
A. Yes.
Q. You've now risen to the position of Vice President in charge of Marketing?
A. Yes.
Q. You have been told by your superiors that this case means a great deal to the company? Isn't that a fact?
A. No, but I assume that it does. We feel we're in the right, and want to win this case.
Q. Doesn't your future promotion or pay raises turn in part on the outcome of this case?
A. Not at all. My future at ABC turns on how hard I work at my job, whether or not I can be trusted, and whether I am an effective executive.
Q. How fast did you say the car was going?
A. 50 miles an hour.
Q. You're sure of that?
A. Yes.
Q. Do you remember being deposed 14 months ago, by me?
A. Yes.
Q. And you were under oath? Raised your right hand and swore to tell the truth?
A. Yes.
Q. And your deposition 14 months ago was closer in time to the events I'm asking you about than today's testimony?
A. Yes.
Q. Your memory then was better than it is now?
A. No.
Q. What do you mean by that? [Mistake.]
A. When I testified at the deposition, I had not reviewed the accident report and some notes I made for myself, which has greatly refreshed my memory for today's testimony. (Or: I was flustered and tired at deposition. We had been going at it for almost two days when you asked me about the speed of the car.)
Q. You are on trial for a serious crime, Mr. Smith. You know that?
A. Yes, I do.
Q. You will do almost anything to avoid conviction, won't you? (A bad question, which will normally not be asked in a criminal case. Parallel questions are often asked in civil cases, and deserve an answer similar to the one below.)
A. I certainly don't want to go to prison for ten years for a crime I never committed. But I'm not going to lie to the jury, if that's what you mean.

Finally, in criminal cases, or in some civil cases, the client may be impeached by a surprise witness or a surprise document. See 1 Jefferson, California Evidence Benchbook §10.1 p 324, §27.14 (2d ed CJA-CEB 1982). Always advise the client about the possibility of surprise. In such instances, the client must stay calm. Counsel should demand a recess to explore with the court whether the surprise evidence should have been turned over in pre-trial. This should provide an opportunity to discuss the new material with the client.

§6.8 VIII. FRIENDLY WITNESS PREPARATION

Some friendly witnesses are so identified with the client's side of the lawsuit that counsel can prepare them just as if they were a client. However, the attorney may need to be careful about bruising their feelings. Counsel should never discuss any aspect of the case with them that counsel would not want repeated to a jury, or even perhaps relayed to opposing counsel.

If practicable, counsel should take important friendly witnesses through most of the preparation steps used for the client.

Counsel should provide positive reinforcement to friendly witnesses by reminding them why counsel is on the right side of the dispute; providing them with details about other witnesses that corroborate their own testimony; and by reminding them of the importance of the case to the client.

The attorney should meet with all important friendly witnesses face-to-face. They should be assured that counsel is working with them to help them tell the truth in an effective manner, and that counsel does not want them to twist or distort their testimony just to help the client.

It is important for the attorney to find out what friendly witnesses fear most about their impending testimony, and try to calm those fears. Most sophisticated witnesses are worried about the time demands of trial testimony. Counsel should explain to them how counsel will schedule their testimony to minimize waiting time. This should be followed with updates on the prospective time of appearance as the trial progresses.

Take the friendly witness through proposed testimony in detail. Counsel may be surprised on the eve of trial to find that the witness has recalled new facts, or recalls old facts differently. If the witness is now wavering (perhaps in an effort to avoid testifying), counsel must provide reinforcement to remind the witness of his earlier recollection: deposition extracts, declarations, transcripts of interviews, or "pin-down" letters. See §§2.13; §§6.1-6.18.

§6.9 IX. MECHANICS OF PREPARATION

To Update

Videotape is a very effective way to show a client how he appears as a witness. Evasive body language, bad speech habits, nervousness, and hesitations: all are magnified under the gaze of the camera. Counsel should experiment with videotape. Some attorneys believe that videotape preparation is dangerous, because it opens the door to skeptical cross-examination that will develop an image of "slick" rehearsed testimony. The dangers of video use are outweighed by the benefitsbut the witness should be prepared to be cross-examined on the use of videotape in preparation for testimony.

Even if video is used, counsel or another attorney must take the client (and important friendly witnesses, if they are willing) through rigorous mock cross-examination. If done properly, the mock cross-examination will be far tougher than the real thing.

Counsel risks rupturing his rapport with the client if he asks hard-hitting or sarcastic questions. If the client is timid, a tough mock cross-examination may damage his self-confidence. Consider:

1. Having another attorney conduct the hard-hitting cross-examination.
2. Explain in detail your trust and confidence in your client, and the purposes of the mock cross-examination.
3. Don't conduct a hard-hitting mock examination.

PRACTICE TIPS

The following is a good preparation system if you have the time and resources:

1. Have another attorney from the office sit in.
2. Take your client through cross-examination, without being too abrasive.
3. Examine your client vigorously on those points that concern him, and on the five major issues of the case.
4. Finally, take your client through a complete cross-examination, being as hard-hitting as possible. If your client is hesitant or inept in some areas, have the other attorney take you through those areas one more time, with you playing client.
5. Repeat the full examination twice more, the third time on the day before actual testimony.

Some clients are too self-confident. If the witness is too detailed, arrogant, or evasive, counsel must forcefully and frequently correct the client.

Ideally, counsel should take key witnesses through one complete preparation session several weeks before trial, and another just before testimony. In a long trial, counsel should, if possible, wait for the final preparation until a day or two before testimony.

It should be kept in mind that if counsel represents a defendant, the opponent may call and cross-examine a party witness as a hostile witness at the very beginning of trial. Evid C §776; see Fed R Evid 611(c). In state court, a party may be compelled to attend by notice under CCP §1987.

There is no notice provision in federal law; a subpena is required.

Videotape will probably not be used in most cases. Used or not, the client should practice eye contact with an imaginary jury and an imaginary judge. Many witnesses are so intent on projecting to the jury box that they forget the importance of turning to face the judge to answer court questions.

Do not overwhelm the witness with too many facts or too many "do's" and "don'ts." Keep the witness focused on the few key areas of the case.

Counsel should not be critical during breaks in trial testimony. The witness needs support from counsel, even if it requires exaggerating his abilities as a witness. Constructive criticism should be coupled with positive reinforcement. During breaks in testimony, counsel may be able to tactfully steer the witness in the right direction by asking him how he feels about his testimony. Often the witness will be conscious of the same weaknesses counsel wants to correct.

§6.10 X. REHABILITATION BY RE-DIRECT

The most common problems to be remedied by re-direct are:

1. Contradiction between a deposition and trial testimony;
2. mistaken testimony on cross-examination;
3. insufficient context to explain actions or words;
4. misleading implications; and
5. statements of bias.

The attorney should anticipate that some of these problems will arise during cross-examination, and discuss with the client in advance what will be done to correct the problem. Sections 6.11-6.15 contain typical questions and answers for review with the client, used for the problems discussed above.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/6 Preparing Favorable Witnesses for Cross-Examination/§6.11 A. Deposition Contradicts Testimony

§6.11 A. Deposition Contradicts Testimony

Q. Mr. Smith has read from your deposition, taken about one year ago, in which you testified that you met Mr. Jones at 3:00 in the afternoon. Is that correct, or is it correct, as you testified earlier today, that you met him at 4:00 in the afternoon?

A. I met him at 4:00 in the afternoon.

Q. What preparation had you done for your deposition?

A. Very little, really. I did not review the notes I had taken of the meeting, but did go over the complaint and answer.

Q. Have you reviewed your notes now?

A. Yes, I have, and they show that the meeting was at 4:00 p.m.

Q. Have you done anything else since your deposition to help you remember details about the meeting?

A. Yes, I talked to the two other participants in the meeting, and checked their memories against mine.

Q. How long did your deposition last?

A. Three and one-half days.

Q. When, during the deposition, were you asked about the time of the meeting?

A. Near the end of the third day. I was quite tired by then, frankly.

Q. And you affirm to the jury today, under oath, that the meeting took place at 4:00 p.m.?

A. Yes, I do.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/6 Preparing Favorable Witnesses for Cross-Examination/§6.12 B. Mistaken Testimony on Cross-Examination

§6.12 B. Mistaken Testimony on Cross-Examination

Q. You testified on cross-examination that you met with Mr. Green in April of 1981, and agreed at that meeting to sell fabricated steel for him. Is that correct, or did you enter the agreement with him June of 1981?

A. Now you've got me confused. I just don't remember.

Q. Let me show you a letter sent by you on June 17, 1981, and ask you to look at it and see if it refreshes your recollection.

A. Yes, it does. This letter confirms the agreement to sell steel, and was sent after our meeting in June.

Q. Did you have some other meeting in April 1981?

A. Yes, now I remember. We did meet in April to talk about the possibility he might invest in my marketing company.

Q. And your earlier testimony was simply wrong?

A. Yes.

Q. Are you nervous as you testify today?

A. Yes, I am. This is very important to me.

Q. And a little tired?

A. And a little tired

§6.13 C. Mistaken Context

Q. You testified on cross-examination that, just after the accident, you said "It's all my fault, it's all my fault" to the other driver. Did you say that?
A. Yes.
Q. When Mr. Brown hit you, where were you driving?
A. Home from work.
Q. How long had you been working?
A. I had worked ten hours that day. We had an emergency at the office.
Q. Were you tired?
A. Yes, I was.
Q. Were you suffering any tension during the day?
A. Yes, I was. My child had been running a high fever for two days, and I had to leave her with a day care center that day.
Q. Were you shaken by the accident?
A. Yes, I was trembling and out of breath for hours afterwards.
Q. Why did you say "It's my fault"?
A. Just a combination of all those things. I was tired, distracted, and having one of those low days. The accident happened so quickly that I had no idea who was to blame until much later.
Q. Do you know now if it was your fault?
A. I know now it was not my fault.

§6.14 D. Misleading Implications

Q. Miss Smith, you testified that you went to dinner three times with your supervisor, Mr. White, before he tried to assault you.
A. That's correct.
Q. And the second and third time he ordered a bottle of wine for you?
A. Yes.
Q. And you had brandy afterwards?
A. Yes.
Q. Why did you agree to go out with him for three dinners? Were you trying to lead him on?
A. Not at all. He was very aggressive and insistent. I did not think I could turn him down.
Q. Was he your sole supervisor?
A. Yes, he was.
Q. And you depended upon him for quarterly evaluations, and recommendations for promotions and raises?
A. Yes.
Q. Any other reasons you accepted his invitations?
A. Yes, although I wasn't attracted by him, I felt grateful to him. He had taken pains during my first three months to teach me my job.

§6.15 E. Statements of Bias

Q. You have admitted during cross-examination that you are good friends with my client, Joe Jones, haven't you?
A. Yes.
Q. And you have both been members of the Oakland Rotary Club for the past 20 years?
A. Yes.
Q. And your family and his have dinner together occasionally?
A. That's right.
Q. You also admitted that you hope he wins this lawsuit?
A. Yes, I did.
Q. Has your friendship led you to say a single thing to the jury which is not absolutely true.
A. Absolutely not.
Q. Would you testify falsely in this lawsuit to help Joe Jones then?
A. No. I like Joe, but I would have made an excuse not to testify rather than testify falsely under oath.
Q. Has Mr. Jones ever asked you to change the truth to help him?
A. No, never.
Q. Have I ever asked you to change your testimony to help Mr. Jones?
A. No, you told me several times to be sure to tell the truth.
Q. And have you told the truth, the whole truth, and nothing but the truth during your testimony?
A. I sure have!

XI. APPENDIX

§6.16 A. Sample Cover Letter to Witness

[Attorney letterhead]

Re: Brody v Yaeger

Dear Fred:

This case is coming to trial on November 20, 1986. Our law clerk has already talked to you.

Limited Liability, Inc., still has Jim Yaeger working for them, has refused to apologize or otherwise settle this action, and insists upon trial. Your testimony is necessary: we are not allowed to use your deposition, since you are still living in the Bay Area.

By proper scheduling, I anticipate that your trial testimony will not inconvenience you any more than your deposition and may be less inconvenient because the trial will be held in the San Francisco City Hall.

I am sending you two forms with general information about the trial, and a copy of your deposition. I realize the events are years old, and reviewing your deposition will help jog your memory.

I will give you a call as we get closer to the trial date. By the way, if Melinda Dedlock is now living in Los Angeles, we can establish that fact and use her deposition instead of her testimony. I understand she has been ill, and I do not want to complicate her life.

Give me a call if you have any questions. Otherwise, you can expect to hear from me sometime in September.

Somebody will probably serve a trial subpoena on you in the next few weeks. We are required to subpoena each of our witnesses, because if they are ill or otherwise unavailable, the judge will not continue the trial unless the subpoenas have been sent out.

Sincerely,

_ _[*name of attorney*]_ _

Source: Civil Litigation/Effective Direct and Cross-Examination Book/6 Preparing Favorable Witnesses for Cross-Examination/§6.17 B. Sample Information for Witness

§6.17 B. Sample Information for Witness

Information for Witness

Smith v Kelly

The following paragraphs will provide you with important information about your testimony in the case of *Smith v Kelly*. Smith has claimed that Kelly has infringed his trademark, by sending out boxes carrying the words "genuine Vistum Parts" and stamped with the same colors that Vistum had been using to ship its golf cart replacement parts.

Kelly has counter-claimed. Kelly, in early February 1979, got a promise from Vistum that it would not sue for trademark infringement if Kelly used up all of the boxes it had carrying the words "Vistum parts" or "genuine Vistum parts." In making the promise, Kelly did not admit that it *was* infringing. Since virtually everybody purchasing golf cart replacement parts knows exactly who Vistum is, the use of "Vistum parts" does not confuse the customer, the test in trademark infringement.

Court trials proceed by formal rules. We are unable to simply agree to facts which are obvious. We are forced to produce the records in court so that the jury can view them as evidence. Similarly, we are forced to produce live witnesses to testify to each fact of our defense, and each fact of our counterclaim.

We recognize that this is often an inconvenience for witnesses. We will do our utmost to make it easy. Please read the following paragraphs for fuller information.

(1) Smith's case against Kelly is now set to begin on February 4, 1987, at 10:00 a.m. It will be held in the Courtroom of the Honorable George Garibaldi, United States Courthouse, 450 Golden Gate Avenue, San Francisco, California (17th floor). Since Smith is the plaintiff in the case, witnesses for them will appear first. *Civil trials are often delayed in starting, sometimes days,* sometimes months. We will keep you advised.

(2) Do *not* appear in court on February 4, 1987, unless advised to do so. You will be placed on phone call standby, and we will advise you as accurately as possible when we need your presence. We intend to make this process as easy as possible for you, with minimum disruption in your personal or professional life.

(3) Moira Shearer, my secretary, or Jack Jones, a private investigator working on this case for me, will advise you when you should expect to appear in court. If the situation changes (it often does, since a trial does not go according to script), they will keep you advised. You should tell them any scheduling problems you have, in order that we might work around them. My office phone number is _ _ _ _ _ _, and Jack's number _ _ _ _ _ _.

(4) Either Bob Hansen, or Henry Moore, the attorneys for Kelly, will try to review your testimony with you before trial, either over the telephone or in person. The purpose of this review is to make you more comfortable at trial. All attorneys prepare their witnesses. If you are asked about this in court, you should not be embarrassed about admitting that you have spent time with us going over your testimony.

(5) We cannot emphasize too strongly our wish that you each tell the complete truth. If a representative of Smith contacts you, you do not have to speak with them. If you want to do so, of course you may. We prefer to have a representative of our office present if they interview you. This guarantees that your statements will not be taken out-of-context and used against you at trial.

(6) The attorneys for Smith may also subpoena you for trial. If so, you will have to make separate arrangements with them for your appearance. We will try to ask all of our questions during your appearance for Smith, so that you do not have to come back during the defense part of the case. You should understand the reasons issuance of a subpoena benefits you:

(a) The subpoena entitles you to collect the modest witness fees set by law, $30.00/day and $.185/mile.

(b) The subpoena can be used with your employer to justify your absence from the job on the day of testimony.

(c) If you are ill, or unable to appear because of an emergency, the Court may continue the trial to allow you to appear, but only if we have subpoenaed you.

(7) The date on the subpoena is the date the trial begins. You are apt to appear later, and your appearance will be coordinated by our secretary or the investigator, named in Paragraph 3 above.

(8) Please call us if you have any questions, or any additional information about this case.

Bob Hansen

_ _[*evening and weekend telephone numbers*]_ _

Henry Moore

_ _[*evening and weekend telephone numbers*]_ _

§6.18 C. Sample Advice to Witness

Gerard Nash Case

INTRODUCTION

General guidelines:

1. Tell the truth.
2. Don't be afraid of lawyers.
3. Relax, never lose your temper.
4. Speak slowly and clearly (most of us speak more rapidly than we realize).
5. Always be sure of the question. Neither anticipate the question, nor begin until the question is completed. If you are unsure of the question, ask for a repeat or rephrasing.
6. Under cross-examination, DON'T VOLUNTEER. If you can answer "yes" or "no," do so and STOP.
7. Do not be afraid to admit you don't know an answer, or do not remember a fact. Many witnesses are embarrassed to admit that they are human.
8. You need not be positive to give an answer. You may testify that you think something is probably true, or probably untrue. If you need to explain an answer, do so.
9. Do not memorize your testimony. Speak in your own words. Don't kid or joke, and always be courteous to the judge and other counsel.
10. Do not be reluctant to admit on the stand that you have reviewed your testimony with me. Every competent attorney goes over testimony with prospective witnesses.

DIRECT EXAMINATION

Your testimony is very important. The most effective witness is sincere, direct, well-prepared, and not too emotional. Your presentation of the facts, brought out through my questioning, will educate the jury about the circumstances surrounding the lawsuit. You should "paint the picture" as clearly as possible, but do not exaggerate. The truth will best be served by a deliberate and succinct recitation of what you know to be true.

CROSS-EXAMINATION

You will probably be cross-examined by opposing counsel. He will attempt to shake your belief in what you have said; always stating the truth defeats this tactic. The cross-examination may stray from the search for the facts, and wander in an attempt to show bias or favoritism towards Gerard Nash. Such questions might include:

1. Is Gerard Nash your friend? A good friend? You want to see him win, don't you? Do not be afraid to admit that he is your friend. You should add that you are not prepared to exaggerate under oath on account of your feelings of camaraderie with him.
2. Have you prepared your testimony with anyone today? Again, do not be hesitant in answering "yes." It is perfectly proper to prepare testimony with counsel prior to taking the stand.

Do not feel badgered by questions you feel are irrelevant. An opposing counsel may be searching for a way to discredit your direct testimony; answer each question concisely, politely, and honestly.

CONCLUSION

Bob Hansen or Henry Moore, attorneys for Gerard Nash, Graduate Student Instructors will attempt to speak with you prior to your testimony. You may ask us questions at that time. If, in the press of trial preparation, we are unable to talk to you, an investigator or law clerk will prepare you. Feel free to ask any questions or express any thoughts regarding your testimony at that time.

We are all very grateful for your assistance.

__[Signatures of attorneys]__

_ _[Typed names]_ _

To see sections added to this chapter since publication of the book, click To Update

7

Experts

§7.1 I. EXPERTS AS WITNESSES

To Update

An effective expert witness is unshakable and firm in his opinions. As a consequence, lawyers, judges, and jurors feel ambivalence about experts. They are admired as purveyors of relevant wisdom. On the other hand, they are resented because they claim knowledge most cannot share or understand: experts are undemocratic. Moreover, they are looked on with suspicion because they are paid for their opinions.

In planning to present an expert to the jury, or to cross-examine the opposing expert, counsel should tap into the feelings about experts which help the client's case. See §7.14.

This chapter cannot cover all counsel needs to know about the law and tactics of expert testimony. An excellent introduction to that subject is California Expert Witness Guide (Cal CEB 1983). This chapter will provide basic tips on direct and cross-examination of experts.

§7.2 II. DIRECT EXAMINATION

Once counsel has decided to present expert testimony as part of the case, and has found the best expert witness, and prepared him thoroughly, counsel must then plan the examination.

Direct examination of any expert usually elicits the following from the expert:

1. Qualifications and training;
2. when contacted and work done since initial contact;
3. opinion;
4. basis for the opinion; and
5. other (*e.g.,* why alternative opinions were rejected, and other testimony in anticipation of problems).

Source: Civil Litigation/Effective Direct and Cross-Examination Book/7 Experts/§7.3 A. Qualifications

§7.3 A. Qualifications

Direct testimony regarding an expert's qualifications is easy.

Q. Mr. Expert, would you briefly describe for the jury your education [since high school].
Q. Since gaining your third Ph.D., would you tell us where you have worked.
Q. What is the field of [area of expertise]?
Q. During your education and work, have you obtained special training or experience in the field of [area of expertise]? Please tell us about that. Have you done research in the field?
Q. Have you published papers or books in the field?
Q. Have you taught in the field?
Q. Have you received honors in the field?

In going through the qualifications, counsel should have the expert explain terms unfamiliar to the jury, *e.g.,* what does "board certification" mean? What special training, work, or recognition was necessary for the expert to become "board certified"? The attorney should detail the material for the jury, not in a condescending way, but recognizing that almost no one knows the meaning of technical terms or honorary or organizational abbreviations outside one's own work experience.

The attorney must establish two things during this phase of direct examination. One is that expert testimony can help the jury on some issue in the case. The second is that the witness is qualified to provide that help.

PRACTICE TIPS

It follows that you should never stipulate to an expert's qualifications in lieu of presenting those qualifications to the jury. The presentation may be shortened, but do not stipulate. Instead, state, *e.g.,* "I appreciate counsel's offer to stipulate, but since jurors must decide what weight to give Dr. X's opinion, they are entitled to know of his vast learning and experience in this field."

§7.4 B. Contact With Case

After establishing the witness's qualifications to talk about the subject matter, counsel should have the expert explain how he was brought into the case, and what work has been done. It is important for the jury to understand the basis of the expert's opinion. If the work done is comprehensive, the jury will be impressed. If the work done is superficial (*e.g.,* a 45-minute psychiatric interview), the opponent will bring it out unless counsel does so in direct. Questions here are:

Q. When were you first contacted in connection with this case?
Q. [Optional] Describe financial arrangements and compare them to standard fees for similar work.
Q. What were you asked to do?
Q. What materials have you examined?
Q. What tests have you done?
Q. Tell the jury what work you did to get to a point where you could render an opinion in this case.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/7 Experts/§7.5 C. Opinion

§7.5 C. Opinion

The expert must be asked if he has formed the relevant opinion. The question should be asked in a way that permits the expert to say "yes," so that counsel can follow with: "Please tell the jury what your opinion is."

> Q. Based on the work you did, have you reached an opinion as to, *e.g.,* the cause of death?/ the type of instrument which caused the wound?/ the speed of the car when it left the road?
> Q. What is your opinion as to....?

Next, ask the expert for the basis of the opinion.

> Q. Will you explain to the jury how you reached your conclusion?

Here the expert explains his reasoning, tying together the work done, examinations made, materials examined, and references consulted, to show how they support the conclusion.

Finally, the attorney should ask cleanup questions related to the basis for the expert's opinion, *e.g.,* why particular alternatives were rejected. In short, here is where counsel anticipates the cross-examination. Let the expert explain to the jury why the opponent's theories are wrong.

Carefully rehearse the expert in accordance with the discussion in §§7.2-7.5.

§7.6 D. Jargon

Lawyers often get so involved in minutiae that they forget that what an expert thinks does not matter unless the jury understands it. Avoid technical jargon wherever possible. Where jargon is absolutely necessary, ask the expert to explain technical terms. Remember that jargon is seldom necessary. It is a product of specialist talking to specialist; all those terms have comprehensible meanings. When experts get nervous they retreat to the comfortable obscurity of specialized language; help them recognize what they are doing, and to avoid it.

Whatever the expert's area of specialty, it is probably not persuasion. That is counsel's job. By practicing with the expert, counsel can make sure that the opinion and its bases are understandable to jurors. If they are not, it is the attorney who has failed, not the expert. If the witness continually lapses into esoteric language, counsel should press the expert to clarify matters for the jury.

> Q. Dr. Jones, I did not understand what you just said, and I suspect some of the jurors did not either. Will you say it again, using layman's language, please?
>
> Q. To make sure we understand the principle you just explained, could you give us some examples from everyday life that illustrate it?

§7.7 E. Visual Aids

The lawyer uses the expert as a tool for teaching and persuasion, which can be made more effective by repetition and the use of visual aids. Blackboards, overhead projectors, charts, and models have the advantage of summarizing the expert's testimony so that the jury can see it as well as hear it, and also reinforces the psychological identification of the expert as a teacher, an authority figure.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/7 Experts/§7.8 F. Admitting Normally Inadmissible Evidence

§7.8 F. Admitting Normally Inadmissible Evidence

The attorney should remember that an expert, unlike a lay witness, can offer opinion evidence, but it must be based on matters, whether or not admissible, of a type an expert can reasonably rely on to form an opinion. See Evid C §801(b); Fed R Evid 703. Experts are also effective vehicles to, *e.g.,* summarize other evidence, authenticate a chart showing the significance of fifteen cartons of invoices, a warehouse full of personnel records, or ten years of checking account activity. Although anyone can provide the summary (Evid C §1509; Fed R Evid 1006), usually the expert will make the point best, and relate it to other matters of opinion.

§7.9 III. CROSS-EXAMINATION OF EXPERTS

To Update

The successful cross-examining of experts depends on adequate preparation. In civil cases, the experts should be deposed. See CCP §§2016(a), 2037 (demand for exchange of lists of expert witnesses); Fed R Civ P 26(b)(4)(A)(ii) (depositions only by stipulation or approval of court). In criminal cases, counsel should insist on appropriate discovery, which in both state and federal courts includes expert's reports. *People v Cooper* (1960) 53 C2d 755,3 CR 148 (defendant has a right to reports of the state's experts); *People v Johnson* (1974) 38 CA3d 228, 113 CR 303 (names and addresses of experts consulted but not used are discoverable); *Walker v Supreme Court* (1957) 155 CA2d 139, 317 P2d 130. Fed R Crim P 16. On discovery in criminal cases, see California Criminal Law Practice Series, *Discovery* (rev ed Cal CEB 1980). In a criminal case, if an expert does not prepare a report, move to exclude him as a witness.

How the expert is examined depends on what counsel's investigation shows. It is unlikely counsel will want to emphasize the money the expert is being paid if counsel's experts are getting more. Does the expert have a special relationship with the party or attorney or attorney's firm employing him? Is the expert a "testifying expert" who spends much of his time and derives much of his income from being a witness? Is the expert always on the same side of an issue, *e.g.,* a psychiatrist who always testifies for the government in criminal cases, an economist who always testifies for the plaintiff in personal injury cases, a doctor who testifies only for the defense in workers' compensation cases.

§7.10 A. Attacking Facts

The most common attack on expert opinion is to show that the facts on which the opinion is based are wrong. It has the advantage of avoiding the opponent's witness's expertise. If the expert's facts are wrong, his opinion is irrelevant. When the facts on which the expert bases his opinion are debatable, one common method of cross-examination is to ask the witness whether his opinion would change if the facts were slightly different. Such cross-examination has several advantages. First, it emphasizes to the jury counsel's version of the facts. Second, it puts the expert in a position of looking dogmatic (if no change in facts would change his opinion), or irrelevant (if a slight change in facts would change his opinion). If the expert is too ready to change his opinion when the facts change, counsel should argue that the expert supports counsel's side of the case, not the side which paid the expert. If the expert stoutly refuses to change his opinion no matter what facts are changed, the jury should conclude that the witness has no scientific basis for the opinion and is instead closed-minded, or worse, a professional hack who will testify to anything just for the money.

On cross-examining an expert about professional texts, see §12.21.

§7.11 B. Weakness of the Expert

Counsel should not be intimidated by expert witnesses. If the attorney is prepared and has thought through the examination, an expert is often easier to take on than lay witnesses. First, there is the benefit of cross-examining a witness who is being paid to testify against counsel's side. Second, many "experts" are not truly experts. Most people have to look things up to be certain. So do doctors, economists, and geologists. Many experts are in fact more summarizing witnesses than real experts. For example, the last government witness in most tax-fraud cases is an IRS agent who testifies how the return should have looked. He summarizes all the government's evidence as if it were proven, and calculates the tax due. Since his testimony is completely argumentative, so can counsel's cross be. The witness knows no more about the "facts" than does the cross-examiner or the jury.

A common situation occurs when the expert testifies to what he (and the rest of the "scientific" community) does not know. For instance, a toxicologist testifies that counsel's client's symptoms "don't appear in the scientific literature regarding use of drug X." Or a manufacturer's expert reports no complaints about the product which injured a client.

Ask the expert:

> Q. If there were one such report (or complaint), should the company warn consumers?
> A. Well, it would depend on the reliability of that report.
> Q. If there were *two* such reports (or complaints), should the company warn consumers?
> A. Well, again it depends on how reliable the report is, but, to anticipate where you are going, at some point as the reports of adverse reactions built up I would certainly think a warning appropriate. But of course no such reports exist here.
> Q. Doctor, until enough reports come in to satisfy you that a warning is necessary, do you believe that the first and second and third victim of this drug shouldn't be compensated?
> *Screaming objection sustained.*

Source: Civil Litigation/Effective Direct and Cross-Examination Book/7 Experts/§7.12 C. Controlling the Witness

§7.12 C. Controlling the Witness

To Update

As with all witnesses, the cross-examiner must control the expert. The expert should be forced to give simple answers to simple questions. Many experts with experience in testifying use the cross-examiners the way presidential candidates deal with the press during televised debates. They ignore the question and answer the question they prefer. The attorney should make sure the court sees what is going on by, if necessary, repeating the question until the witness's evasion is obvious, then by asking the court to direct the witness to answer. Another way of calling attention to the witness's evasion is:

> Q. Did you understand my last question?
> Q. Are you willing to answer it?

Remember that the objection that an answer is nonresponsive is designed for the examiner when facing an evasive witness.

§7.13 D. Attacking Qualifications

Attacking a witness's qualifications is rarely productive, but should never be ignored in preparation. The attorney should learn as much as he can about other cases the expert has testified in. Talk to lawyers who have cross-examined the expert. For some professional witnesses, a Nexis or Vu Text computer search of news articles containing their names can be valuable. In one case, it was discovered through Nexis that a very famous psychiatric witness to be called by the government in an insanity defense trial had published with his wife a book on extramarital sex contracts. On cross-examination, the witness was examined as to qualifications, to determine how much time he spent as a psychiatrist as opposed to time spent researching his extramarital sex book. The jury found the situation hilarious and the expert a fool.

If counsel has a serious challenge to make to an expert's qualifications, it should be done outside the presence of the jury. If the attorney voir dires in front of the jury and loses, the judge is telling the jury that the expert is qualified. Counsel would have been better off losing in front of the judge alone, with a right to make the same points (but avoid the ruling) later in front of the jury. On the other hand, if the challenge is won outside the jury's presence, it learns nothing about the witness and his opinion. a situation better than the most devastating cross-examination.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/7 Experts/§7.14 E. Voir Dire in Preparation for Experts

§7.14 E. Voir Dire in Preparation for Experts

Preparation permits counsel to begin the attack on the expert during voir dire. In choosing jurors, counsel should think about each individuals reaction to the experts. If a doctor must be attacked, counsel probably does not want nurses on the jury. The prospective jurors should be voir dired on their willingness to listen critically to expert opinion.

To see sections added to this chapter since publication of the book, click 

8

Recurring Examinations

§8.1 I. INTRODUCTION

This chapter gives sample examinations for recurring trial problems, including some typical answers. They are meant to provoke thought about situations the reader is sure to confront during trial. As with everything else in this book, the sample questions are not meant to be copied or used woodenly. Counsel should adapt them to fit his case and witness.

Many answers are left out of the routine examinations suggested here because the answers are not necessary to illustrate the point.

For other pattern examinations, including ones for biased witnesses (§5.14), failure to follow guidelines (§5.28), destruction of rough notes (§5.20) and impeaching memory (§5.15), see chap 5.

It is recommended that pattern examinations that counsel expects to use frequently be photocopied, and put into a trial book. Counsel can add his own patterns, and edit them with experience.

Confidence is a keystone of successful litigation. The lawyer will be more confident if he does not have to fumble when required to conduct a routine examination.

§8.2 II. BIASED WITNESS

Very few witnesses are totally without bias. Witnesses may be linked with a party by blood, friendship, employment, or professional fees. Here is a pattern examination for a witness with strong biases:

Q. Are you a partisan?
A. What's a partisan?
Q. One who favors one side over anotherfor example, in a trial. Are you a partisan?
A. No.
Q. Weren't you paid $5000 by the FBI to inform against my client, Joe Jones? Aren't you still awaiting payment?
Q. Didn't you refuse to talk to me about the facts of this case when I approached you before trial? Haven't you spent three days preparing your testimony with the prosecutors and the FBI?
Q. Isn't the prosecution picking up your hotel bills at the Hilton? Your food and drink? Your $500 plane fare? And haven't they given you some walking around money?
Q. I ask you again, sir, are you a partisan?

The witness is in a no-win situation answering the final question.

§8.3 III. APPARENTLY NEUTRAL WITNESS

The most effective witness is one with no apparent ax to grind. From time to time, counsel will have to discredit a "neutral" witness. Often, the neutral witness identifies with the opponent simply by association during trial preparation. The following is a model examination developing this theme:

Q. After the automobile accident, you gave your name to Mr. Jones [the opposing party]?

Q. And 60 days or so later, Mr. Smith [Jones's attorney] called you and asked for your help? You went over your recollection of the accident with him a few days after that, didn't you?

Q. [Shooting in the dark] Didn't Mr. Smith remind you of some of the details of the accident? Did he show you a diagram of the accident?

Q. Isn't it true that Mr. Smith's visit and reminders helped you straighten out details of your present testimony?

Q. Didn't you review your testimony with Mr. Smith again before your deposition last May?

Q. Didn't you review it again with Mr. Smith in the past few days?

Q. You've talked with Mr. Jones about his claims, correct? And didn't he provide you with some details of what he remembered of the accident?

Q. Didn't Mr. Smith make it clear to you that you are important to him because you support Mr. Jones's version of the accident?

Q. Isn't it fair to say that you hope Mr. Jones wins this case?

Q. You've never met my client, Mrs. Green?

Q. You refused to talk with my investigator at all about the accident, didn't you? And later, you refused to talk to me at all about the accident?

Q. You have been called by Mr. Jones as a witness? Not Mrs. Green?

Q. Isn't it true that you have identified yourself with Mr. Jones in this trial?

Q. [Whatever answer is given] You certainly haven't identified yourself at all with Mrs. Green, have you? You've never met her? Refused to talk to me or her investigator? Know that your testimony is going to be used against her?

Q. Your memory is only human, correct? And you know that your testimony is important to Mr. Jones, whom you admit you wish well?

Q. Isn't it true that some of your testimony is your own independent recollection, and some is based on Mr. Smith's jogging your memory? Isn't it a fact that important parts of your testimony are based on what Mr. Smith told you, not what you independently recalled? You certainly recognize this possibility, don't you?

Q. On your oath, isn't it probable that much of what you have testified to today is simply repetition of facts Mr. Smith or his staff, or Mr. Jones, told you in their three or four meetings with you?

Q. Can you swear that your testimony has not been influenced, at least subconsciously, by a wish to help Mr. Smith out?

Q. You certainly aren't slanting your testimony to help Mrs. Green, are you?

PRACTICE TIPS

This is a *very* risky line of examination, and should be tried only when you have little choice. If the witness is convincing in fending off your early insinuations, abandon the effort unless you must discredit the witness to win your case.

The dangers of this examination lessen if counsel has pinned down some of its main points at deposition. However, even if the examination scores no direct hits, counsel may raise some doubts in the jury's mind about the witness's neutrality and accuracy.

§8.4 IV. SELECTIVE MEMORY

To Update

Some witnesses have a crystal clear memory about events unfavorable to counsel's client, but express sweeping memory loss on other contemporaneous events. The following is an attack on such selective memory:

Q. Agent Green, you have testified that Mr. White [the client] said to you, before you looked in the trunk of his car, "I'm afraid you've got me dead to rights"?
A. Yes, that's right.
Q. You are a trained customs agent, aren't you?
Q. You knew the importance of including all important facts in your written report, didn't you?
Q. And it is true, isn't it, that you put the important facts into the written report you prepared for this case?
Q. Here is a copy of the written report you prepared four months ago. Would you show me where Mr. White's statement: "I'm afraid you've got me dead to rights" appears?
A. I forgot to include it. But I remember the words very well.
Q. You knew your written report was going to be referred to at trial?
Q. In the six months since you prepared the report, you never tried to correct it to include Mr. White's supposed admission?
Q. You remembered the admission three months ago? Last month? Yesterday? But never amended your written report?
Q. On the day you looked in the trunk, what day of the week was it? Was Mr. White wearing a tie? What color was the car ahead of his? How hot was it? Was it cloudy or sunny? [And so on. These questions may backfire. Judge your witness carefully.]
Q. [If the witness cannot answer some of these questions] You claim to remember precise words spoken six months agoand omitted from your written report? But you cannot recall for the jury whether it was sunny or not that day?
Q. After you found the cocaine, didn't Mr. White say to you: "I don't know how that got in there"?
A. I don't remember that.
Q. You've heard Mr. White's two companions testify to that remark? Didn't that refresh your recollection?
A. I've said I don't remember him saying that.
Q. Can you swear he did not say those very words?
A. I don't remember it.
Q. And so you don't *deny* he said it?
Q. Are you married? How many years?
Q. Have you ever quarreled with your wife about past events when your memory differed from hers? Have you ever found that your wife seemed to remember things to suit her purposes, and forget other things if it was to her advantage? Has your wife ever remembered events you are sure never happened?
Q. Has your wife ever accused you of remembering things that never happened? Or of forgetting things that did happen? Or of remembering details wrongly?
Q. In honesty, in your 37 years, haven't you sometimes found your memory in error? What people mean when they say "my memory must be playing tricks on me"? Usually when it does, isn't it to your advantage?
Q. In the past four months, you have conducted over 3000 border inspections? Isn't it possible that your memory played tricks on you when you recalled this supposed admission by Mr. White that appears nowhere in your detailed three-page report?

This line of questioning is suitable for criminal or civil cases. Whether or not it gets concessions from the witness, it will remind the jury of the frequent untrustworthiness of memory. See also §5.15.

§8.5 V. PRIOR INCONSISTENT STATEMENTS

To Update

Prior inconsistent statements crop up at virtually every trial. The example below is from a civil trial, using a deposition transcript to impeach. Whether using a deposition transcript, a letter, a grand jury transcript, or other impeaching written material, the impeaching matter should be immediately at hand. Drama and pacing are served by impeaching quickly and firmly. See also §5.9.

In order to impeach the witness by another witness's testimony, counsel must simply ask the foundational questions, and impeach later, with the contradictory live testimony.

The witness need *not* be shown impeaching material before being examined. Evid C §§768-769: Fed R Evid 613(a). In federal court (but not in state), the impeaching document, on demand, must be shown to opposing counsel. Fed R Evid 613.

In federal or state court, the witness's attention need not be directed to extrinsic inconsistent statements before introducing the extrinsic proof. However, the witness must be "available" to explain the extrinsic statement. Evid C §770; Fed R Evid 613(b).

PRACTICE TIPS

Therefore, it is important that all witnesses be excused "subject to recall." This normally meets the requirement of "availability." Calif L Rev Comm'n Comment to Evid C §770; see *U.S. v Praetorius* (2d Cir 1979) 622 F2d 1054.

Impeachment should proceed from the general to the specific:

Q. Have you ever said that Mr. Brown seemed drunk on April 13th, 1983?
A. No, I don't believe so.
Q. Were you deposed in this case on August 15, 1984? You raised your right hand and swore to tell the truth? Reviewed your deposition and had a chance to correct it? Signed it under penalty of perjury on September 30th, 1984?

PRACTICE TIPS

You can now confront the witness with the inconsistent deposition testimony. You may ask for an admission of inconsistency or read the inconsistent statement into the record, without giving the witness a chance to explain. If the witness is glib, you may be wise to simply read the inconsistent deposition testimony to the jury, and go on to other matters. Or, make the witness read aloud his inconsistent answer. Opposing counsel will give the witness a chance to explain away the inconsistent statement (if possible) on re-direct. But this explanation will seem more artificial than if the witness explains the inconsistent statement while on cross.

Some courts require counsel to allow the witness to silently read the impeaching statement before asking any questions about it. For example:

Q. I show you a transcript of your deposition of August 15, 1984. The original is filed with the court, and I hand a copy to opposing counsel. Please turn to page 83, and read to yourself from line 17 to page 84 line 7.
Q. [After pause] Were you, under oath, asked the following question and did you give the following answer: [read the inconsistent testimony]?

To press your advantage, follow up as follows:

Q. When you testified at deposition, only three months had passed since the accident, correct? And your memory was far fresher then than it is now, two years after the accident?
Q. Isn't it true you hadn't had any real opportunity to rehearse your testimony with Mr. Jones's attorney when you testified at deposition?
Q. You were under oath at deposition, and you're under oath now, correct? Would you please tell the jury whether you were telling the truth then or are telling the truth now? [Argumentative, but sometimes useful.]

PRACTICE TIPS

Do not read a question and answer out of context. Opposing counsel has the right to read (immediately, in state court, by code, and in federal court, by practice) to the jury other deposition testimony which will correct any misimpression or provide proper context. Evid C §356; Fed R Evid 106. You will appear fairer if you read obvious "context" material into the record along with the inconsistent statement.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/8 Recurring Examinations/§8.6 VI. EMPLOYEE OF HOSTILE PARTY

§8.6 VI. EMPLOYEE OF HOSTILE PARTY

To Update

Employees of a party, especially high-level employees, have an interest in the outcome of the litigation. If the employee is an officer, a director, or a managing agent of a corporation, the employee has an interest in the outcome of the litigation if the corporation is a party. See CCP §2016(e)(2); Evid C §776(d)(2): Fed R Evid 801(d)(2)(D).

If any employee has exaggerated favorable points, minimized unfavorable points, or otherwise varied from the truth, that employee should be cross-examined on the employee's motives. This is as valid for government employees (including law enforcement agents in criminal trials) as for private sector employees.

Q. How long have you been Regional Sales Manager for the ABC Motorcycle Company?
A. Four years.
Q. Didn't you begin as a stock clerk 22 years ago? You have been promoted through four different positions with ABC in your years with them?
Q. You now directly supervise 25 salesmen? And a support staff of 30 more?
Q. Isn't it fair to say that you occupy a position of substantial importance in ABC? You're grateful to ABC for giving you a good career, aren't you?
Q. You made over $60,000 last year? With another $30,000 of fringe benefits and a $15,000 bonus?
Q. How is your bonus determined?
Q. In addition to meeting specified goals [for the bonus], aren't you evaluated by your supervisors on job performance? These are largely subjective evaluations, aren't they?
Q. Don't those subjective evaluations weigh heavily in ABC's decisions about your bonus? Future promotions? Salary raises?
Q. [If written evaluations are used] Describe the factors covered on your evaluation sheet.
Q. You try to do well on your yearly evaluations, don't you?
Q. You are on the job right now, aren't you? Isn't it a fact that you are receiving full salary during your testimony? You have been flown out here at company expense, correct? Aren't you staying at the Hilton Hotel? Who is paying for that?
Q. One of your supervisors is observing the trial, isn't he? That's Mr. Black, back in the audience? Would you please stand, Mr. Black?
Q. Mr. Green [client] has asked for over $1,000,000 for his pain, lost work, and other harm caused by ABC's faulty motorcycle. You understand that this trial is important to ABC, don't you?
Q. As a loyal employee, aren't you doing your best to put ABC in the best possible light? You certainly don't want to put them in a bad light during this trial if you can avoid it, do you?
Q. You have spent over ten hours going over your testimony with Mr. Jones [opposing counsel]. Hasn't he reminded you of facts which had grown dim in your memory? He told you not to volunteer testimony unfavorable to ABC, didn't he?

Note: If the witness is also a party, this question may breach the attorney-client privilege. The work product privilege is applicable at trial as well as at pretrial discovery proceedings. *Rodriguez v McDonnell Douglas Corp.* (1978) 87 CA3d 626, 151 CR 299.

Q. You have repeatedly refused to talk to me or my paralegal about the facts of this case, haven't you?
Q. Don't you view this trial as a contest between ABC and Mr. Green? A contest you hope ABC will win, correct?
Q. In sum, isn't it fair to say that you hope that ABC is pleased by your testimony?
Q. And, in fact, as a loyal employee, haven't you exaggerated the extent to which ABC's safety program was disseminated to dealers? And haven't you been careful to avoid mentioning the three prior safety complaints reported to you by your salesmen?

PRACTICE TIP

This cross-examination should be performed in a respectful manner, unless the jury has good reason to think the employee has lied. And never use any part of this examination with an employee witness who has helped your case more than hurt it.

If a law enforcement agent has testified in a criminal prosecution, counsel may ask how his job performance is evaluated. Will he be penalized for bringing a case which does not result in convictions? Is there an unexpressed "quota" of arrests or convictions which he is expected to participate in? There are no "official" quotas: but the jury will understandwhatever the agent's answersthat an agent's career is advanced by participation in successful prosecutions.

§8.7 VII. REFRESHING RECOLLECTION

To Update

Frequently, law enforcement agents refresh their recollection by reading verbatim from written reports. Defense counsel should object. A written report may be read into the record as past recollection recorded if properly qualified (see §12.4), but not otherwise.

Counsel has the right to examine any document used by the opponent to refresh a witness's recollection, and the right to read into the record parts of the document relating to the witness's testimony. Evid C §771; Fed R Evid 612. The document is not otherwise admissible into evidence by the side refreshing recollection but should simply be referred to by the witness. See 1 Jefferson, California Evidence Benchbook §27.16, p 780 (2d ed CJA-CEB 1982). The attorney should be on guard to block efforts to use "refreshing recollection" as a guise for submitting inadmissible evidence to the jury.

Anything can be used to refresh recollection: a writing, a physical object, counsel's questions. See §12.5.

Q. When did you first meet Mr. Green?
A. I don't remember.
Q. There will be evidence that it was around July 21, 1983. Does that refresh your recollection?
A. Yes, it does. That is the approximate date.
Q. What did he say to you about the stocks?
A. He told me that the stocks he was offering had very little risk of loss, and would almost certainly double in value over the next year.
Q. Did he tell you anything else about the stocks?
A. That's all I remember now.
Q. Did you write him a letter about your conversation?
A. Yes, I did, about a week later.
Q. Let me show you a letter marked Exhibit "D." Is that the letter you wrote him?
A. Yes, it is.
Q. Read the third paragraph, and tell me if it refreshes your recollection about other matters covered in your conversation with Mr. Green?
A. Yes, it does. [Witness provides refreshed recollection.]
Q. What else did he tell you?
A. He also told me that three of my fellow directors were planning to buy large quantities of the stock.

Remember that, on demand, counsel must show the opposing attorney any document used to refresh recollection, unless it is not in the possession and control of the witness or party who produced the testimony and was not reasonably procurable by such party. Evid C §771; Fed R Evid 612. If the court will allow it, read the refreshing material to the witness to refresh recollection. This puts the facts before the jury twice: once through the reading, once through the witness's mouth. See also §5.11.

§8.8 VIII. PAST RECOLLECTION RECORDED

Past recollection recorded permits putting a prior written statement into evidence. Evid C §1237; Fed R Evid 803(5). Counsel may not admit the *document* into evidence, as its proponent, but he may read into the record relevant portions. Opposing counsel may have the document, or parts of it, received into evidence. Evid C §1237; Fed R Evid 803(5).

Foundation for past recollection recorded requires:

(1) A writing, attested to as true by the witness, which was;

(2) Made, dictated, or reviewed and adopted by the witness when:

(3) The matter was fresh in the witness's memory, and;

(4) Not as a result of afterthought, consideration, or mental or physical re-enactment of the event (this requirement is not codified, but will bear weight with the court on the accuracy of the writing).

For example:

> Q. What specifications did Mr. Brown give to you for the axle?
> A. I don't remember. We had our talk over three years ago.
> Q. Did you make any notes about your meeting?
> A. Yes, I wrote down the key specifications in a pocket notebook which I carry with me. I dictated the other specifications to my secretary two days later.
> Q. I show you two documents, marked for identification as Plaintiffs' Exhibits "1" and "2." Please take a moment and read them to yourselves. Having read them, does it refresh your recollection about the specifications given to you?
> A. No, it does not.
> Q. What are exhibits "1" and "2"?
> A. Exhibit "1" is the page from my pocket notebook containing the notes I made while I talked with Mr. Brown. Exhibit "2" is a memorandum typed by my secretary from my dictation.
> Q. Were the handwritten notes made while the facts were fresh in your memory?
> A. They were. I wrote them down as Mr. Brown spoke to me.
> Q. What about the memorandum? Were the facts fresh in your memory then?
> A. Yes, they were.
> Q. Were your handwritten notes and the dictated memorandum an accurate account of the specifications given you by Mr. Brown?
> A. Yes.
> [Read the relevant portions of the exhibits into evidence; if the witness is a good speaker, have him read them into the record.]

Opposing counsel should consider requesting voir dire of the witness on the foundation for past recollection recorded, before the exhibits are read into evidence. Evid C §405; Fed R Evid 104. For example, following up the above examination:

> Q. You waited until two days after the meeting to dictate many of the specifications, correct?
> A. Yes.
> Q. Isn't it true that many of the specifications contained in your dictated memorandum do not appear in your handwritten notes?
> A. That is correct.
> Q. When you dictated that memorandum, two days after the meeting, you knew that the precise specifications given you by Mr. Brown were going to be disputed, didn't you?
> A. I don't remember that.
> Q. Do you remember your boss calling you, the day before you dictated the memorandum, and telling you that you might expect a lawsuit?
> A. Yes, I remember that.
> Q. So, when you dictated the memorandum, you were making a record which you knew might be used for a lawsuit?
> A. In part.
> Q. I object to introduction of any part of the dictated memorandum, since it was evidently prepared as an afterthought, in contemplation of litigation, and its accuracy is suspect, violating Evid C §1237 (or Fed R Evid 803(5)).

§8.9 IX. BUSINESS RECORD

To Update

It is easy to forget a foundational element for admission of a business record. Such an omission is rarely a disaster, just an embarrassment. Even a strict judge will point out the omission, and permit a correction.

At least one recent federal case adds a new important foundational element neglected in most pattern business record examinations. *NLRB v First Termite Control Co.* (9th Cir 1981) 646 F2d 424, requires the custodian of records to attest that the business maintaining the records had a concern for their accuracy. The same rule logically would apply to California business records. Compare Evid §1271(d) with Fed R Evid 803(6). The following is a pattern foundation for admission of a business record, including the "new" element.

Q. What is your job, Mr. Black?
A. I am the assistant controller of the ABC company.
Q. As assistant controller, do you control the payroll ledgers for ABC?
A. Yes, I do.
Q. More precisely, do you control the 1982 payroll ledgers for January and February?
A. Yes, I do.
Q. Does the ABC Company have a policy of maintaining those ledgers accurately?
A. Yes, we do.
Q. And a policy of keeping the ledgers complete?
A. Yes.
Q. Are the payroll ledgers I've described kept in the normal course of business of the ABC Company?
A. Yes, they are.
Q. Are the entries made shortly after the information comes to the attention of the accounting department?
A. Yes, within 48 hours.
Q. I show you plaintiff's exhibit "35," for identification. What is it?
A. Those are the payroll records for January and February of 1982.
Q. I move the ledgers into evidence as business records.

Frequently, counsel attempts to place into evidence "business records" or similar "public records" which contain a narrative, not just statistical information, *e.g.,* medical charts maintained by nurses, police logs, employee evaluation reports, and numerous others. Such documents present thorny evidentiary problems and have inspired special rules for law enforcement narrative reports. Fed R Evid 803(8)(B)-(C); Evid C §§1271, 1280. For a discussion of these problems, see 1 Jefferson, California Evidence Benchbook §§4.2, 5.1 (2d ed CJA-CEB 1982).

To see sections added to this chapter since publication of the book, click To Update

Source: Civil Litigation/Effective Direct and Cross-Examination Book/8 Recurring Examinations/§8.10 X. ESTABLISHING AGENCY

§8.10 X. ESTABLISHING AGENCY

To Update

The pattern examination below concerns an admission of an *employee* of a hostile party, acting within the scope of employment. Evid C §1220; Fed R Evid 801(d)(2)(D). The employee generally need not be expressly authorized to make the damaging admission, but the admission itself should be within the scope of employment. See *Miller v Anson-Smith Constr. Co.* (1960) 185 CA2d 161, 8 CR 131; *Carl Wagner & Sons v Appendagez, Inc.* (SD NY 1980)485 F Supp 762.

PRACTICE TIP

Counsel resisting damaging admissions made by his client's agent should demand the opportunity to voir dire the witness (out of the presence of the jury), seeking to prove that the statement was not made within the scope of the declarant's employment. Evid C §402(b); Fed R Evid 104(c).

Q. Mr. Jones, are you employed by the Swift Trucking Company?
A. Yes, I am.
Q. What is your job?
A. I am a truck driver.
Q. Were you a truck driver for Swift in June of 1983?
A. Yes, I was.
Q. How long had you been a truck driver for Swift?
A. For seven years.
Q. One of your responsibilities as a truck driver was to be sure the mechanical condition of the trucks was safe, wasn't it?
A. No, we had mechanics for that.
Q. I'm not asking whether you had to perform maintenance on the truck. As a driver, weren't you responsible for reporting any safety defects to management, so that they could be repaired?
A. Yes, I suppose so.
Q. Were you driving a 16-wheel rig on June 15, 1983, which hit the Volkswagen driven by my client, Mr. Jones?
A. Yes, I was.
Q. And did you help remove him from the wreckage of the automobile?
A. Yes, I did.
Q. And, did you say to his wife, the passenger: "God, I'm sorry. I tried to stop, but the brakes failed."
A. Yes.

There is *no* valid way to put this truck driver's critical statement in evidence, other than as an admission against interest, unless a generous judge rules it a spontaneous declaration. Counsel should always consider the valuable admission against interest exception to the hearsay rule when faced with apparent hearsay.

§8.11 XI. THE EVASIVE WITNESS

To Update

Every trial has at least one evasive witness. Counsel must learn early to control rambling or evasive witnesses. See also §5.5.

If nothing else, simply repeat the question over and over again until a straight answer is obtained. If the witness continues to evade, the jury will become increasingly disenchanted long as the question is simple enough to demand a simple answer.

The examining attorney has a right to insist on a definite "yes" or "no" answer, with an explanation after the answer, if an explanation is necessary. Evid C §766. See 2 Jefferson, California Evidence Benchbook §27.13 (2d ed CJA-CEB 1982). Some judges will support that right, others not. They will be more disposed to require an answer first, explanation later, if counsel has broken complex questions down to their simplest constituent parts. See §5.7.

PRACTICE TIP

Remember that the motion to strike a witness's testimony as nonresponsive is designed to be used by the questioner. When a witness stubbornly persists in answering the wrong question, make a motion to strike the answer as nonresponsive.

Generally, counsel should begin control efforts courteously, and move to more insistent questions (and eventually, motions to strike) only if the witness has lost the jury's sympathy by refusing to give direct answers to direct questions.

Below, in increasing order of aggressiveness, are follow-up questions for evasive answers:

Q. [Politely] You must have misunderstood my question. Did you see the light change?
Q. You're answering a different question than the one I asked. Did you see the light change?
Q. Yes or no, please. Did you see the light change?
Q. You answered the question when you said "yes."
Q. I take it your long answer means "yes, you did see the light change"?
Q. In fairness to my client, please listen carefully to my question, and answer that question, and not another. Did you see the light change?
Q. [To reporter] Please read the answer back. What question were you answering?
Q. I didn't ask you if it was raining. I asked if you saw the light change. Are you willing to answer the question?
Q. Mr. Jones, you give the impression that you are deliberately avoiding giving a straight answer to a simple question. Please tell the jury, yes or no, did you see the light change?
Q. Your Honor, I move to strike the last answer in its entirety as nonresponsive and ask you to instruct the jury to disregard it.
Q. Your Honor, please strike the last answer as nonresponsive, instruct the jury to disregard it, and admonish the witness to answer my question directly.

PRACTICE TIPS

An evasive witness will sometimes ask you questions. In response, you can simply state that you are not permitted by the Rules of Court to answer questions, but must ask them. The witness must answer questions, not ask them. Or, if the witness richly deserves it, and the court seems to agree, take the golden opportunity to give a full answer to the question, throwing in a preview of your closing argument.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/8 Recurring Examinations/§8.12 XII. CHARACTER WITNESSES

§8.12 XII. CHARACTER WITNESSES

To Update

Until recently, a character witness was permitted to testify only about "reputation in the community." This artificial limitation has been expanded, so that now character may be proved by reputation in the community or by the witness's personal opinion. Evid C §1100; Fed R Evid 405(a).

In limited circumstances, a witness may testify to specific instances of conduct. Evid C §1100; Fed R Evid 405(b). Normally, a witness may not testify about specific instances of conduct, except on cross-examination of a character witness. Evid C §787; Fed R Evid 405(a).

If a witness, for background, describes his *own* war record, charitable works, Boy Scout activities, or the like, the witness may be held to have impliedly put his character at issue. This opens the door to rebuttal evidence.

Many trial attorneys downplay character evidence. However, there is sometimes *no* danger in proffering such testimonyand it will impress *some* of the jurors. Therefore, use character evidence in small doses unless the benefits are outweighed by the dangers described below.

It is *very* dangerous to cross-examine a character witness. Normally a character witness's testimony is brief and undramatic (see sample below). If you cross-examine, you risk swinging the door wide open for the witness to launch into an impassioned speech defending his opinion and giving specific examples of good character, otherwise barred.

Character evidence can support the truth and honesty of a witness in criminal cases or attest to a specific character trait to show conduct in conformance with the trait. Evid C §1102; Fed R Evid 404(a).

Some matters which are inadmissible as character evidence are admissible as habit, custom, or practice. For example, in a civil case, witness should not be allowed to testify about another's "character" for "safe driving." Evid C §1101(a). The witness should be allowed to testifywith proper foundationabout another's custom of driving carefully to demonstrate that it was likely that the person was driving carefully on a specific occasion. Evid C §1105; Fed R Evid 406.

Below is a pattern direct examination developing character for honesty:

> Q. Do you know the defendant in this case, George Jones?
> A. Yes, I do.
> Q. How have you come to know him?
> A. We have been next-door neighbors for the last 20 years. We belong to the same church group, and I have been involved in two substantial business transactions with him.
> Q. Does the witness have a reputation in the community in which you reside as to his truthfulness and honesty?
> A. Yes, he does.
> Q. What is that reputation?
> A. Excellent.

This is not dramatic testimony. To the extent it is helpful at all, the testimony is useful if the *witness's* obvious good character rubs off on the client, or by the recital of how witness and client know one another.

Usually, the examiner should ask about the witness's personal *opinion,* rather than community reputation. Testimony about reputation in the community invites the following effective cross-examination:

> Q. Mr. Smith, you are basing your testimony upon the defendant's reputation for honesty in the community?
> A. Yes.
> Q. Give me the names of five people with whom you have discussed Mr. Jones's truth and honesty in the past six months.
> A. [Confusedly] I don't think I can.
> Q. Tell me about *any* specific conversation you have had with any single individual in the past six months in which you have ever directly discussed Jones's truth and honesty.
> A. I cannot remember any.

Below is an example of the danger of attacking opinion evidence about good character.

> Q. Mr. Smith, Mr. Jones is charged with embezzlement of funds from his employer. Regardless of your opinion of his honesty, you have no personal basis for knowing whether or not he is an embezzler, do you?
> A. I certainly do. He has raised his kids to always do the right thing. I have loaned him money many times which he has always paid back promptly, and he has spent two weeks every year trying to raise funds for crippled children in the city.
> Q. Move to strike as non-responsive. [The damage has already been done.]

PRACTICE TIP

In federal court, if a witness has testified about another's honesty, counsel may cross-examine, in the court's discretion, about specific instances of past dishonesty otherwise inadmissible. Contrast Evid C §787 with Fed R Evid 608(b). Aggressive examiners may ask character witnesses to assume that the defendant in a criminal case has committed the crime at issue, and then ask if that would change the witness's opinion about the defendant's good character. This may be permitted by the court. A character witness in a criminal case should not be called unless he believes and will testify that he cannot accept, even hypothetically, that the client has committed the crime charged, because it would be contrary to everything he knows about the defendant's personality.

§8.13 XIII. HABIT, CUSTOM, AND PRACTICE

Counsel may submit evidence about habit, custom, and practice (Evid C §1105) if:

1. The practice is at issue in the case: and
2. the witness has had the opportunity to observe the practice; and
3. that observation provides sufficient basis to establish the practice as habitual.

See 2 Jefferson, California Evidence Benchbook §33.8 (2d ed CJA-CEB 1982).

Q. What is your occupation, Mr. Smith?
A. I operate Smith's Flying Service, located north of here in Lakeport, California.
Q. Did you know my client, Sam Jones?
A. Yes, I did.
Q. How did you come to know him?
A. He kept his charter plane hangared at my airport, and flew from the airport frequently.
Q. Did you ever observe him conducting pre-flight checks?
A. Yes, I did.
Q. How often?
A. It's a small airport, and I frequently assisted Sam in preparing his aircraft for flight. I would say I watched him go through pre-flight check over 50 times per year.
Q. Did he follow essentially the same routine each time?
A. Yes.
Q. What was his practice?
A. [Provides details.]

PRACTICE TIPS

"Practice" testimony has numerous valuable uses, but is often overlooked. If the witness has a sound basis for his testimony, it is dangerous to try to shake the testimony on cross-examination. Instead, briefly establish (if true) that the witness did *not* observe the practice in issue on the day of the accident, and that people sometimes vary from habit. You may also be able to establish that the witness knows nothing about specific facts in evidence that point strongly to the failure of the party to conform to the practice in issue.

§8.14 XIV. OBSERVATION AND PERCEPTION

If a witness has not observed the facts he has testified to, he is incompetent as a percipient witness. Evid C §702(a); Fed R Evid 602. If he cannot observe them well, he is impeached.

Here, a pattern impeachment in a simple vehicular accident suit:

Q. Mrs. Wright, you were standing at the corner of Main and Broadway when the automobiles collided, weren't you?
A. Yes.
Q. On the spot marked "X" on this diagram?
A. Yes.
Q. Your memory is clearyou were standing here, no more than a few feet from the "X" on the diagram?
A. Yes, it is.
Q. Isn't it true that you were not expecting the automobile collision?
A. That's true.
Q. [Pleasantly] You have no psychic powers which you have kept from the jury, have you?
A. No, I certainly don't.
Q. You were looking across the street at the walk sign when the sound of the collision first attracted your attention, weren't you?
A. Yes.
Q. Wasn't your attention drawn by the crashing sound to the dramatic sight of the automobiles?
A. Yes.
Q. Hadn't the automobiles, then, already collided when you first saw them?
A. I suppose that's right.
Q. You did not look up at the stop light at the center of the intersection until *after* you had looked at the collision? Isn't that true?
A. I think that's true.
Q. You say the stop light was red when you looked at it?
A. Yes.
Q. And since you didn't look at the light until after the collision, you can't say whether or not the light was yellow in the moments just prior to the collision?
A. I guess I can't.
Q. And isn't it true, Mrs. Wright, that from your vantage point, on the "X" (pointing to the diagram), the glare shield over the stop light made it impossible for you to see the color of the light at all?
A. No, I could see the light.
Q. Mark for identification Exhibit "P," a photograph. Mrs. Wright, I show you Exhibit "P." Isn't this an accurate view of the intersection, including the stop light, taken from the corner where you were standing when the cars collided?
A. I cannot be sure.
Q. We will provide evidence later about the foundation for this photograph. Tell me, Mrs. Wright, looking at the photograph, is the color of the light obscured by the glare shield?
A. Yes, it is.

Counsel will put on the photographer later to establish a foundation for admission of the photograph. After the photograph is admitted into evidence, counsel should move to have the witness's testimony stricken as incompetent.

§8.15 XV. UNIMPEACHABLE WITNESS

To cross-examine a witness who is telling the truthand is fully supported by a detailed consistent report prepared close to the time of the events he attests tocounsel must look for *gaps* in testimony, and highlight and exploit those gaps if they fit counsel's theory of the case. Often this type of witness will have taken a statement or noted facts without covering all the details that become legally important in the context of a trial. The theme of such an examination is the "you didn't ask..." question.

The following pattern examination assumes that the cross-examiner's client is charged with first degree felony murder, based in part on the defendant's confession. The witness, a police officer, took detailed notes of the confession. Under the law as it existed during this examination, diminished capacity was a defense to first degree murder.

The examination:

Q. Mr. Jones, how much time did you spend with Mr. Balch, getting him to tell you what he had done?
A. Almost 45 minutes.
Q. You took detailed notes of his statement, didn't you?
A. Yes.
Q. Mark this as Exhibit "1," for identification. This 22-page document is those same notes, correct?
A. Yes, it is.
Q. Did you include in these notes all of the important points Mr. Balch made?
A. Yes.
Q. Did you ask him quite a few questions, to be sure you had obtained a complete statement?
A. Yes, I did.
Q. Mr. Balch told you, quote: "We went to rip off some speed from Charlie, and we offended him when he tried to kick us out of the apartment"?
A. That's what he said.
Q. Mr. Balch told you further that it was his friend, Eddie Weir, who stabbed Charles Jones 27 times?
A. He said that.
Q. "Rip off" were the exact words Mr. Balch used?
A. Yes.
Q. Reviewing your comprehensive notes, I find no other reference to Mr. Balch's stated reason for visiting Charles Jones's apartment. Did he give any other reason?
A. No, he didn't.
Q. You never asked him to explain what he meant by "rip off," did you?
A. No, I assume he meant "steal."
Q. I didn't ask you what you assumed. I asked you if you ever asked Mr. Balch what he meant by "rip off"?
A. No, I didn't.
Q. Did you know that "rip off" can mean in slang to "retrieve forcefully what is yours by right"?
A. No, I never heard that.
Q. Isn't it true that you never asked Eddie Balch if Charles Jones owed them speed from a prior drug deal?
A. He never told me that.
Q. You missed my question. I asked if you ever asked Mr. Balch if Jones had owed them speed from a prior drug deal?
A. No.
Q. In your 45 minutes with Mr. Balch, you never asked him whether he had taken any drugs before going to the Jones apartment, did you?
A. No, I didn't.
Q. During your interview, you didn't bother to find out whether Mr. Balch was under the influence of drugs when Mr. Jones was killed?
A. No.

This is a remarkably safe approach to cross-examination, once the witness confirms that all important details are contained in his written report. Of course, it only works if the report omits important elements of the case.

9

Depositions

§9.1 I. IMPORTANCE OF DEPOSITION

In civil cases, cross-examination is heavily dependent on what the witness said at deposition. This chapter discusses how to get the most out of a deposition, if you are taking one, or to give the least to a deposition, if you are defending one. At trial, great cross-examination depends on preparation, and in civil cases the deposition is the key to preparation.

II. DEPOSITION ABUSES

§9.2 A. Common Abuses

To Update

Deposition testimony may be taken as permitted at the trial. Fed R Civ P 30(c); CCP §2016. This model described in the statutes is ignored in the real world.

Deposition examination is more informal than trial examination. But, more importantly, depositions invite abuses:

1. There is no judicial officer present to act as policeman. Counsel make frivolous objections; coach their witnesses; improperly instruct not to answer; and make unnecessary speeches "for the record."

2. Counsel call frequent recesses to "consult" with their witness. The consultations are thinly disguised preparation sessions, putting a derailed witness back on track.

3. Attorneys double-team. If there are several opposing counsel, they may make multiple objections, making it well-nigh impossible to keep the thread of examination. Occasionally (and quite improperly) two lawyers representing the same witness may attempt to speak or object during examination of a single witness.

4. Time is wasted. No judge or jury fidgets, and so, attorneys needlessly prolong an examinationgoing through every scrap of paper, every conversation, and every remotely relevant event.

5. Attorneys posture, bluster, and sometimes get genuinely angry in ways they would not in court. For example, from an actual deposition transcript:

> A. Yes, I told you it was refurbished. It's true.
> Q. Let me ask you, so that you don't squirrel around so much.
> A. If you refer to me squirreling around again, I'm going to come across the table at you and shove your glasses down your nose.
> Q. Are we on the record? I've just taken my glasses off here because I'm in physical fear of Mr. Jones. If you want to come across the table, let's do it on the record. Should make for interesting reading.
> Q. What's the difference betweenyou're screaming so loud it's hurting my ears. I wonder if you could calm down. Could you get your client under control or somehow take control. If he comes across the table, it's going to be the first time in years. I mean, I don't know what to tell you. If he comes across the table, I sure want it on the record. He appears out of control and screaming.
> Q. I believe you're squirreling around on me, again.
> Q. I thought maybe you'd come across the table if I said "squirreling around." That's why I used the word. I was just waiting here for you.
> A. You're talking so loud I can't hear you.

§9.3 B. Countering Abuses

To Update

The most effective solution to deposition improprieties is a firm supervising court. Judges are becoming more willing to order sanctions against counsel who abuse depositions; see, *e.g., Ralston Purina Co. v McFarland* (4th Cir 1977) 550 F2d 967, 973 (instruction not to answer improper); *Langston Corp. v Standard Registered Co.* (ND Ga 1982) 95 FRD 386 (improper to make coaching objections at deposition).

Counsel should not lightly terminate a deposition to seek court relief. If the deposition is going badly, remain unruffled. If counsel allows himself to be baited by the opposing attorney, the deposition will become pure sound and fury. If the opposition is guilty of misconduct, counsel should firmly but courteously note it, and continue the deposition.

Should the opposing attorney improperly instruct the witness not to answer, counsel could terminate the deposition immediately to seek relief from the court. However, that does little good if there are many other questions to ask. It is better (and proper) to insist on an answer or an instruction not to answer, and go on to complete the remainder of the deposition. See CCP §2034(a); Fed R Civ P 37(a)(2). Have the court reporter mark all instructions not to answer. Most reporters will gladly provide an index of pages containing such instructionsor an expedited transcript of questions and non-answers.

Listen *carefully* to objections made as to form. Many objections are valid. Do not hesitate to amend the question to correct possible error as to form. If the objection is valid, only a correction can save a badly formed question and answer for use in court. See CCP §2021(c)(2); Fed R Civ P 32(d)(3)(B).

Counsel make speeches "for the record" to impress the witness or a client who will be reviewing the transcript later, or to work off steam. Limit these pointless speeches by going off the record for informal conferences to resolve differences over points of evidence. Then, go back on the record to briefly describe resolution of the differences, or the reasons each party is holding his position. Going off the record will save transcript costs, and discourage rhetoric aimed at an absent client.

If friction is anticipated, counsel should consider videotaping the examination. See CCP §2019; Fed R Civ P 30(b)(4) (requiring stipulation or court order). It is not overly expensive; videotape has a calming influence on counsel and witnesses. The camera will record a long pause, a sneer, or angry voices, where a typewritten transcript will not. Videotape should not be used if counsel's goal is an expansive and natural witness; the videotaping will crimp some witnesses' exuberance or indiscretion.

Increasingly, federal and state courts allow counsel to schedule a telephone conference with a judicial officer to resolve discovery differences expeditiously, *e.g.,* ND Cal Local R 230-4(e), U.S. District Court, Northern District of California. This is an excellent development, and can quickly bring a misbehaving attorney into lineespecially if counsel is corrected in the presence of his client.

Normally, request a discovery telephone conference when a serious problem first arises, and continue other areas of questioning until the judicial officer is available. Otherwise, one or two hours may be wasted in recap.

A referee or special master may be desirable in high-budget cases with ongoing discovery problems. The master can attend selected depositions (or be available by phone), and make immediate rulings subject to later approval by the trial court. Code of Civil Procedure §§638-645.1, governing appointment of referees, provide authority for this practice in state court. Beware thoughboth sides are often left unhappy with a referee, and the costusually borne by both sidesis high.

Finally, counsel must become familiar with statutes and authorities applicable to deposition problems. See §§9.3-9.13.

C. Improper Objections and Proper Responses

§9.4 1. Instruction Not To Answer Based on Form

To Update

Counsel sometimes instructs the witness not to answer because a question "has been answered," is "argumentative," or is otherwise defective in form. All answers objected to are taken subject to objections (CCP §2019(c); Fed R Civ P 30(d)). Therefore, an instruction not to answer based on form is improper. See *Ralston Purina Co. v McFarland* (4th Cir 1977) 550 F2d 967, 973; 1 California Civil Discovery Practice §5.30 (Cal CEB 1975). Nonetheless, such instructions are common.

If the instruction is given, counsel should courteously advise the witness of the purpose of an objection based on form. Explain that if the objection is sustained by the trial judge, both the question and answer will be barred from evidence. If, on the other hand, the objection is improper, the question and answer will stand. Then say: "The objection is noted. Please answer the question."

If the witness remains directed not to answer, counsel must make a record: either (1) note the witness's refusal to answer; or (2) (more commonly) stipulate that each time counsel instructs the witness not to answer it may be deemed that the question has been asked and the witness has not answered. Normally there is no need to "certify" the question because counsel can notice all affected persons of a motion to compel an answer. CCP §2034(a). "Certification" permits the moving party to seek a hearing on a motion to compel, without formal noticed motion, 10-30 days from the date of the deposition, by notifying the refusing party or deponent of such application at the time of the refusal. Code of Civil Procedure §2034(a) provides details of this procedure, which has no federal counterpart. If the witness is a nonparty, all papers regarding the motion must be served on the witness. Cal Rules of Ct 337(b). In Los Angeles County, even if the "certification" procedure is used, counsel must also use a written motion. Los Angeles Law Dep't Policy Manual §316.

See Civil Discovery Practice §5.26 for the language of an oral notice of motion to compel answers.

PRACTICE TIPS

Certification should seldom be used. It is nearly impossible to get an original transcript lodged with the court not less than five days before the hearing (CCP §2034(a)); prepare points and authorities; and reserve a hearing date 10-30 days from any deposition. Furthermore, if you certify, and cannot have the matter heard within 30 days of deposition, you will have to reschedule the hearing by way of noticed motion.

§9.5 2. Misleading

To Update

The objection "misleading" is often used in deposition to cue the witness. Counsel often follows the objection with corrective suggestions which coach the witness. There is no easy counter to such coaching. A statement suggesting that counsel is coaching will create hostilitybut may mute, if not prevent, the coaching. If "coaching" impedes or distorts the deposition, counsel should allow enough coaching to make a sufficient record, terminate the deposition, and make a motion for a protective order under CCP §2019(d) or Fed R Civ P 26(c) for an order requiring counsel to refrain from suggestions. See, *e.g., Fidelity Bankers Life Ins. Co. v Wedco, Inc.* (1984) 102 FRD 41; *Dennis v BASF Wyandotte Corp.* (1983) 101 FRD 301. See 1 California Civil Discovery Practice §§2.31-2.33 (Cal CEB 1975) for a general form of protective order motion, and 1 Civil Discovery §2.38 for a form of protective order.

Frequent conferences between the opposing attorney and the witness, whether conducted sotto voce at the deposition table or during frequent recesses, usually serve one purpose: scripting the witness's responses.

Counsel should have the court reporter note each conference. If the practice continues unduly, terminate the deposition and seek a protective order. CCP §2019(d); Fed R Civ P 26(c).

Coaching can also be cut back by videotaping the deposition.

§9.6 3. Question Calls for Speculation

To Update

The objection that the question calls for speculation, or the comment (following a question): "If the witness knows," nudges the witness to claim ignorance, or to refuse to answer. This practice should be countered by:

(a) Advising the witness that counsel seeks information only about what the witness knows, or has reason to believe may be true. Note that a deposition is not limited to inquiry into admissible evidence, but may seek information that is reasonably calculated to lead to the discovery of admissible evidence. CCP §2016(b); Fed R Civ P 26(b)(1).

(b) Reminding the opposing attorney thatalthough pure speculation may be undiscoverablecounsel is entitled to all information which the witness believes has a probable or even a slight basis in fact. Discovery demands much broader inquiry than trial. *Pacific Tel. & Tel. Co. v Superior Court* (1970) 2 C3d 161, 172, 84 CR 718, 726.

§9.7 4. Argumentative or Harassing

The objection "argumentative" is often misused in lieu of "misleading." An argumentative question is one which is tendentiousit seeks to pick a fight with the witness, or is framed in the language of closing argument: "Isn't it true that you desired revenge when you learned your hated competitor had secured the contract?" If counsel is sure the question is proper, the objection should be noted and an answer insisted on. If wrongly accused of "harassment," counsel should ask the witness a series of questions to rebut the charge: "Have I raised my voice? Have I insulted you? Do you feel harassed?"

§9.8 5. Leading

To Update

The objection that the question is leading is valid for a question put to a witness who is not an adverse party or identified with an adverse party. Evid C §§767, 776; Fed R Evid 611(c). But it is proper to ask leading questions if a witness: (1) is an expert; (2) has demonstrated hostility; (3) needs to have his attention directed to a precise topic; (4) is unable to understand; (5) is being questioned about preliminary matters; or (6) has shown his memory to be exhausted. See 3 Wigmore, Evidence in Trials at Common Law §§777-778 (3d ed 1970). A few foundational questions often will establish one of these grounds as a basis for asking leading questions. If notthe witness is truly neutralcounsel should rephrase a leading question.

§9.9 6. Irrelevant

An objection based on irrelevancy is simply wrong. See CCP §2016(b); Fed R Civ P 26(b)(1). If counsel couples it with an instruction not to answer, he is vulnerable to a motion to compel. The proper objection to questions unrelated to the lawsuit is "irrelevant and not reasonably calculated to lead to discovery of admissible evidence." See *Pacific Tel. & Tel. Co. v Superior Court* (1970) 2 C3d 161, 84 CR 718.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/9 Depositions/§9.10 7. Asks for a Legal Conclusion

§9.10 7. Asks for a Legal Conclusion

To Update

The objection that the question asks for a legal conclusion is proper, if the question asks for a true legal opinion: "Did you delegate authority to your sister? Did you have a binding contract?" See California Trial Objections §§20.2-20.4 (2d ed Cal CEB 1984). But a similar question is propera question about the witness's state of mind: "Did you think you had a contract?" "Did you count on your sister to dispose of the property for you?"

§9.11 8. Assumes a Fact Not in Evidence

The objection that the question assumes a fact not in evidence is a frequently made (but puzzling) objection. At deposition, counsel must make factual assumptions that are not yet "in evidence." Because there is no judge to order exhibits or facts "into evidence" (exhibits, for example, are marked in a deposition only for identification), the objection is fallacious.

An objecting attorney may properly object to a question as "compound" or "misleading" because it misstates the facts. Faced with this objection, rather than engage in a profitless quarrel, consider posing the question as a "hypothetical," then demand an answer. Carefully frame the hypothetical, to be certain each of its elements can be established at trial.

§9.12 9. Confusing

An objection because the question is confusing is frequently well taken. If so, the question should be broken down into its component parts, or framed in simpler language. If the question was lucid, and the opponent is just being obstructive, counsel should brush aside the objection by asking the witness, flatteringly, "*You* aren't confused, are you?"

§9.13 10. Improper, Except as the Subject of Interrogatories

Improper, except as the subject of interrogatories, is an objection that is an old chestnut, but it pops up occasionally. It has no basis because of the broad scope of deposition discovery. See CCP §2016(b).

III. ORGANIZING, CONDUCTING, AND DEFENDING A DEPOSITION

§9.14 A. Organization

A deposition should be organized around both the case chronology and the relevant documents. A chronology is easy to prepare. In most cases, counsel can prepare it, using the complaint, responsive pleadings, notes, and key documents. A secretary or paralegal can help in complicated cases. The chronology should show, with a separate entry for each month (or day, for important events), when all important matters occurred. Counsel will use the chronology:

1. As a checklist, to be certain to cover all important topics in deposition;
2. As a possible outline for questioning;
3. As a reference point, when counsel or the witness are floundering for a date.

Several days in advance of the deposition, three copies should be made of all documents to be explored. They should usually be arranged in chronological order. Occasionally, the documents might be better arranged by issue. Generally, the deposition is more coherent if documents are in chronological order.

Three copies of documents are necessary, to provide: (1) one to be marked for identification and given to the witness; (2) one for opposing attorney; and (3) one for the examiner, marked up in red pen, with comments and possible questions. Extra copies should be made for additional counsel, if it will speed the deposition.

PRACTICE TIPS

Keep one unmarked original set of documents. You will need unmarked documents for trial, and as a source for later depositions.

In cases with many documents it is useful to premark deposition exhibits, and to maintain a running number system. Do not begin again at Exhibit "A" or "1" for each new deposition, but pick up with the next highest Exhibit letter or number in succeeding depositions. You will then have a unique letter or number for each of the many exhibits created.

Prepare a three-ring deposition book (similar to the examination book discussed in §13.10). Your deposition book should have sections for evidence, a perpetual calendar, and your chronology of the case.

In the Deposition Book, under separate tabs for each witness, either write out your questions in detail (with cross references to other deposition transcripts or exhibits), or block out a rough outline of deposition topics. Which system you select will depend on your personal style, developed over time.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/9 Depositions/§9.15 B. Commencement

§9.15 B. Commencement

To Update

Most attorneys have a standard set of introductory remarks they make at the beginning of a deposition. This equivalent of throat-clearing is too predictable; instead, begin immediately with important questions, and make the introductory remarks whenever justified. Most deposition transcripts have a stock introduction. Counsel need not run through all of the stock remarks, but should tell each witness:

1. She will have a chance to correct errors in her deposition. CCP §2019(e)(1); Fed R Civ P 30(e); §9.18. Counsel, however, may examine her on these deposition corrections at trial (see 1 California Civil Procedure During Trial §5.30 (Cal CEB 1982)), and may comment on changes made during argument to the jury. See *Knight v Russ* (1888) 77 C 410, 414, 19 P 698, 700; *Shriver v Silva* (1944) 65 CA2d 753, 764, 151 P2d 528, 534; *Duncan v St. Louis-San Francisco Ry.* (CA Mo 1973) 480 F2d 79; *Barnes v Omark Indus., Inc.* (CA Mo 1966) 369 F2d 4.
2. She can correct misstatements or errors she has made by requesting the opportunity from counsel at any time. This admonition will be useful for trial, if the witness takes the tack at trial that much of her deposition testimony was mistaken.
3. She is under oath, and should try her best to be accurate.

Should counsel enter into stipulations at commencement of the deposition? Some attorneys breezily ask "usual stipulations?" at the beginning of a deposition. The "usual stipulations" don't exist: they vary from attorney to attorney and from jurisdiction to jurisdiction. Counsel should counter with an offer to take the deposition "in accordance with the code (or the rules)." CCP §§2016-2036.2; Fed R Civ P 26-37.

Two stipulations that generally benefit both sides are:

1. When an attorney has instructed a witness not to answer, it is deemed that the question has been repeated, and the witness has refused to answer.
2. The deposition may be mailed to the witness for review and correction. The witness need not come to the court reporter's office to make corrections. See CCP §2019(e)(1); Fed R Civ P 30(e) (the federal rule specifies that "the deposition shall be submitted" to the witness for corrections and signing).

PRACTICE TIPS

1. Write in advance a checklist of points and documents you *must* cover with the witness, and review it before concluding the deposition.
2. Save unfriendly or embarrassing questions until the end of the deposition. If the witness is neutral, or friendly, keep his good will as long as possible. If the witness is hostile, beginning with a series of hostile questions will foster attorney's quibbling and the witness's stonewalling. Asking hostile questions early also will give the witness more chance to "explain" her answers later in the deposition.
3. Try to begin questioning on sensitive issues or surprise areas immediately after a recess. You then have your best chance of covering those areas without recess or meal break.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/9 Depositions/§9.16 C. Taking Depositions

§9.16 C. Taking Depositions

To Update

The attorney must *not* control the witness tightly in deposition. Contrary to trial, rambling non-responsive answers should be welcomed. Counsel's goal is to gather as much information as possible in depositionto be fashioned into damaging evidence at trial, or to be used as a guide to prepare counsel's defenses. To meet this goal, conduct relaxed, informal, and hospitable depositions.

> PRACTICE TIPS
>
> Two exceptions to the friendly rambling deposition: (1) The witness who may not be available at trial, and whose specific favorable testimony you want to preserve; (2) A party-witness in a case which is very likely to settle. You may wish to demonstrate the strength of your case and the harsh aspects of cross-examination to this witness to impress on her the weaknesses in her case and the prospective rigors of trial.

Generally, counsel should encourage a relaxed and friendly atmosphere at deposition. If the witness wants to go off-the-record to confide certain facts to counsel, permit it. If her "off-the-record" comments are critical, counsel can place them on the record later (unless counsel has promised that the off-record remarks will remain off the record).

The attorney should suppress ego, and not trade ripostes with the witness. In a relaxed deposition, the witness often forgets that every word spoken may be read back to a jury in a solemn courtroom setting. This should never be forgotten by counsel.

Witnesses at deposition are prone to severe memory loss. Some restoratives can be applied:

1. Press the witness for probabilities, or even educated guesses (estimates which have some factual basis, however slight). This is the examiner's right under the standards of discovery. See CCP §2016(b); 3 Wigmore, Evidence in Trials at Common Law §777 (3d ed 1970).

2. Ask the witness about how she expects to restore her memory for trial. If she testifies that she will not be able to remember a fact at trial, counsel has a basis for impeachment if the witness finds a sudden restoration of memory at trial.

3. Use documents and other testimony to refresh recollection. Make the witness's obtuseness embarrassing. Fear of seeming stupid may overcome sham loss of memory. Here is one verbatim examination of a wandering witness:

> Q. Mr. Blank, have you every had your IQ tested?
> A. I don't recall. Probably in high school.
> Q. Have you ever had your ears tested?
> A. I am sure I have seen an ear, nose, and throat doctor, yes.
> Q. Do you know if there is anything wrong with your hearing?
> A. No.
> Q. Have you ever been committed to a mental institution?
> A. No, I have not.
> Q. In your normal course of business can you read a menu and order?
> A. Yes, I can.
> Q. Can you hear what people say and respond accordingly?
> A. Yes, I can.
> Q. Would you listen once more to the Court Reporter while she reads you the question. I know you are anxious to talk about something, but please listen to the question and show me that you have an understanding of the question by answering it.
> A. Okay.

Develop a list of stock questions, and ask them routinely of most deposition witnesses. For example:

1. If you don't know, who does?

2. Describe the search made for documents designated in the subpena duces tecum received by the witness. (Mark the subpena duces tecum as an early exhibit, and review it in detail.) Has the witness personally conducted a search for documents, or directed others to carry it out? What rooms, cabinets, and files were searched? What standards were used for the search? What other files or locations (including "dead storage" space) might contain responsive

documents?

3. If you don't know the answer, what documents would you consult to find an answer?

4. (For non-party witnesses.) Have you discussed this case with opposing counsel? Exactly what did you talk about? How many meetings did you have? How long did they last? What documents were reviewed or shown to you? Have you discussed the case with anyone else?

Note: If the witness is *not* a party, work-product or attorney-client privileges are inapplicable, and counsel may strike paydirt by asking these questions early in the deposition. Ask the same questions after recesses or lunch, to find out if opposing counsel has been coaching the third party witness, or has revealed case theories to the witness.

5. What have you reviewed to prepare for your deposition? Was your memory of past events helped by the review? (Demand details about everything reviewed, including the witness's personal notes.)

There are two divergent lines of authority on whether a party waives the attorney-client and work-product privileges by reviewing privileged documents to prepare for testimony. *Kadelbach v Amara* (1973) 31 CA3d 814, 107 CR 720 (waiver of work product); *Sullivan v Superior Court* (1972) 29 CA3d 64, 105 CR 241 (no waiver of attorney-client privilege); *Kearns Constr. Co. v Superior Court* (1968) 266 CA2d 405, 72 CR 74 (both privileges waived); *In re Comair Air Disaster Litigation* (ED Ken 1983) 100 FRD 350 (weighing process; waiver may be found if documents used extensively to prepare for testimony); see *Note*, 88 Yale LJ 390 (Dec. 1978).

Ask the big question. Counsel should not miss the chance to develop invaluable testimony because of an assumption that the witness will evade or deceive on some key point. Key questionswhich do grave damage to the witness, or to a party the witness is identified withsometimes are answered with full candor.

For example, in an antitrust case, an executive had carried cash around in a black bag and bribed distributors to handle his line of goods. A capable aggressive plaintiff's attorney questioned the executive for a day and a half about improper advertising rebates, promotional budgets, and volume discounts. He never asked about direct cash bribes. Had he done so, the witness would have testified truthfully.

Attorneys are usually honestwitnesses often so. A witness may bend testimony, backpedal, evadebut will usually not perjure himself if confronted with a direct question.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/9 Depositions/§9.17 D. Defending Depositions

§9.17 D. Defending Depositions

To Update

Defending depositions is the mirror-image of taking depositions. The suggestions in §9.16 are reversed: *e.g.,* the witness should *not* make statements "off the record"; the witness should give concise limited answers; the witness should conduct a careful search for documents sought by subpena duces tecum; the witness should not review privileged documents to refresh recollection for deposition.

The attorney should remind the witness that verbal sparring and one-liners can be replayed to a jury in the formal circumstances of trial. The points presented in the rules for the deposition witness in the Appendix §9.20 should be covered carefully with the witness.

Critical points for the deposition witness include:

1. Do not volunteer. A perfect deposition (for the defense) would contain questions and one of three answers: "Yes," "No," "I don't know."
2. Do not joke, use slang, or disparaging or vulgar language.
3. If the witness is a party, she should never review privileged documents for the primary purpose of refreshing recollection for deposition. This may waive the privilege. See §9.16.
4. The witness should pause after any objection to permit the attorney to give an instruction not to answer, if appropriate.

A deposition witness should be prepared by being given written general guidelines. For sample deposition witness guidelines, see Appendix §9.20.

Counsel defending a deposition should meet with every witness before the deposition one day or more in advance, if possible. A witness cannot be properly prepared for deposition by meeting at the deposition site 30 minutes before questioning begins. Go over the points outlined above, and review with the deponent prospective lines of questioning. In particular:

1. If the witness is a party, review the complaint. The witness should be prepared to substantiate each and every allegation, or provide a reason why he can not. ("My lawyer drafted that paragraph and she knows all the facts supporting it.")
2. Review interrogatory answers and responses to requests for admissions, if verified or vouched for by the witness. If boiler-plate interrogatories have been served and answered, counsel should concentrate on the most important questions and answers.
3. Go over key documents: be sure the witness understands their significance, and can testify accurately about their creation and meaning.

Spend some time educating the witness about the personality of the deposition-taker. Many deposition-takers can be placed in four categories:

The Fraternity Brother or Sorority Sister

He throws his arm around the witness, suggests he take off his coat, loosen his tie, offers a cup of coffee, and says that "we're all friends here." He hopes to charm the witness into damaging admissions.

The Bumbler

She claims abysmal ignorance about key facts, drops papers on the floor, forgets dates, fumbles with her examination outline, and encourages sympathy and help. The witness should be unmoved.

The Thunderer

Bellicose, self-assured, and pushy, he sneers, threatens, raises his voice, pounds on the table. The attorney should firmly prevent intimidation. A protective order may be appropriate if the questioning attorney is trying to damage the witness's reputation, invade privacy, or assault her personality. See 22 Wright & Graham, Federal Practice and Procedure §5222 (1978).

I'm O.K., You're O.K., but your attorney?

She implies that the witness is remarkably sophisticated and knowledgeable but is represented by a dolt. If only (she implies) she could get the true version of the facts, she could easily settle the case. She attempts to drive a wedge between witness and attorney. This play is most effective with third party witnesses or experts.

PRACTICE TIPS

If you have previewed the examining attorney's characteristics for the witness, he will be amused rather than overwhelmed when the gambits begin.

When defending a deposition, counsel should assume a measured, ethical, and alert style. Eschew quibbling objections, frequent speechmaking, or overt coaching. The client will be better served by a reasoned and reasonable deposition style. First, depositions will be shorter and less expensive. Second, the client will be spared the cost of bringing or defending expensive discovery motions. Finally, all counsel will have a chance to evaluate the witness in circumstances resembling trial. Both sides can then better intelligently weigh the settlement value of the case. Most civil cases settle. A swift and fair settlement is more likely if counsel has avoided acrimony during discovery.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/9 Depositions/§9.18 E. Other Deposition Considerations

§9.18 E. Other Deposition Considerations

To Update

When taking or defending a deposition, the attorney is making a record for the jury. This should not be forgotten. Sometime, perhaps years after the deposition, a judge and jury will hear parts of the deposition, verbatim.

The deposition will be used to impeach; to refresh recollection; as an admission by a party, andfor unavailable witnessesin lieu of live testimony. Many attorneys, lulled by the informal nature of a deposition, neglect to make a jury record.

To make a better jury record, counsel *should not:*

1. Use "lawyer's language." Use plain English instead. The "party referred to" did *not* "exit the motor vehicle." Instead, the "man got out of a car."

2. Trade insults with opposing counsel or the witness. The judge may edit out pot shots, but if your questions are impolite, prolix, or dishonest, the jury will see counsel in a bad light.

3. Refer to documents by only their deposition exhibit number. Once an exhibit has been identified, refer to it by short-hand description ("the letter of November 18th"). This will make testimony much more comprehensible when read to the jury.

4. Let a witness draw pictures in the air. Require the witness to make a diagram. If a witness indicates that the screwdriver was "about this long," get in words how many inches "this long" is.

Opposing counsel can examine at trial about corrections made to a deposition after the deposition is concluded, and comment on the corrections when arguing to the jury. See §9.15. If counsel's witness has made a mistake, get the mistake corrected on the record during the deposition. Then, at trial, the judge will allow counsel to read to the jury the correctionsusually right after the mistaken testimony is read. This greatly minimizes the force of the original error.

Counsel should nail down key admissions unless counsel believes the admission will be weakened or qualified by repetition. Generally, if a *hostile* witness makes an important damaging admission, counsel may be better off tiptoeing away from the topic and hoping that opposing attorney does not correct the damage. If a *neutral* or *friendly* witness provides important helpful testimony, it is probably safe to ask the leading question in several different ways, and get repeated affirmations.

PRACTICE TIPS

If you are taking the deposition of a witness who cannot be compelled to attend trial (and is not likely to attend), consider videotaping the deposition, if you expect favorable testimony. Out-of-state fired or retired employees of an adverse corporation are obvious candidates for videotape. You cannot force live testimony in a civil trial from any witness, party or not, if they reside out of state. CCP §1989; Fed R Civ P 45(e)(1). In federal criminal cases service is nationwide. Fed R Crim P 17. In state criminal cases special procedures must be followed to subpena out-of-state witnesses. Pen C §§1333-1334.6.

Even when the deposition is finished and transcribed, the attorney's work is not over. Counsel (or a capable paralegal) should review the deposition carefully and frame follow-up interrogatories and document requests.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/9 Depositions/§9.19 F. Direct Examination at Deposition

§9.19 F. Direct Examination at Deposition

The attorney defending a deposition should rarely conduct direct examination of his own witness. Exceptions include:

1. Aged or infirm witnesses, who may not be around to testify at trial.
2. Witnesses who cannot be compelled to attend trial (out-of-state).
3. Critical witnesses in cases likely to settle. A full exposition of *counsel*'s side of the case develops a better record for favorable settlement.
4. Correction of serious errors made in cross-examination. When correcting errors, counsel may draw the witness's attention to the erroneous testimony, and may ask leading questions. See Comment to Evid C §767 (permitting leading questions to refresh recollection).

If the attorney expects to conduct direct examination at deposition, he should prepare the witness as if he were preparing direct examination for trial. See §§2.9-2.14.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/9 Depositions/§9.20 IV. APPENDIX: SAMPLE DEPOSITION WITNESS GUIDELINES

§9.20 IV. APPENDIX: SAMPLE DEPOSITION WITNESS GUIDELINES

You are about to give testimony in a Deposition. This sheet will give you some general advice. Please read it carefully. It is based upon long experience.

ADVICE TO DEPOSITION WITNESSES

Summary

1. Tell the truth.
2. Never lose your temper.
3. Dont be afraid of the lawyers.
4. Speak slowly and clearly.
5. If you dont understand the question, ask that it be explained.
6. Answer all questions directly, giving concise answers to the questions, then STOP TALKING.
7. NEVER VOLUNTEER any information. Wait until the question is askedanswer it, then STOP. If you can answer yes or no, do so, then STOP.
8. Do not magnify or minimize your damages. Exaggeration can be embarrassing at trial. Likewise, if you underestimate damages, this can be used to impeach you.
9. Testify only to basic facts and do not attempt to give opinions or estimates unless you have a good reason for knowing such matters.
10. If you dont know, admit it. Some witnesses think they should have an answer for every question asked. You cannot know all the facts and you do yourself a disservice if you attempt to testify to facts with which you are not acquainted. It is IMPERATIVE that you be HONEST and STRAIGHTFORWARD in your testimony.
11. Dont try to memorize your story. Justice requires only that a witness tell his story to the best of his ability.

Detailed Advice

1. Listen to the question. Analyze it for its specific meaning, assumptions of fact, any misquotations, et cetera. Wait at least a few seconds after the question to give yourself time to think about it and to give me time to object.
2. Answer only the question. Dont volunteer information. Dont try to set the lawyers straight. Dont try to save everybody a lot of time. Just answer the question. (NOTE: When an answer demands an explanation in order to be fairly understood, you are perfectly free to explain your answer. However, this should be the exception rather than the rule.) If the attorney has presented to you a question containing hypothetical facts and a conclusion, and you do not agree with the conclusion, he may go on to ask you: Well, whats wrong with what I said? The temptation is to go ahead and help the attorney out by filling in missing facts and explaining the fallacy of his thinking. However, to do so simply gives the attorney a free education and assists him in developing his case again the company. There is nothing wrong with what he said; its just that you dont agree with his conclusion. He can re-ask the question, rephrase it, add facts, subtract facts, or do whatever he wishes. It is not up to you to do the job for him. You can simply say that you do not agree with the conclusions, or that he should rephrase the question, or that he should be more specific, or whatever may be appropriate.
3. Dont guess or speculate or try to interpret what someone else meant by what he said. If you dont know the answer to a question, just say so and dont be embarrassed. It is perfectly understandable that you do not have all of the facts immediately at hand, or that you may have general knowledge on the subject but not specific details. You can always protect yourself by saying As I sit here now, I just cant give a specific answer; I couldnt answer that without reviewing the report (or whatever may be involved); Its been a long time since I had anything to do with that matter, and I would hesitate to give a definite answer without a great deal of reflection and further study. (This does not mean that you should not give a reasonably firm estimate on the subject when you have a reasonably firm estimate to give; just be sure that your estimate does not later become an established fact in subsequent questions and answersthis is a technique which some lawyers are very adept at employing.)

4. With respect to records, the lawyer questioning you will frequently ask you about a statement in some document without showing it to you, or ask you a question by reading from a particular document. You are always free to ask to look at the document to refresh your recollection, and this is advisable. With regard to any portion of a document as to which you are being questioned, take plenty of time to read the whole thing so that you have a thorough idea of the context in which a given statement is made and so that you have plenty of time to frame your answer (or your attorney to frame his objection).

5. In contrast with the immediately preceding remarks, keep in mind that the opposing attorney does not have access to a number of records of which you may be aware, and that it is to our advantage in the lawsuit to turn over as few records as possible. Consequently, unless you are sure that the opposing attorney is making reference to a particular record in his question, dont volunteer information as to the existence or identity of any records. This will simply cause the attorney to ask you a lot more questions. Hell ask you to identify the additional records specifically, ask to have them produced, and then ask further questions based on the new records. This prolongs the deposition and can complicate the litigation. Similarly, the attorney may ask you a number of general questions about filing systems, people who are in charge of records, summaries, or lists of records, and the like. Be sure not to volunteer information or speculate as to what you assume in answer to questions along this line. Give only your specific knowledge in response to specific questions.

6. A frequent source of trouble in depositions is that a witness says that he follows one particular practice while a company manual or checklist may suggest a somewhat different practice. Generally speaking, this is easily explained by pointing out that the company manual or checklist is giving only general guidelines for people who have not had a great deal of experience in a particular field or that the general guidelines are always subject to practical necessities in a given situation. Bear this in mind if the attorney attempts to embarrass you with an apparent contradiction between your own practice and a guideline set out in a manual or checklist.

7. Attorneys frequently try to lead you into saying that the company has accidents, or that the company has a problem, or some such, when interrogating you about, *e.g.,* the history of reported accidents, incidents, malfunctions, complaints. Keep in mind the fact that, generally speaking, accidents, incidents, and malfunctions occur to others and are *reported* to the company; the company does not have the accidents, incidents, or malfunctions. Moreover, these occurrences are frequently totally unverified and simply reflected by some customer complaint coming in from the field. The company frequently asks for follow-up investigations by having the part returned for laboratory examination, which often is not done. In fact, then, it may be the case that there are very few verified occurrences of operational difficulties with the companys product and it creates an unfair impression to go along with the other attorneys terminology in saying that the company has had this or that problem.

8. Another troublesome area arises where the attorney tries to get you to admit that the product in question could have been safer than it was. This frequently relates to the question of design redundancy, where you are asked to go along with the idea that two are always better than one. This is a very tricky area and requires a lot of thought on your part. The first thing to keep in mind is to make sure that the question asked of you is completely specific and is not misleadingly vague; dont admit the general proposition unless it is always and invariably true; just tell the attorney that the question is far too general for you to answer and hell have to be more specific. The second thing to keep in mind is that there are countless considerations which go into the ultimate decision of how a particular product is to be designed or manufactured. These include customer requirements, the total operation of the product, the demands of regulatory agencies, the availability of materials, the state of the art, the history of reported malfunctions at the time of design and manufacture, how critical the particular item is in relation to other more or less critical items, economic feasibility, and any number of other considerations, which go to make up the total picture of the design, manufacture, production, and marketing of a particular product. Think twice (or three times) before answering in this area.

9. Although depositions are generally conducted in informal surroundings, you are giving testimony under oath, which is being recorded verbatim, and which may later be read in a courtroom at trial as if you were on the witness stand. Consequently, you must conduct yourself as if you are in court. The following are some pointers to keep in mind:

(a) Call people by their formal names, *e.g.,* Mr. Jones rather than Joe.

(b) Dont make jokes; they may sound very funny at the time, where people can see your gestures and facial expressions, and hear the tone of your voice, but they may sound entirely different when read to a jury from a transcript of your deposition.

(c) Dont use technical slang (such as carcass for wreckage) or imprecise terminology (push it through the floor

boards for accelerate fully); again, your meaning and attitude can be greatly misunderstood when the transcript of your testimony is read to a jury a year or two later.

(d) Where possible, avoid using analogies or simplified comparisons to explain a technical concept or principle. Where possible, use the technical definition and language so long as you feel comfortable doing so. Comparisons are never completely valid and the more simplified the comparison, frequently the greater the number of differences between the comparison and what counsel is trying to explain. This type of thing can be very useful in a courtroom at trial where you are face to face with the jury and have a full opportunity to explain exactly what you mean. However, when simply transcribed in a deposition, such comparisons can later be used with misleading effect by opposing counsel.

(e) Dont make any off-the-record comments, except to me and in private. If you feel that the line of interrogation is going haywire, dont go off the record to explain this to everyone; you may go off the record to explain it to me in private. If there is a break in the deposition and people are talking casually off the record, be sure not to talk about the case or anything related to the deposition to anyone except me. It is hard to refrain from doing so when people are conversing with you in a friendly fashion, but more often than not these friendly casual conversations come back to haunt you when you go back on the record. Remember that you are in an adversary proceeding and that the opposing attorney does not alter his adversary position just because your statements are not being recorded.

10. When you see that you are in a troublesome area, or when you are not really sure how to respond, feel completely free to ask the attorney to rephrase his question, to make it more specific, to ask the question again, to state just what he means by the question. Sometimes, the attorney does not know just what he wants to ask and will drop the subject; at the very least, it forces the attorney to make his question quite specific so you can focus on it, and it gives you plenty of time to frame your answer.

11. From time to time in the deposition I will say that answers the question; that means that you have said enough and that you are starting to volunteer information. Or, I may say, the question was _ _ _ _ _ _, and reiterate the question. This means that your answer is not responsive to the question asked and that you should concentrate on answering the specific question. You should take these as cues for any further interrogation in the deposition.

12. At times during the deposition I will instruct you not to answer the question. You should follow this instruction with complete confidence, regardless of what the other attorney may say. He and I will settle the matter in court if need be and it is not your concern.

13. All of the above is obviously subject to the overriding and basic principle that you tell the truth and that you use your own good judgment. If you try to be too cagey, you may find yourself in trouble. If you tell the truth as you know it, you have nothing to worry about.

To see sections added to this chapter since publication of the book, click 

10

Examination of Jurors

I. OVERVIEW

§10.1 A. Major Aims of Voir Dire

To Update

Many experienced attorneys believe that voir dire and opening statements, not the more theatrical cross-examination and closing argument, are the most important components of successful trial practice. For a comprehensive, practical discussion of voir dire, see Jurywork (2d ed 1984).

Voir dire is the most difficult (and unpleasant) single task of trial. It is the curtain-raiser; it is unpredictable. As practiced in state court, a rigorous voir dire is equivalent to cross-examining twenty or thirty surprise witnessesmany of them hostilewithout the aid of normal witness control devices.

There are three primary and two secondary purposes for voir dire. The primary purposes are:

1. Selecting a jury that will sympathize with and vote for counsel's client.
2. Educating the jury venire about the strengths (and weaknesses) of the client's case.
3. Establishing rapport with the jurors.

The secondary purposes are:

4. Obtaining commitments from the jury which can be called on during closing argument, *e.g.,* fairness to defendant despite bad experiences with members of defendant's profession. See §10.18.
5. Determining the jury's possible view of the case, so counsel can adjust the case presentation accordingly.

Of these five categories, the most important is *selection.* If counsel finds the prospect of keeping five different goals in mind daunting, he should stick to just this one: selection. If the attorney intelligently selects a jury, using voir dire to best advantage, most of the other purposes will also be accomplished without special effort.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/10 Examination of Jurors/§10.2 B. Other Considerations

§10.2 B. Other Considerations

Voir dire should be kept as simple as possible. Counsel wants to come out of voir dire feeling confident, exuding optimism which will buoy the client and provide a positive note for the remainder of the case. If the attorney is not a "natural" at voir dire, or has not become practiced through long experience, counsel should not flounder about in voir dire for two or three difficult days. Counsel should conduct a short, crisp, fundamental, voir dire, mixing intuition and logic to make the best choices possible.

A long, skillfully conducted voir dire, however, will help spot bad jurors and serve to pre-try the case. Very few can master this lengthy poised voir dire. A *short* and skillful voir dire is a satisfactory substitute.

PRACTICE TIPS

Many lawyers work hard with pencil and paper, keeping score on jurors. This is dangerous. You may lose your "feel" for individual jurors, or you may allow the point-keeping system to overrule your sound instincts. While you busily write dozens of facts about a specific juror with your head down, that very juror may be smirking at a question by opposing counsel, and the smirk may convey volumes of information. Follow these simple rules:

1. Look at each juror;
2. listen to each juror;
3. use the juror's name when speaking to him;
4. after you have completed voir dire, select jurors with whom you feel compatible or who you think feel compatible with you. Pick jurors you would like to have lunch with.

II. PREPARATION FOR VOIR DIRE

§10.3 A. Juror Background

Very few lawyers practice today in small towns where information on potential jurors is available from friends, neighbors, and tradespeople. The following sources of juror information can be used:

1. Jury services. Many metropolitan areas offer jury books, containing information about jurors. Of particular interest, the books provide:
   a. Political party registration;
   b. background on prior jury verdicts, sometimes including specific information about the juror's position;
   c. address and nature of neighborhood (*e.g.,* blue collar, conservative, ethnic composition);
   d. marital and family status;
   e. job history;
   f. support of political initiatives (*e.g.,* gun control, death penalty, legalization of marijuana);
   g. age; and
   h. spouse's jury service and voting record.

2. Voting registration records. These are open to public scrutiny, and are often located in or near the courthouse. Once you have the list of the juror venire, a paralegal or secretary can go through the registrar's records and pick up information, including party affiliation, address, and support of political initiatives.

3. Organizational jury services. Some prosecutors' offices maintain running information on active jury members, containing the voting record of each juror. The defense may move to have this information provided to them, but courts are not required to order this. *People v Castro* (1979) 99 CA3d 191, 160 CR 150. In some communities, groups such as the local Trial Lawyer's Association attempt to keep a history of jurors. In addition, the local defender organization may maintain a jury book.

4. Jury questionnaires. Both federal and state systems require juries to fill out questionnaires. These are not normally available to counsel, but counsel should check with the local clerk to see if they are available for examination. If unavailable, consider asking the court to make those records available to counsel. The attorney should argue that it promotes the interests of the jury system for all counsel to be more completely informed about the background of each juror.

PRACTICE TIPS

An attempt to digest all the information contained in a comprehensive jury service while observing the jurors and preparing to question them can lead to confusion. Try to get jury books several days in advance of trial. You can often secure from the court clerk a list of prospective jurors several days in advance of trial, or the night before. You, or someone working for you, can then summarize the most important information about prospective jurors, and provide a tentative rating for each of the 50 or 60 prospective venire members.

Many of the facts provided by jury services are superfluous. Race, age, profession, family status: these are all facts which counsel can see, or which will be revealed during voir dire by the court or counsel. The most important information which is not normally discovered during voir dire, but is part of a jury service, is political affiliation, full details of prior jury experience, and support of specific political initiatives.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/10 Examination of Jurors/§10.4 B. Rating Jurors

§10.4 B. Rating Jurors

Everybody has his own scientific or unscientific list of juror characteristics they desire or do not desire for a particular case. These lists are subjective and anecdotal. Above all, they are generalizations, which can lead to terrible misjudgments if followed rigidly. Though a juror may rate highly in all categories, if counsel or client feel strong antipathy to the juror after voir dire, counsel should be guided by those instincts, rather than some mechanical application of a point system. On the use of nonverbal indications in voir dire, see 7 CEB Civ Litigation Rep 148 (1985).

For every case, develop a rule-of-thumb rating system for jurors. Everyone deplores stereotypes, but you need them to pick jurors. What follows is a checklist of characteristics counsel must think about *before* voir dire begins to develop a profile of ideal jurors *for that case.*

- Age
- Sex
- Marital status
- Ethnicity
- Education
- Political affiliation
- Economic status
- Profession or trade
- Leader/follower
- Type of employer
- Military background

For any given case, add appropriate characteristics that seem useful for picking good jurors. Also consider the following impressionistic observations:

1. Some jurors should be viewed as dangerous by both sides of a case. Extroverts, cranks, and authority figures may impede the jury from reaching any verdict (especially if unanimity is required) or may lead the jury in directions unexpected by either side. If counsel represents a criminal defendant, he may welcome a maverick on the jury. Otherwise, counsel may want to stipulate with opposing counsel that unsuitable jurors may be excused with neither side exercising a challenge.

2. Persons employed in the medical profession are in a "helping" profession, but may have become inured to pain and suffering. Some attorneys, however, prefer a nurse to most professions if representing plaintiff in a personal injury case. Opinions differ on this.

3. Technical and numbers professions (*e.g.,* accountants, engineers) tend to favor prosecutors and civil defendants. However, when judging a criminal defendant, a very precise juror may find reasonable doubt because the prosecutor has not proven each element of the offense convincingly.

4. If a juror suffered an injury, counsel should try to find out whether or not the juror sued to recover for damages or passively accepted fate. A juror who has not been aggressive in pursuing his own rights is not likely to be generous in vindicating the rights of others.

5. If counsel represents a minority group member, criminal defendant, or civil plaintiff, selecting a jury presents special problems. How to use voir dire to probe racial attitudes of jurors is discussed in §10.14. Counsel should talk to the client and use counsel's own experience to determine whether certain specific ethnic groups will be predisposed toward or against the client.

6. Self-employed jurors do not fit neatly into any box. Generally, they are favorably inclined to civil plaintiffs and unfavorably inclined to criminal defendants. They have experienced hard knocks in building a business and will be sympathetic to the small plaintiff suing the more powerful defendant. On the other hand, they have managed to make it on their own, and may impose their own high standards on criminal defendants.

7. Generalizations about age are difficult, and change every five years. Ten years ago, there was a natural young-old break, with younger jurors being largely pro-criminal defendant and pro-civil plaintiff. That younger group is now

aged 30-50; jurors younger than that now often have strong conservative points of view. This may change again in five years.

8. Expert jurors are dangerous to both sides, whether or not their field of expertise will be at issue in trial. Both sides also should be wary of "would-be experts," jurors who will attempt to assume the mantle of expertise, or even educate themselves during trial about technical areas in dispute. There is no easy profile of the "would-be expert": counsel should try to identify such personalities during voir dire.

9. Many lawyers believe that poorer jurors may vote more readily for liability, but are stingy in giving away money. This has not been our experience.

PRACTICE TIPS

When constructing an ideal juror profile, there are alternatives to one's intuitions:

1. Some lawyers retain the services of a clinical psychologist, both for assisting and drawing up an ideal juror profile, and in trying to help "weed out" bad jurors during voir dire.

2. In large budget cases, consider hiring a polling service to ask a cross-section of the community key questions about jury attitudes. Poll results can then be used to prepare an ideal juror profile.

3. Talk to non-lawyer friends about the case, and find out what their preconceptions and predispositions are.

4. Talk to other local attorneys with substantial jury trial experience to find out what *their* list of characteristics would be for your trial.

5. Some big budget case lawyers have used shadow juries in advance of trial. These juries are a cross-section of the public, who are paid to sit through a condensed version of the trial, and are polled afterwards on their reactions to each phase of the trial. Few lawyers will ever have the money or inclination to use this time-consuming process. And, if used, it may add little to the other methods.

The importance of picking the proper jury cannot be overemphasized. A sympathetic jury goes far to ensuring victory for the lawyer who selected it. Much professional attention has been devoted to jury selection in recent years. The best book on this topic is Jurywork (2d ed 1984).

Source: Civil Litigation/Effective Direct and Cross-Examination Book/10 Examination of Jurors/§10.5 C. Jury Selection: The Rules of the Game

§10.5 C. Jury Selection: The Rules of the Game

To Update

Opposing counsel play a poker game during jury selection. Each attorney would like nothing better than to see the other side run out of challenges early.

To play this game successfully, counsel must know something about the jury selection system used by the trial court judge. There is a great deal of latitude in federal jury selection: therefore, counsel should ask the judge's court clerk what system will be used. Some of the systems and rules used by federal judges are:

1. The so-called "Arizona System." Twenty-eight jurors are selected in order, they are all voir dired, and then the defense attorney and prosecutor must exercise their challenges blind, on separate forms. Neither knows which challenges the other is exercising. The first twelve jurors (in the order called) remaining after this dual blind challenge constitute the jury.

2. A pass on the twelve jurors in the box bars any later peremptory challenge for the jurors in the box. The Ninth Circuit Court of Appeals has indicated in *U.S. v Turner* (9th Cir 1977) 558 F2d 535, that this rule may be valid; but a pass is not a waiver of a peremptory challenge as to a person who was not a member of the panel at the time the jury was accepted.

3. The judge may require that if either party passes a peremptory challenge, the challenge is waived. The application of this rule was upheld in *U.S. v Pimentel* (9th Cir 1981) 654 F2d 538.

4. Varying alternation of challenges between counsel. Normally in federal criminal cases if the offense is punishable by imprisonment for more than one year, the prosecutor has only six challenges, while the defense has ten challenges. In the case of multiple defendants, the court may allow both sides additional peremptory challenges. Fed R Crim P 24. Usually the prosecution exercises one of its challenges, and then the defendant one or more. See, *e.g.*, 1 ND Cal Local R 326-1. Counsel should check with the court clerk to see if the judge has variations on this system.

5. Various systems for selection of an alternate. In a long trial, the selection of the first alternate in particular may be very important. In state court, one challenge is allowed per side per alternate selected (CCP §605), and in federal court, one challenge per each two alternates (Fed R Civ P 47).

> PRACTICE TIPS
>
> Review applicable statutes and local rules to determine the number of peremptory challenges and what standards may be used to challenge for cause.

STATE COURT

1. Six peremptories for two parties, and eight or more if over two parties. CCP §601.

2. One challenge per alternate. CCP §605.

3. Pass of the jury as constituted does not waive a later peremptory challenge for any juror in the box. CCP §601.

4. For state criminal cases, ten peremptories for the prosecution and ten peremptories for the defense, with an additional peremptory for each alternate. For capital or life imprisonment cases, each side is allowed 26 peremptories; if the maximum term is 90 days or less, each side gets six peremptories. Pen C §1070. See also Pen C §1070.5.

FEDERAL COURT

5. For federal civil trials, three peremptories per party, and one more for each two additional alternates. 28 USC §1870; Fed R Civ P 47. A federal jury in a civil case must arrive at a verdict by a *unanimous* vote. Federal courts often have local rules limiting a civil jury to six persons. See, *e.g.,* ND Cal Local R 245-1.

6. For federal non-capital criminal cases, the prosecution has six and the defense ten peremptory challenges. Fed R Civ P 24.

In a civil case or a criminal case when the interests of counsel's client are adverse to those of his nominal co-parties, counsel should press the court for additional challenges. CCP §605; 28 USC §1870; Fed R Crim P 24.

Challenges for cause are spelled out in CCP §602 and (with no specificity) in 28 USC §§1866, 1870. Counsel will

most often use the provisions allowing challenge for cause, for interest in the action, or enmity against or bias to either party.

For a more detailed discussion, see 1 California Civil Procedure During Trial §§7.35-7.45 (Cal CEB 1982).

§10.6 D. Voir Dire Tactics

Many attorneys believe that a short voir dire and minimum use of challenges sets the right psychological stage for their case. There are veteran prosecutors who frequently advise the court that they are satisfied with the jury as constituted immediately after impaneling of the first twelve jurors.

This approach is questionable: probing voir dire and maximum use of challenges is essential to getting the best possible jury. In an ideal case, all of counsel's challenges should be used and none of the challenges of opposing counsel. In practice, if one side runs out of challenges early, the opponent can then begin to draw substitute jurors from the pool in the back of the room for jurors in the box, and change the composition of the jury substantially before it is sworn.

Thus, counsel should never try to get more than three or four challenges ahead of the opponent, keeping a few challenges in reserve, passing, if necessary, to let opposing counsel catch up, before exercising the last few challenges.

Counsel should be very aware of the jury pool in the back of the courtroom. The judge will frequently ask questions of the entire jury panel, so counsel will have received some information about prospective jurors who have not yet been impanelled. This, and simple observation, will provide an overall picture of the average age, ethnic background, alertness, and gender of the members of the jury pool. This information should be used in deciding whether to use penultimate and last challenges to remove a juror in the box who is not clearly likely to be sympathetic to counsel's client.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/10 Examination of Jurors/§10.7 E. Preparing and Using the Client and Others

§10.7 E. Preparing and Using the Client and Others

The attorney's client, paralegal, or legal secretary can help greatly during selection of the jury. They are extra eyes and ears. In most courtrooms, non-jurors can sit with the jurors in the back of the courtroom during the selection process. If so, have a paralegal sit with the jurors, and note juror comments or reactions to the voir dire.

The client should help select the jury, but should be undemonstrative. Stage whispers, head-shaking, or glares may antagonize some jurors.

Most jurors today know that a jury book exists, containing background information on them. Most do not like it. It is not good practice for counsel to bury his head in a jury book as each new juror takes a seat. Rather, counsel should try to glance at the jury book during the court voir dire, and have the paralegal summarize the most important jury book points. If the jury book is obtained several days in advance, counsel should already have condensed the most salient points onto the jury list.

During the trial proper, it looks bad for the client to be whispering suggestions into counsel's ear. During jury selection, consultations with the client seem natural. If, after consultation, the jury is accepted as constituted, none of the decision-makers has been insulted. If, after consultation, a juror is dismissed, that juror will take no further part in determination of the client's case. But the other jurors may have befriended the dismissed juror, and feel insulted.

A client's instincts, although not based on trial experience, should be respected. Subtle visual and aural cues can transmit hostility or warmth toward a client; the client may be more sensitive to these cues than counsel.

The attorney should develop a system for recording information about jurors. The system can be as simple as cross-hatched boxes on a yellow legal pad, or can be a more formal form consisting of the following categories placed in boxed areas. A convenient design is seven boxes across and down.

NAME
Age:
Party:
Race:
Home:
Job:
Education:
Jury:
Other:

Be sure that the system, whatever it is, permits keeping track of the exact number of peremptory and cause challenges exercised by all parties, as well as challenges for cause exercised by the court. Despite counsel's best efforts and intentions, he will frequently lose track of the status of peremptory challenges. If so, the attorney should ask the court to have its clerk announce the current status of challenges.

A "point system" for overall rating of a juror should be used. Whether it is one to ten, "good-average-bad," or some variation, a quick overall rating is crucial to comparing jurors and carrying through selection tactics. The chart can assist in applying the rating system.

Finally, in preparing the client for the voir dire, counsel should spend substantial time talking about the jury profile, the game theory to be used, and the mechanics of the challenges. By doing so, counsel will guarantee that the voir dire joint attorney-client decisionmaking will be smooth.

When trying a case with one or more co-counsel, the attorney should work out in advance a method for exercising challenges. Some counsel prefer to confer and exercise a joint challenge, while others prefer to alternate among themselves. Alternating challenges (rather than joint challenges), with conference and advice from all counsel before each peremptory challenge, is one practical approach.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/10 Examination of Jurors/§10.8 F. Form: Proposed Voir Dire

§10.8 F. Form: Proposed Voir Dire

To Update

Many federal courts and some state courts by local rule require counsel to submit a list of proposed voir dire questions for the court to ask the panel. The majority of federal courts resist the efforts of counsel to undertake voir dire themselves; counsel must submit proposed questions in those federal courts, or take the chance that voir dire will be incomplete, with no record for appeal.

Here is a sample of the requested voir dire in a federal criminal case, with bank robbery the charge:

_ _[*Name of Attorney*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _

Attorneys for Defendant _ _[*name*]_ _

[*Title of court*]

[*Title of case*] **No. _ _ _ _ _ _**
REQUESTED VOIR DIRE

It is requested that the following questions be asked of the jury in voir dire in the above-entitled action:

1. Where do you presently live? How long have you resided there?

2. What state were you born in? When did you come to California?

3. Are you married? Do you have any children?

4. What is your occupation? Your spouse's occupation?

5. Do you have any prior criminal jury experience? How many trials? Did you arrive at a verdict?

6. The defendant in this case is charged with the crime of bed bank robbery. Will the nature of this charge make it difficult for you to be impartial in this trial?

7. Have you (or your spouse) served in the military? In which branch? In what capacity? What rank or rate? Have you (or your spouse) ever served as a military policeman or shore patrolman? As a member of a Court Martial Board? If so, would this make it difficult for you to be a fair juror in this case?

8. Have you, your immediate relatives, or close friends, ever been the victim of a crime? Have you ever been a witness in a criminal action? If either, would it adversely affect your jury service in this case?

9. This trial will last about three days. Will the time element make you unable to lend your best attention to the evidence presented by both sides?

10. Are you acquainted with Assistant United States Attorney _ _[*name*]_ _, prosecuting this case, or any of the following persons:

a. FBI agent _ _[*name*]_ _

b. _ _[*name*]_ _

c. _ _[*name*]_ _

d. _ _[*name*]_ _

e. _ _[*name*]_ _

f. _ _[*name*]_ _

g. _ _[*name*]_ _

11. The defendant in this case is a black man. Do you feel that blacks, as a race, are more likely than other racial groups to commit crime? If so, will you be able to put aside this belief in trying to determine whether or not defendant is guilty of the charge against him in this trial?

12. Will anything about the defendant's race make it difficult for you to be an impartial juror in this case?

13. Have you discussed any criminal cases with any Assistant United States Attorneys? If yes, give details.

14. Have you, your immediate relatives, or your close friends, ever been involved in any phase of law enforcement or criminal prosecution? If so, give details. Would any of your _ _[*relative's/friend's*]_ _ experience make it harder to be fair in this case?

15. Do you believe that law enforcement officers are more likely than other citizens to tell the truth? Do you believe that their recollections and perceptions are more accurate than those of ordinary citizens? Will you give any special credit to testimony of law enforcement officers simply because of their job?

16. Do you believe that eye-witness testimony is invariably accurate? If eye-witness testimony is presented, will you wait until you have heard all the evidence before you determine what weight to give to it?

17. Do you understand that the defendant, as he stands now, is presumed to be innocent?

18. You will be instructed that you must find defendant guilty beyond a reasonable doubt before any guilty verdict can be returned. If you think defendant is probably guilty, but entertain a reasonable doubt, what will your verdict be?

19. Will you be able to listen to all evidence from both sides, and listen to the appropriate instructions before you form any final opinions as to defendant's innocence or guilt?

20. Will you be able to freely exchange opinions with your fellow jurors during deliberations? If you are convinced you are correct in your views, either for guilt or innocence, will you stand by them even though you are in the minority?

21. Will you be able to put aside any compassion or emotional empathy you feel for the victim bank tellers in this case, and decide the innocence or guilt of defendant without being influenced by such compassion or emotional empathy?

22. Have you, your immediate relatives, or close friends ever worked at a bank? Will this affect your ability to judge this case without passion or prejudice?

23. Recently, our newspapers have been carrying numerous stories about violent and dramatic crimes in San Francisco. Have these stories aroused fears or emotions in you, to such a point where you will no longer be able to impartially sit as a juror in this trial, in which defendant is charged with a crime of violence?

24. If you were prosecuting or defending this case, would you want 12 jurors in your present frame of mind?

Dated: _ _ _ _ _ _

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
Attorney for Defendant
_ _[*name*]_ _

The Appendix to the Standards of Judicial Administration, Cal Rules of Ct 8 (civil) and 8.5 (criminal), spells out areas of inquiry that the trial judge should include in examination of prospective jurors in state civil and criminal cases. The

questions provide a good outline for counsel to use themselves in conducting voir dire. They include special questions for personal injury and wrongful death cases, eminent domain cases, and cases with a corporate party.

Counsel should also prepare a written list of witnesses for the judge to read to the jury. The list should be typewritten, or clearly printed, with phonetic spelling as necessary. Trial judges will usually expect such a list. It should be made up in advance of voir dire.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/10 Examination of Jurors/§10.9 G. Jury Questionnaire

§10.9 G. Jury Questionnaire

To Update

Special jury questionnaires (as opposed to those filled out for jury duty) are coming into increasing use in cases with sensitive issues, or highly publicized parties. If the case warrants a jury questionnaire, counsel should make a motion during the pretrial proceedings to have such a questionnaire filled out in advance by all prospective jurors on the panel. The trial court should be asked to provide counsel with the questionnaires in advance of trial if possible. Advance questionnaires are not usually practicable in state court, with a master calendar system.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/10 Examination of Jurors/§10.10 H. Preparing Voir Dire Questions

§10.10 H. Preparing Voir Dire Questions

The following are sources for voir dire questions:

1. Areas of inquiry set forth in the Appendix to the Standards of Judicial Administration, Cal Rules of Ct 8 and 8.5;

2. Jury instructions for the case, culled from Devitt & Blackmar, Federal Jury Practice and Instructions, Civil and Criminal (3d ed 1977) (federal court) or CALJIC and BAJI (state court);

3. Weak points or controversial points in counsel's case. This might include self-defense, contributory negligence, punitive damages. They should be reviewed early with the jury.

4. Sensitive areas of possible prejudice, *e.g.,* race, prior criminal record, repulsive facts.

5. Expert issues at trial, and the use of expert testimony.

6. Testimony by members of a profession that is viewed favorably or unfavorably by many persons, *e.g.,* police officer, lawyer, surgeon, stockbroker.

7. Names of organizations and persons whose credibility or liability may be at issue.

PRACTICE TIPS

Block your questions out with a separate index card or sheet of paper for each separate area of inquiry. 5 x 8" index cards for voir dire are handy because you can recycle many of the questions and use them over and over again with different jurors.

Questions prepared on 5 x 8" index cards have a further advantage: after the trial, they can be stored, and many of them used again as the basis for voir dires in later trials.

Once counsel has written the outline of his questions, counsel should organize them and arrange them in order of importance. Counsel will want to ask some questions of every juror, and repeat other questions many times with different jurors. Other questions may be asked only once or twice during the entire voir dire.

The attorney should practice using different formulations for the same general question. Otherwise, the jury may be bored by rote repetition of key questions.

Once the main areas of inquiry have been determined, counsel must consider how to follow-up on the initial question: how to rehabilitate prospective jurors whom counsel wishes to keep on the panel but who have indicated some bias in favor of counsel's case; and how to establish grounds to challenge for cause prospective jurors biased against cause, client, or counsel.

III. PERTINENT LAW

§10.11 A. Right To Complete Voir Dire

To Update

California Rules of Court 228 permits counsel, on request, to supplement the judge's examination by oral and direct questioning of prospective jurors. The courts have refused to circumscribe full voir dire by counsel in state practice. *People v Terry* (1964) 61 C2d 137, 147, 37 CR 605, 612; *People v Hernandez* (1979) 94 CA3d 715, 156 CR 572.

Sections 8 and 8.5 of the Appendix to the Standards of Judicial Administration, Cal Rules of Ct, also state that, on request, the "trial judge should permit counsel to conduct such [supplemental voir dire] examination without requiring prior submission of the questions to the judge."

Federal courts uniformly refuse to allow counsel to personally conduct voir dire. In theory, federal voir dire is required to be complete. See *U.S. v Blanton* (6th Cir 1983) 700 F2d 298 (reversal of conviction because judge asked jurors only whether they could disregard publicity, and should have conducted more detailed questioning). But see *U.S. v Blanton* (6th Cir 1983) 719 F2d 815 (on rehearing, held judge's questioning was sufficient to produce an impartial jury); see §10.15; *U.S. v Baldwin* (9th Cir 1979) 607 F2d 1295, 1296 (criminal conviction reversed; trial court refused to ask about jury's acquaintance with witnesses, and whether the jury would give special weight to testimony by police officer).

In practice, federal voir dire is often cursory. With a flexible federal judge, or in a case demanding special effort to secure a fair-minded jury, counsel should not hesitate to ask the trial judge for the chance to conduct attorney voir dire. The request may be more favorably regarded if backed by a promise to take no more than 30 minutes for such attorney voir dire. There is no substitute for voir dire by counsel to get a true feel for the jury. Pleas for such personal voir dire will probably fall on deaf ears in federal court. Nonetheless, the effort is worthwhile in sensitive cases.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/10 Examination of Jurors/§10.12 B. In Chambers Voir Dire

§10.12 B. In Chambers Voir Dire

Jurors will often, out of embarrassment, refuse to answer candidly if they are voir dired in the presence of their fellow jurors. One-at-a-time voir dire of jurors in chambers will alleviate this problem. *Silverthorne v U.S.* (9th Cir 1968) 400 F2d 627, mandated such practice in a case which had received widespread publicity. The court could also allow jurors to come to side-bar to answer embarrassing questions out of the earshot of other jurors.

State courts also recognize the propriety of in chambers voir dire in special circumstances. See, *e.g., Hovey v Superior Court* (1980) 28 C3d 1, 80, 168 CR 128, 181.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/10 Examination of Jurors/§10.13 C. Impermissible Questions

§10.13 C. Impermissible Questions

To Update

Sections 8 and 8.5 of the Appendix to the Standards of Judicial Administration, Cal Rules of Ct, list "improper questions," including attempts to precondition the prospective jurors to a particular result, questioning about the pleadings, the applicable law, the meaning of particular words and phrases, and questions about the personal lives and families of the attorneys or jurors. Code of Civil Procedure §§608 and 609 probably bar counsel from going into specific jury instructions during voir dire, and limit the questioning to whether or not the jury will follow the court's instruction on the law.

This rule should be relaxed where specific points of law may be prejudged by some jurors, *e.g.,* the concept of contributory negligence. Counsel should attempt to find out in advance whether such questions need be cleared by the court before being asked.

Counsel should not be permitted to ask questions during voir dire which cover areas impermissible in opening statement or case-in-chief, *e.g.,* comments about insurance coverage, prior convictions (if barred by law), settlement offers, and inadmissible bad conduct by a party. The careful lawyer will, prior to voir dire, ask the judge to declare such areas out of bounds for voir dire and opening statement.

§10.14 D. Racial Prejudice

To Update

Where race is at issue, the court should exercise special sensitivity during voir dire. In *U.S. v Robinson* (3d Cir 1973) 485 F2d 1, 157, the Court of Appeals for the Third Circuit reversed defendant's conviction because the trial court refused to voir dire jurors about their possible prejudice against black witnesses.

A detailed set of guidelines has evolved in state courts permitting counsel in civil or criminal cases to challenge opposing counsel's use of peremptories to eliminate black jurors from potential service on the jury. *People v Allen* (1979) 23 C3d 286, 152 CR 454; *People v Wheeler* (1978) 22 C3d 258, 148 CR 890; *People v Ortega* (1984) 156 CA3d 63, 67, 202 CR 657, 659 (challenge to race-motivated peremptories must be made as early as practicable). See also *People v Hall* (1983) 35 C3d 161, 197 CR 71. Under *Wheeler,* Blacks generally or Black women are protected against being eliminated from jury service by race-motivated peremptories. *People v Motton* (1985) 39 C3d 596, 217 CR 416, modified at 40 C3d 46 (discussion of timing of defense objection). The *Wheeler* protection extends to civil cases. *Holley v J & S Sweeping Co.* (1983) 143 CA3d 588, 192 CR 74. No similar line of cases has evolved in federal court. But see *U.S. v Pearson* (5th Cir 1971) 448 F2d 1207 (systematic use of peremptories to ensure all white juries for black defendants constitutionally invalid; not proven in this case).

Unfortunately, there is no law requiring the trial court to ask "open-ended" questions to test sensitivity on the race issue. This is probably the only effective way to get a good line on a juror's racial attitudes.

To see sections added to this chapter since publication of the book, click To Update

§10.15 E. Problem Areas

Federal courts, in their eagerness to streamline voir dire, may undertake en masse voir dire of the entire panel, including those not in the jury box. Questions addressed to a group of 50 people, asking, for example, whether any of them had been convicted of a crime, are particularly unlikely to ferret out unpopular viewpoints or embarrassing facts. However, at least one circuit court, en banc, has approved group voir dire. *U.S. v Blanton* (6th Cir 1983) 719 F2d 815.

IV. QUESTIONING AND SELECTION

§10.16 A. Overview

To Update

Before beginning voir dire, counsel should have the main trial themes firmly in mind. Counsel will have, in hand, written-out major areas of inquiry, so as not to lose track of the main goals.

It is essential during voir dire to watch the jurors, and listen to what they say. The plaintiff or prosecution will normally go first on voir dire. This will provide defense counsel an opportunity to observe the jury while someone else is addressing them. By the same token, if counsel represents the plaintiff, or is prosecuting, he will have a chance to sit back and watch the jury being voir dired by the defense after he has finished his voir dire.

Voir dire is stressful for the attorney. It is difficult to keep the presence of mind necessary even to remember names. However, repeated use of the names of each juror will go far to creating a bond between counsel and the jurors.

PRACTICE TIPS

1. Learn the jurors' names. Write down the name of each juror, by location, on a schematic chart, and spell the name phonetically if necessary. Use names in addressing individual jurors.

2. Quiz the jurors in order from left to right rather than jumping around. Although it may be more impressive to jump around, and will tend to keep the jury more alert, it is difficult to jump randomly, and to call each juror accurately by name.

3. Don't be afraid to mispronounce a name once or twice. On the other hand, don't do it deliberately.

4. Relax as you address each juror, and when you are done, try to decide whether or not you would like to be seated next to the juror at a dinner. This may be as good a test as any for eliminating or keeping jurors.

5. Don't make your voir dire longer than the case justifies. You may dissipate a lot of good will if you spend two days in voir dire on an automobile injury case involving modest damages. On the other hand, do not make your voir dire too brief in cases which demand comprehensive jury education and careful selection.

6. Have crisp, confident exit line questions at your fingertips to use when you are concluding your voir dire.

7. Questions to individual jurors should be broken up by occasional questions to the entire box. Group questions should usually be rhetorical, *i.e.,* "Is there anyone on the jury who can't be fair to my client because he is Mexican-American?"

Source: Civil Litigation/Effective Direct and Cross-Examination Book/10 Examination of Jurors/§10.17 B. Selecting the Jury: Sample Questions

§10.17 B. Selecting the Jury: Sample Questions

To Update

Both subjective and objective tests should be used to select each juror. Objective tests require basic information about the juror. Following are fundamental background questions many of which will have been asked by the trial judge (in federal court, all voir dire will be conducted by the court):

1. Where do you live? How long have you lived there? Where were you born? Where else have you lived for over five years? (Seeking information about rural or urban environment, and nature of neighborhoodblue collar, wealthy, ethnic background).
2. Have you served on a previous jury? What was the nature of the case? Without telling me what the verdict was, can you tell me whether or not you arrived at a verdict? (A juror who has served on a jury that has arrived at verdicts is less likely to be a maverick. If the juror has served in prior cases similar to yours, try to get the details of the case from the juror outside the presence of other jurors, by asking the court for individualized voir dire.)
3. Have you ever been a party in any litigation? Have you ever testified as a witness? (If the answer is yes, follow these questions up with an inquiry about details.)
4. Do you know any of the witnesses or parties in this case? Do you know any of the attorneys? (Read witnesses' names, and attorneys' names, if the judge has not done so. If opposing counsel is from a large firm, find out if the jurors know anyone else from the firm.)
5. Do you have any special training in medicine? Law? (and so forth for other specialties which may be involved in the case, *e.g.,* accounting).
6. Have you ever been injured by another? Have you ever had a dispute with another about a contract? Did you ever file suit as a consequence? (This is a very important area: Did the prospective juror fight for rights, or decide to let the grievance pass? This may suggest the juror's attitude toward your client's complaint or defense. In addition, find out whether or not the juror has had to defend any lawsuit.)
7. What is your occupation? What do you do in a typical day? (Job titles alone will not give you enough information about the juror.)
8. Have you served in the military? When and in what capacity? Did you participate in any way in any court martials?
9. Have you, your immediate relatives, or close friends ever worked in law enforcement? When? What did you/they do?
10. What have you heard about this case before today? (If the case has been publicized, and jurors have heard something about the case, further voir dire about juror's awareness should be conducted individually in chambers or at side-bar.)
11. Have you or any of your immediate relatives or close friends been involved in any situation similar to the dispute on trial here?
12. What do your children do for a living? Your spouse?
13. Have you ever worked for yourself? (Get details: entrepreneurs often have a slant on life different from that of wage earners.)
14. This trial may last over two weeks. If it does, will you be able to devote the necessary time to hearing the case and deliberating thoroughly?

PRACTICE TIP

The trial judge should ask jurors about marital and family status and education. Some questions (educational background) may be embarrassing to a juror, and are better asked by the court. Generally, the occupation of a juror will give you a good idea about the juror's education. If a juror is now retired or a housewife, be sure to find out the juror's prior occupations.

Most trials have one or more sensitive issues, *e.g.*, race, the willingness of a jury to award punitive damages, personal feelings about charges of sexual harassment, and willingness to be fair to a corporate defendant. Try to find out about these areas by asking open-ended questions, *i.e.,* ask questions which require a narrative answer.

Below is a sample of some open-ended questions proper if you represent a member of a minority group:

Have you ever worked with [racial or ethnic group]? Tell me something about those work experiences. Have you had any [racial or ethnic group] neighbors? Tell me about any social contact you had with them. What close contacts have you had with [racial or ethnic group]? What bad experiences have you had? Good experiences?

Such questioning is often awkward for both lawyer and juror. It cannot be avoided if race, religion, or other sensitive matters are going to be an issue. Open-ended questions provide an opportunity to observe the *way* in which a juror answers questions. Hesitation, embarrassment, tone of voice, and other "body language" clues are highlighted during open-ended questioning.

PRACTICE TIP

If a juror has had bad experiences with a particular race or ethnic group, or with a profession, follow through to find out whether or not the juror is prejudiced, *i.e.,* "likely to prejudge" because of those experiences. Most of us possess prejudices. You might prefer a juror who will honestly admit a prejudice and will try to overcome it to one who conceals true feelings.

Here is sample questioning for "event-specific" prejudice:

I suppose your unpleasant experience with your lawyer left some bad feelings? And it would be natural for you, at least subconsciously, to have some doubts about the integrity of other lawyers, wouldn't it? My client, Bob Smith, is a lawyer. Do you think he may be starting out with at least one strike against him because of your prior bad experience with your lawyer? Can you promise me that you will remain conscious of this possibility and put it aside when deliberating the facts of this case?

Q. Mr. McGuire, you have been kind enough to tell me about your bad experience with your personal attorney five years ago. You understand that my client, Bob Smith, is also an attorney, and that Mrs. Green has charged Bob Smith with malpractice, don't you?

A. Yes, I understand.

Q. Will your past bad experience make you uncomfortable about your ability to be completely fair to Bob Smith?

A. Yes, I suppose it might.

Q. [If the juror says that it will make him uncomfortable.] If you were Bob Smith, can you see that you might feel uncomfortable knowing that one of the jurors has had a prior bad experience with a lawyer?

A. Yes, I can see that.

Q. Since Bob Smith doesn't know you or any of the details of your bad experience, you can see that he might feel that you, at least subconsciously, might be biased against him before you have heard any evidence?

A. Yes, I understand that.

Q. Considering that, do you think it might be better if you served as a juror in some other case that did not involve questions about attorney's malpractice?

A. Yes, it might.

[To the Court] Your Honor, in consideration to Mr. Jones, I suggest that it would be better if he were excused from this panel, so he could sit on some other case not involving attorneys as parties.

PRACTICE TIP

Keep in mind the bases for challenges for cause contained in CCP §602. If the court will not permit a challenge for cause after the above voir dire, you have at least sensitized the juror to your concerns, and if you do exercise a peremptory challenge the remainder of the panel will see your reasons for doing so in the best light.

To rehabilitate a juror:

Q. Mr. Jones, you knew nothing about this case before you came into court this morning, did you?

A. No, I didn't.

Q. And as far as you know, your bad experiences with your attorney several years ago have no relation to the facts in this case, do they?

A. That's true.

Q. You don't have any fixed feeling that all lawyers are bad or incompetent, do you?

A. No, I don't.

Q. Then you would listen carefully to all the evidence, and try to judge this case fairly and impartially, wouldn't you?

A. Yes.

Q. You don't have any real reason, as you sit here, to believe that you are going to be unfair to either side, do you?

A. No.

Q. And, when the judge tells you that you must judge this case on the basis of the evidence you hear and see in this courtroom, you can follow that instruction can't you?

A. Yes.

Q. You understand, don't you, Mr. Jones, that your bad experiences with your earlier lawyer are ancient history, and have nothing to do with this case?

A. Yes, I do.

PRACTICE TIP

If you must use a peremptory, be sure to follow the following formula: Your Honor, would the Court please thank and excuse Mrs. Jones?" If the Court permits, you might then look at the juror and say "Thank you Mrs. Jones" yourself. Remember, remaining jurors may have made friends with Mrs. Jones during the assembly. You do not want any juror to feel that you have any antagonism toward the jurors you are dismissing by peremptory challenge.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/10 Examination of Jurors/§10.18 C. Educating the Jury: Sample Questions

§10.18 C. Educating the Jury: Sample Questions

During voir dire, counsel has an opportunity to educate the jury to strengths or weaknesses of the case, and the standards which the jurors must be prepared to apply. Naturally, many of the educational questions asked will also assist in selecting jurors (see §10.5) and structuring the case (see §10.20).

It is likely that the most frequently misunderstood jury standard is the *burden* of proof. Importantly, juries in civil cases often apply a quasi-criminal standard.

Therefore, perhaps the most important educational aspect of voir dire is familiarizing the jury with the standard of proof. In a civil case, this flows naturally from voir dire of jurors who have had prior criminal experience:

> Q. Mrs. Brown, you have previously served in a criminal case, is that correct?
> A. Yes.
> Q. What was the standard of proof you were asked to apply in that case?
> A. The judge told us we had to find the defendant guilty beyond all doubt.
> Q. That sounds very close to the standard I have seen applied. That is, guilt beyond a reasonable doubt. This is a civil trial. My client is the plaintiff. We expect to prove that he was crippled by the Acme Trucking Company. What standard of proof do you expect to have to apply in deciding whether we are right or not?
> A. I am not sure.
> Q. Well, because it is a civil case, with different stakes from a criminal case, you must simply decide the issues of the case by what is called preponderance of the evidence. In other words, after weighing all of the evidence, if you find that the weight of the evidence is in favor of Mr. Smith, even by a margin of 5l percent to 49 percent, you must find for Mr. Smith. Do you understand that standard?
> A. Yes. (If not, all the better, you can explain it again, using a different formulation.)
> Q. Can you promise me you will be able to erase from your mind the very different standard you used in the criminal case, and apply the preponderance of evidence standard in deciding whether or not Mr. Smith has proved his case?
> A. Yes.
> Q. No doubt about that?
> A. None.

On the other hand, counsel defending a civil case has no good reason to clarify the distinction between civil and criminal burdens of proof.

Below are many other standard areas to inquire about in the appropriate case in order to preview important points with the jury:

At least once at voir dire, a juror will make an embarrassing speech. Counsel should be prepared to counter this. For example:

> Q. My client, Joe Johnson, is charged with armed robbery. He has entered a plea of not guilty, and we expect to prove his innocence. Is there anything in the nature of the charge which will make it difficult for you to be a fair juror?
> A. You bet. I was robbed and pistol-whipped only two months ago. I think it's outrageous the light sentences the courts are handing out for serious crimes. Nor do I like the way guilty people are getting off on technicalities. I don't think I could possibly be a fair juror in this case.
> [After juror's dismissal for cause]
> Q. [To the next juror] Mrs. White, we all deplore armed robbery: You, me, and my client Joe Johnson. The last juror I questioned seemed to be confused about what an American jury trial is all about. Do you understand that the issue in this case isn't whether you are for or against armed robbery, but whether or not you find beyond a reasonable doubt Joe Johnson committed the particular armed robbery he is charged with here?
> A. Yes. I understand that.
> Q. And you understand how uneasy the last juror's speech made me, my client, and the judge?
> A. Yes, I can understand that.
> Q. Will you try to be the same kind of even-handed juror you would want sitting in judgment of you if you were innocent and charged with armed robbery?
> A. Yes, I will.

[From the prosecutor's standpoint]

Q. You have heard the judge tell you about the dispute in this case and the general standard of proof which must be applied. If the state proves beyond a reasonable doubt that William Green embezzled $200,000 from the Acme Construction Company, what will your verdict be?

A. Guilty.

A similar question should be asked of each juror by the prosecutor. Defense counsel should pose questions which require each juror to voice the words "not guilty." Counsel should watch carefully to see whether the words stick in any juror's throat.

In most civil cases, it is harder to pick a single phrase which states the desired verdict. Perhaps counsel can be effective by getting the jury to state "proven" or "not proven" or "liable" or "not liable" for one or two of the key issues that must be established.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/10 Examination of Jurors/§10.19 D. Establishing Jury Rapport

§10.19 D. Establishing Jury Rapport

Ideally, when voir dire is completed, the jury will know and like counsel. The following suggestions will further this goal:

If the importance of the case or its sensitive issues makes a short voir dire impossible, counsel should do the next best thing; keep the voir dire *focused.* A rambling time-consuming voir dire will irritate jurors.

If voir dire must be lengthy, counsel should talk about the jury process with the jurors, including their understandable irritation. They should be made to understand the reasons for counsel's lengthy voir dire. The jurors should be questioned about what their jury experience has been like, including waiting periods, prior voir dires, and any reason they might have to be impatient about a voir dire which extends over several days.

§10.20 E. Structuring the Case

No jury is made to order. If counsel has paid attention to the jurors' answers to voir dire, he will be ready to change parts of the case in response to the composition of that jury. For example:

1. *Approach to Expert*

Depending on the jury, counsel may want to emphasize the expert's practical experience over his academic experience, or change the level of sophistication of the planned direct examination.

2. *Use of Emotional Argument*

A tender-hearted jury responds to emotional issues. Other juries may be offended by an overtly emotional slant to the case, preferring a more even-handed and rational presentation.

3. *Degree of Detail*

Most cases suffer from too much detail. But, with a jury of accountants, counsel may want to pile up details.

4. *Vocabulary*

Counsel should never talk like a lawyer. He should try to adjust counsel's vocabulary to the jury's educational level.

5. *Establishment Bias*

Most jurors begin a criminal case being pro-government; in a civil case, being anti-big-business. Some jurors will depart from this pattern. Counsel should adjust the case accordingly.

PRACTICE TIPS

Your closing argument can also benefit substantially from voir dire. Remember, in a comprehensive voir dire, you will have made the jury promise you certain things. Call in those promises, reminding them, *e.g.,* that they promised you they would not be swayed by sentiment; that race would not be an issue in their deliberations; or that they would treat a police officer like any other witness.

After voir dire is over, it will become more and more difficult for counsel to make accurate judgments about the jury. The moral is obvious: make maximum use of your voir dire opportunity.

11

Objections

I. COMMON OBJECTIONS

§11.1 A. Purposes

To Update

There are three primary legitimate purposes served by objections, and three common illegitimate purposes.

The legitimate purposes:

1. To ensure that the jury hears only admissible evidence.

> PRACTICE TIPS
>
> Never object, if the inadmissible evidence will *help* your case (unless the failure to object will open the door to even more damaging testimony later).
>
> Be quick to object if an answer might inject a new and unpleaded theory into the case. If you fail to object, and the new theory is supported by evidence, the trial judge may permit amendment of a pleading to permit the theory to go to the jury.

2. *To make a record for appeal.* The simple words "I object," *if sustained,* will keep out inadmissible testimony. But, if the objection is overruled and counsel wants to make a record for appeal, counsel must specify the grounds for the objection. Evid C §353; Fed R Evid 103(a)(1).

3. *Correction of errors.* This purpose is achieved by the motion to strike. If the court grants the motion to strike, counsel should ask also that the jury be told to disregard the stricken evidence. The instruction to disregard evidence may even be followed by a few jurors. See California Trial Objections chap 51 (2d ed Cal CEB 1984).

The illegitimate purposes:

1. *To rattle rival counsel.* Some attorneys lose composure when faced with objectionsspecially sustained objections. If counsel remains calm under fire, continued spurious objections will rebound against the opponenta jury does not like constant interruptions.

> PRACTICE TIPS
>
> Even experienced counsel may lose their composure if the judge sustains objections inexplicably. If this happens, approach side-bar and ask "May I have some guidance, Your Honor?" This will often help you out of difficulty. If not, and if you are certain your questions are proper, calmly complete your line of questions, with answers being barred, and hope for jury empathy. Do not stay with any area of questioning if the judge tells you to abandon it.

2. *To make closing argument to the jury.* Objections should be made *understandable* to the jury. But, an attorney should not make closing argument in the guise of making an objection. Protest the practice, perhaps by asking: "Your Honor, will the court permit me to begin my closing argument now also?"

3. *To coach a witness.* Objections can guide the witness away from danger areas. Objections can give the flustered witness a chance to catch his breath. If you believe an objection is being made to coach a witness, you should firmly and politely state so to the judge and jury.

> PRACTICE TIPS
>
> If you see that opposing counsel has one of your star witnesses transfixed or confused, do not hesitate to make a *legitimate* objection, even though it has a dual purpose. A legitimate objection is a better way to give your witness a chance to find his bearings than knocking over a water pitcher, or pleading for a brief recess.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/11 Objections/§11.2 B. Tactics

§11.2 B. Tactics

To Update

Before making any objection, counsel must weigh the importance of the objection against the impression given to the jury that counsel has "something to hide." Experienced counsel object far less often than beginners.

If counsel *must* object, it should normally be done only if it is likely that the objection will be sustained. And, even if counsel's objections are regularly sustained, counsel should do the following to minimize any adverse jury reaction:

1. During voir dire, discuss counsel's duty to object, and the rationale for objecting. Make the jury realize that objecting at the proper time is one of the attorney's duties and should not be held against the client.

2. Make objections comprehensible to the jury. Do not phrase objections in legalese or Evidence Code section numbers (unless counsel wants to hide the basis for the objection, discussed in §11.4).

3. Keep an even, cordial tone when objecting. Outrage is generally an incommunicable disease. The jury does not want to hear counsel whining or raging.

4. If counsel has had to object frequently (and the objections have been generally sustained), counsel should comment on this in closing argument. Be frank with the jury about the fear that they will assume counsel has been trying to hide something from them; point out that the objections were only to prevent the other side from being unfair, and that the judge generally agreed with the objections.

If counsel believes that many of his objections will be overruled, or that counsel will be required to object with irritating frequency:

a. Make an in limine motion in advance of testimony to bar the line of questioning.

> PRACTICE TIPS
>
> Do not make an in limine motion if it will alert your opponent to a fruitful line of questioning that he otherwise might not use.
>
> If you make the motion in chambers, off the record, have the court reporter memorialize the motion later, on the record, win or lose. If you lose, you will need the record for appeal; if you win, you will want the transcript to refer to if your opponent violates the court's order. See California Trial Objections chap 1 (2d ed Cal CEB 1984).

b. Question the witness on voir dire, *i.e.,* out of the presence of the jury. Voir dire is appropriate if counsel intends to call into question the witness's competence (ability to see, hear, taste, recall, or recount). Counsel may also voir dire experts and non-experts about their qualifications to render an opinion. Such hearings are usually better held out of the presence of the jury, in the court's discretion. Evid C §402(b); Fed R Evid 104(c). See California Expert Witness Guide §10.7 (Cal CEB 1983).

c. Make a "running objection" to an entire line of questioning, so there is no need to pop up after each question and state the objection. Define the line of questioning carefully, if it is not clear on the record. The standard formulation is: "Your Honor, may I have a standing/running objection to this entire line of questioning?" Comment to Evid C §353.

If the opponent successfully objects to some of counsel's questions, unless the answers are obvious, *make an offer of proof.* Attorneys often fail here, meekly accepting sustained objections which bar important sections of their case. An offer of proof should be made for three reasons:

1. The offer of proof may be essential to show the prejudicial effect of the ruling to the court of appeal.

2. A detailed offer of proof may persuade the judge to change an adverse ruling.

3. Should counsel be permitted to make the offer of proof in the presence of the jury, they will learn exactly what facts the opponent has kept from them. An offer of proof, however, *should* be made at side-bar, or otherwise out of the presence of the jury. If counsel is the attorney whose objection has been sustained, counsel should request that the offer of proof be made out of the jury's presence. See *People v Francis* (1957) 156 CA2d 1, 319 P2d 103.

> PRACTICE TIPS
>
> If you are trying to change a court's mind after the court has ruled against you, allow time to pass before you try.

Few of us will confess error readily. Argue, wait for a recess or overnight adjournment, then argue again.

What should be done if the trial judge conducts extensive examination himself and violated the rules of evidence to boot? There is no easy answer. The old saw: "Judge, I don't mind if you try my case for me, but please don't lose it for me," may raise a chuckle from the jury but make an enemy on the bench.

Whatever is done, keep a pleasant tone. Give the trial judge far more latitude than an opponent, but do not hesitate to make calm, measured objections and motions to strike if called for. If the court persists, ask to discuss counsel's reservations during recess and make objections, informally, and then on the record. Cases condemning overzealous court examination include: *McCartney v Commission on Judicial Qualifications* (1974) 12 C3d 512, 583, 116 CR 260, 275; *People v Campbell* (1958) 162 CA2d 776, 786, 329 P2d 82, 88. See generally 7 Witkin, California Procedure, Trial §231 (3d ed 1985); 2 California Civil Procedure During Trial §14.63 (Cal CEB 1984).

Sections 11.3-11.17 contain the most frequently used objections, suggestions on how to make them comprehensible to the jury, and criticisms of often misused objections.

For a comprehensive discussion of objections, and privileges, see California Trial Objections (2d ed Cal CEB 1984). The book's pocket part contains a checklist of objections and one on privileges that can be used at trial.

If counsel must object, he should usually frame the objection so that the jury understands the reasons for the objection. Some samples of such "Comprehensible Objections" are provided below.

C. Frequent Objections

§11.3 1. Irrelevant

Comprehensible Objection: I object to that question. This witness's opinion of Mr. Jones's honesty has nothing to do with whether or not Mr. Jones knew what he was doing when he signed the contract, and is irrelevant.

Comprehensible Response: Your Honor, Mr. Smith's drinking habits are relevant to how he behaved on the day of the accident. Mr. Brown's objection goes only to the weight of the evidence, and should be saved for closing argument.

§11.4 2. Prejudice or Confusion Outweighs Probative Value

To Update

This is one of the few objections which should not be phrased in commonsense language for jury comprehension. Counsel does not want to signal to the jury that the evidence will prejudice the case: they will only pay more attention to it. Object by using the code section number only. For example: Your Honor, I object under [Evid C §352] [Fed R Evid 403].

If the court requires specificity, try:

> Your Honor, that is unfair/ a cheap shot/ an effort to appeal to the jury's prejudice, not their minds. We should not waste time listening to evidence of that quality.

If proffering evidence is objected to as prejudicial, press the offer as follows:

> Your Honor, of course the answer will hurt Mr. Smith's case, because it is powerful evidence of his client's negligence. The jury should hear it.

See California Trial Objections chap 33 (2d ed Cal CEB 1984).

Source: Civil Litigation/Effective Direct and Cross-Examination Book/11 Objections/§11.5 3. Hearsay

§11.5 3. Hearsay

Hearsay includes out-of-court declarations by a witness who *is on the stand and testifying.* Many attorneys and some judges do not understand this.

For a more detailed discussion of the hearsay rule and its many exceptions, see §12.7.

Comprehensible Objection: I object. That statement was made three months ago halfway across the state. We cannot test its truth by cross-examination. It is hearsay.

§11.6 4. Leading

To Update

Many judges disregard the strict definition of a leading question as "a question which suggests to the witness the answer that the examining party desires." Evid C §764. Those judges permit a question which suggests an answer, as long as it is preceded by the phrase "whether or not." For example: "Mr. Smith, would you tell me *whether or not,* on April 3, you saw a four-foot Albino dwarf drinking a Mai Tai?" The question is leading, but the objection will often be overruled because the judge believes "whether or not" gives the witness the chance to say "yes" or "no."

See California Trial Objections chap 19 (2d ed Cal CEB 1984).

PRACTICE TIPS

Think twice about objecting to an important question on the basis that it is "leading." Often, the question will be stricken, and a non-leading question will be asked immediately, with the witness giving the answer suggested by the stricken leading question. If your opponent uses too many improper leading questions try to get the court to rein him in early in the examination. when the questions and answers are still innocuous.

Comprehensible Objection: I object. Mr. Smith is trying to put words in the witness's mouth. It is leading.

See Trial Objections chap 13.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/11 Objections/§11.7 5. Confusing

§11.7 5. Confusing

To Update

The objection that the question is confusing is an easy objection to make, and is often framed "Objectionthe question is confusing, ambiguous, and unintelligible." Why make this easy objection? If the question is inartfully phrased, and no damaging answer is likely, counsel is better off not objecting. The court, the jury (and very likely the witness) will all be confused, to counsel's benefit.

PRACTICE TIPS

One possible reason to object to a confusing question: if you are the prosecutor, the defense in a difficult case may use confusing questions to persuade a jury to return a not guilty verdict because there is no clear-cut evidence, and thus reasonable doubt.

Comprehensible Objection: I object, Your Honor. Mr. Smith has put two questions in one, asking both for the time of the accident and the location of the traffic light. It is compound and ambiguous.

See California Trial Objections chap 7 (2d ed Cal CEB 1984).

§11.8 6. Nonresponsive

To Update

Technically, only the *questioner* may move to strike an answer as "unresponsive." As long as a nonresponsive answer is otherwise admissible, there is no purpose to striking it, unless the questioner wants to insist on the right to pin the witness down.

Many courts permit the non-questioning counsel to make this motion. Counsel in such a court and as a non-questioner should not make the motion to strike. If the motion is sustained, the questioner has the option of immediately following up with the question that calls for the previously nonresponsive answer. The answer will be repeated again, and now will be responsive. The jury has heard it twice.

If questioning a nonresponsive rambling witness, counsel may properly interrupt the witness, once it becomes clear to the judge' that the answer is going to be evasive. For example:

> Excuse me for interrupting, Mr. Smith, but I asked you only what time you left the office. Your Honor, I move to strike Mr. Smlth's testimony about the argument he had with Mr. Brown on April 13.

§11.9 7. Beyond the Scope of Direct or Cross

To Update

The objection that the question exceeds the scope of direct or cross-examination is another objection of questionable value. Try to find out the trial judge's policy on "scope objections." Many judges will permit an attorney, after such an objection, to question the witness as if the attorney had called the witness. Evid C §772(c); Fed R Evid 611(b). Once this is done, the attorney can continue the examination "beyond-the-scope."

There are two sound reasons for making the objection:

1. To force your opponent to shift from using leading questions to direct examination during which leading questions are not permitted.

2. To prevent opposing counsel, on re-direct or re-cross, from eliciting testimony counsel neglected to cover during original direct or cross-examination. Judges often favor objections of "beyond the scope" where addressed to re-direct or re-cross. See California Trial Objections chap 6 (2d ed Cal CEB 1984).

II. FREQUENTLY MADE IMPROPER OBJECTIONS

§11.10 A. Best Evidence

To Update

Attorneys often improperly make the objection: "Not the best evidence" when what they mean is: "Your Honor, the witness is not presenting us with the best *available* evidence." This objection misapprehends the best evidence rule, which applies only to *writings* and only when a party seeks to prove the contents of the writing itself, *e.g.*, a contract. See the discussion in §12.29. If the objection is made, it should be made as follows:

> Comprehensible Objection: I object. Mrs. Jones's recollection of the contents of the will does not satisfy the best evidence rule. The will itself should be presented to the jury.

See California Trial Objections chap 24 (2d ed Cal CEB 1984).

§11.11 B. Document Speaks for Itself

An objection that the document speaks to itself is related to conclusions about "best evidence," discussed in §12.29. A document in evidence to prove its own contents does "speak for itself," but a witness should always be permitted to testify about the content of a document when:

a. The witness's understanding of the document is an issue in the case. For example, if a witness thought a letter was a threat, the witness can state her impression of the letter, if her state of mind is an issue;

b. Portions of a document may be read orally by counsel or a witness to prevent juror confusion. A jury gets very frustrated when confronted with a long series of questions about a document which they cannot see and know little about. The use of overhead projectors or blow-ups to show the document to the jury helps prevent this frustration. The witness or the questioning attorney should be permitted to read relevant portions of a document aloud to assist the jury in following testimony about the document.

c. Portions of a document can be read as a predicate to a proper question: "Were you drunk when you drafted the paragraph that says X?" "Were you at all confused about this clause? [Read clause]."

§11.12 C. Calls for Narrative Answer

There is no rule of evidence barring use of a narrative answer. A narrative answer may include inadmissible testimony, and can be objected to as being "too general." Evidence Code §765 and Fed R Evid 611(a) give the court wide latitude in deciding whether or not it will permit narrative answers.

Counsel will have a better chance of making this objection successfully if the witness shows an inability to stick to admissible and responsive evidence during a narrative answer.

§11.13 D. Assumes Facts Not in Evidence

To Update

An objection that the question assumes facts not in evidence is a proper objection only if opposing counsel is insinuating to the jury facts he cannot prove and cannot expect the witness to adopt. See *McDonald v Price* (1947) 80 CA2d 150, 152, 181 P2d 115, 116; California Trial Objections chap 15 (2d ed Cal CEB 1984).

But, on cross-examination, it is perfectly proper to ask a hostile question of a witness, assuming facts only the witness is in a position to know. For example:

> Mr. White, didn't you take your .38 Smith and Wesson and fire five shots into the prone body of your wife?

The question is compound, and the "facts" are probably not "in evidence" (at best based on circumstantial evidence); but the question is of course proper.

To ask this same witness whether or not he had been convicted of five prior murders, when the prosecutor knows full well that he has not been, is objectionable as assuming facts not in evidence.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/11 Objections/§11.14 E. Misquotes Witness or Misstates Evidence

§11.14 E. Misquotes Witness or Misstates Evidence

To Update

Ethical rules and court cases proscribe intentional misquoting of testimony or misstating of evidence. ABA Code of Prof Resp Rule 3.3; Cal Rules of Prof Cond 7-105. See also Bus & PC §6068(d); *Berger v U.S.* (1935) 295 US 78, 84.

If counsel is sure that he is correct regarding the objection, it should be made in the following form:

> Comprehensible Objection: I object. Mr. Jones has misquoted the witness. What the witness actually testified was [provide correct testimony].

Source: Civil Litigation/Effective Direct and Cross-Examination Book/11 Objections/§11.15 F. Calls for a Legal Opinion

§11.15 F. Calls for a Legal Opinion

A lay witness may not express expert opinions. See §12.33. However, if a witness's understanding or belief on a matter of "legal opinion is at issue, the objection should be overruled. A witness should be able to testify, if at issue, "I thought we had a contract"; "I believed she was my agent."

Source: Civil Litigation/Effective Direct and Cross-Examination Book/11 Objections/§11.16 G. Asked and Answered

§11.16 G. Asked and Answered

To Update

This is a bad objection, unless opposing counsel is beating one question to death. There is *no rule of evidence* barring asking a question twice. Still the objection is used frequently, probably to remind the witness that the question is not a new one and the court will respond if questions are being repeated often enough to be cumulative. Evid C §352; Fed R Evid 403.

The objection usually wastes time. If opposing counsel *is* objectionably repetitive:

> Comprehensible Objection: I object. We have heard this testimony over and over again, and it is becoming cumulative.

See California Trial Objections chap 11 (2d ed Cal CEB 1984).

§11.17 H. Argumentative

To Update

This objection is not valid if opposing counsel is simply conducting a robust cross-examination. The objection is proper when:

a. A question is framed as if it were closing *argument.* For example: "Was it fair of you to fire Mr. Smith in a rude and insulting way, without ever having warned him of your dissatisfaction with his job performance?"

b. A question seeks to "pick a fight" with the witness, *e.g.,* "How can you say you saw the knife in his hand when you were standing 50 yards away, and it was twilight?"

c. When the question seeks to embarrass the witness. For example: "How can you pretend to know what the chairman of the board was deciding, when you were nothing but a file clerk?"

The words "how can" beginning any question are a red flag alerting you to a possible argumentative question.

Comprehensible Objection: I object. That question should be saved for closing argument. It is argumentative.

See California Trial Objections chap 14 (2d ed Cal CEB 1984).

§11.18 III. SPECIAL SITUATION OBJECTIONS

To Update

The following are several questions which *sound* objectionable, but the correct objection may not be apparent to counsel. Following each question is a suggested objection.

1. You heard Officer Jones testify. Are you telling the jury that he was lying when he testified?

Suggestion "Irrelevant." What the witness believes about another witness's testimony, or the fairness of his own behavior, is not relevant. It is up to the jury to decide those issues.

Frame the objection so the jury understands your reasons:

> Comprehensible Objection: I object. Officer Jones was testifying falsely or in error. The jury should decide which, and this witness's opinion is irrelevant.

2. When you published the article without presenting both sides, was that fair?

Suggestion "Argumentative." The question is framed like closing argument and attempts to embarrass the witness.

3. And when you reviewed Mr. Smith's deposition, did you discover any inaccurate statements?

Suggestion "Too general." A question requiring a witness to characterize his own behavior, or review voluminous testimony of the witness or others, is harassing. Evidence Code §765 and Fed R Evid 611(a)(3) provide discretion for the court to protect witnesses from undue harassment or embarrassment.

If the opposing lawyer persists in asking improper questions, counsel may, in increasing order of severity:

1. Couple the objection with a request that the judge instruct the jury that the question was improper, and should be completely disregarded;
2. Assign conduct of opposing counsel as misconduct. A request for assignment must be coupled with a request for the judge to admonish the jury to disregard the improper matter.
3. Move for a mistrial.

Counsel should not "cry wolf" too often: assignment of misconduct and request for mistrial should be used sparingly and only if well-called-for.

See generally California Trial Objections chaps 29, 52, 55 (2d ed Cal CEB 1984).

> PRACTICE TIPS
>
> If you are trying a case with multiple parties, be sure (before the jury is sworn) to establish that an objection for one party is an objection for all other co-parties, unless you specifically state that you do not join in the objection. This will prevent a Greek chorus of objections, and will preserve all objections made by co-counsel.
>
> Do not hesitate to opt-out from someone else's objection, if you believe the evidence objected to will help your side. The jury will appreciate your openness.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/11 Objections/§11.19 IV. OTHER OBJECTIONS

§11.19 IV. OTHER OBJECTIONS

1. Privileged (*e.g.,* attorney-client, spousal; see California Trial Objections Part V (2d ed Cal CEB 1984);

2. work product (CCP §§2016(b), (g); Trial Objections §35.1);

3. compound (Trial Objections §§8.1-8.6);

4. right to privacy (embarrassing) (Evid C §352, Fed R Evid 403, on the ground of undue prejudice or presentation of evidence will consume too much time, or Evid C §765, Fed R Evid 611(a)(3)); and

5. not authentic (Trial Objections chap 21).

12

Basic Evidence Rules

I. MOST COMMONLY NEEDED RULES

§12.1 A. Preparation for Use of Evidence in Examination

To Update

It is impossible to master the dismaying number of statutory and case law evidentiary points that can arise in any given trial. However, 90 percent of the evidence the lawyer will use in most cross-examination or direct examination is covered by a few rules. This chapter discusses these rules, as well as some lesser used rules, which cover much of the other ten percent. For background, in addition to the evidence book referred to below, see 1 and 2 California Civil Procedure During Trial (Cal CEB 1982, 1984); California Trial Objections (2d ed Cal CEB 1984); and California Search and Seizure Practice (2d ed Cal CEB 1977).

Several weeks prior to trial, the attorney should read either Evid C §§1-1605 or Fed R Evid 101-1103, as appropriate. Both are short, and should take no more than one hour to read. A rule or code section that appears useful for the case can be photocopied for ready reference.

The next step is to skim through the applicable parts of a good Benchbook.

> PRACTICE TIPS
>
> If you know which judge will try your case, look for or inquire about the evidence book and other ready references the judge keeps at his fingertips on the bench or in chambers, and refer to the same books in arguments and trial motions.

Most California state judges use the two-volume Jefferson's California Evidence Benchbook (2d ed CJA-CEB 1982) (for state cases). A companion volume for trial reference is the softcover, Jefferson's Synopsis of California Evidence Law (CJA-CEB 1985). In the federal area a helpful work is Saltzburg & Redden, Federal Rules of Evidence Manual: a Complete Guide to the Federal Rules of Evidence (3d ed 1982). Moore's Federal Practice Rules Pamphlet With Comments (1985) (Federal Rules of Evidence) is useful to carry to court for ready reference.

Finally, if the attorney anticipates serious argument about particularly important evidentiary points during his direct or cross-examination, counsel should prepare a short memorandum containing arguments on those evidentiary points. Some courts are put off by the formality of written pleadings during trial. For those courts, consider making photocopies of the key cases or text excerpts supporting the point, and presenting them to the court and opposing counsel when the point is argued. Federal judges are usually pleased to receive written memoranda.

§12.2 B. Tactics in Making Evidentiary Points

To Update

If counsel is striving to keep evidence out, he should always try to raise the evidentiary point in advance, and out of the jury's presence. The motion in limine is well recognized in state and federal court. Evid C §402; Fed R Evid 103(c), 104(c); see, *e.g., Akins v County of Sonoma* (1967) 67 C2d 185, 197, 60 CR 499, 506; *U.S. v Posner* (SD Fl 1984) 594 F Supp 923. To quote Fed R Evid 103(c): "In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury."

Every effort should be made to conduct argument before examination begins, while the jury is still out of the courtroom. Jurors can become annoyed if counsel is constantly shuttling to the bench for side-bar conferences, held in whispers.

Should important questions arise unexpectedly during the course of examination, counsel should ask the court if he can raise them during the first convenient recess, when the jury has left. This opportunity should not be denied. Evid C §§402(b), 915; *Brawthen v H & R Block, Inc.* (1972) 28 CA3d 131, 104 CR 486; Fed R Evid 104(c); *Karp v Cooley* (5th Cir 1974) 493 F2d 408. If it is, counsel should state the argument so that the jury understands the common sense reasons behind it. For suggestions, see §§11.1-11.2.

If trying to put evidence in, there is no duty to insist on an in limine preliminary argument and ruling except:

1. If counsel is prosecutor, the issue of the admissibility or not of a confession by the defendant must be heard out of the presence of the jury. Fed R Evid 104(c). Evidence Code §402(b) requires hearing on confessions out of the presence of the jury "if any party so requests."

2. A party should not be required to assert any privilege in the presence of a jury. Evid C §915(b); Fed R Evid 104(a), (c).

3. An attorney should behave ethically, and not offer inflammatory or prejudicial matter in the jury's hearing, even if there is a credible basis for urging its admissibility. Violation of this rule will often turn the judge against the attorney who violated the rule.

C. Recurring Evidentiary Points

§12.3 1. Business Records

To Update

Writings and business records are admissible (Evid C §1271; Fed R Evid 803(6)) if:

a. The writing was made in the regular course of a business;
b. the writing was made at or near the time of the event recorded;
c. the custodian or other qualified witness testifies to its identity and mode of preparation; and
d. the sources of information and method and time of preparation were such as to indicate its trustworthiness.

Sample foundation for a business record is set out in §8.9.

Note: Federal case law (and implications of the Evidence Code) requires that the business have an interest in recording the proffered record reliably. *NLRB v First Termite Control Co.* (9th Cir 1981) 646 F2d 424; *Sabatino v Curtis Nat'l Bank of Miami Springs* (5th Cir 1969) 415 F2d 632; Evid C §1271(d).

Frequently, cross-examination of the witness will reveal that the witness cannot adequately testify to the mode of preparation of the business record, and whether or not the writing was made near the time of the event recorded. Furthermore, business records should not be admitted if they contain hearsay witness statements, or otherwise inadmissible material. *Dahl-Beck Elec. Co. v Rogge* (1969) 275 CA2d 893, 80 CR 440; *People v Grayson* (1959) 172 CA2d 372, 341 P2d 820. Business records are not admissible on behalf of a party who has prepared them with a view toward litigation. *Palmer v Hoffman* (1943) 318 US 109.

§12.4 2. Past Recollection Recorded

Evidence Code §1237 and Fed R Evid 803(5) permit admission of a memorandum of record concerning a matter about which the witness once had knowledge, but now has insufficient recollection to testify fully and accurately. The memorandum must have been made or adopted by the witness when the matter was fresh in the witness's memory, and must reflect the knowledge correctly. Sample foundational examination for past recollection recorded may be found in §8.8.

PRACTICE TIPS

Remember, the memorandum may be read or read into evidence, but may not be received as an exhibit unless offered by the adverse party. Evid C §1237(4)(b); Fed R Evid 803(5).

§12.5 3. Refreshing Recollection

To Update

A witness may have his memory refreshed by any means: counsel can tap dance, ask a leading question, show the witness an object, or provide a writing. Evid C §771; Fed R Evid 612. There is no Evidence Code restriction on the means for refreshing recollection. Comment to Evid C §771. "Almost anything should be useable for the purpose of refreshing the memory of the witness." Saltzburg & Redden, Federal Rules of Evidence Manual: a Complete Guide to the Federal Rules of Evidence pp 415-416 (3d ed 1982). Opposing counsel will often find it profitable, if the court permits, to voir dire the witness about whether or not recollection has truly been exhausted, and whether or not the writing is "refreshing" memory or is serving as past recollection recorded. Police officers and others should not be permitted to routinely refer to investigative reports without admitting loss of memory, referring to the report, and then putting it aside after their memory has been "refreshed."

Both Evid C §771 and Fed R Evid 612 allow an adverse party to demand production of any writing used by a witness to refresh recollection, whether or not the writing is used in court or was referred to prior to appearance in court.

Thus, inventive counsel should routinely ask important witnesses whether they have referred to documents in the days prior to testimony, in order to prepare their testimony. If so, the documents used must be produced at the hearing, or the testimony of the witness may be stricken, subject to the court's discretion. In addition, adverse counsel has the right to cross-examine the witness on the document, and to introduce into evidence those portions of the document which relate to the testimony of the witness.

Sample examinations on refreshing recollection are set forth in §§5.11 and 8.7.

§12.6 4. Prejudice, Confusion, or Waste of Time

To Update

In any state trial, counsel should have Evid C §352 firmly in mind; and in federal court, Fed R Evid 403. These similar provisions permit the trial court to exclude otherwise relevant evidence because it is prejudicial, confusing, or a waste of time. Counsel should be aware that a busy federal trial judge will favor the last ground of Fed R Evid 403, "needless presentation of cumulative evidence."

The court has broad discretion in deciding whether or not relevance is outweighed by countervailing considerations. *Moody v Peirano* (1906) 4 CA 411, 418, 88 P 380, 382. Balancing probative value of evidence against possible prejudicial effect is within the trial judge's discretion. *U.S. v McPartlin* (7th Cir 1979) 595 F2d 1321.

PRACTICE TIPS

If you expect to object to a line of questioning as prejudicial, though relevant, try to raise the issue out of the presence of the jury. Jurors will be irritated and suspicious to hear you trying to bar relevant evidence, whatever grounds you claim.

If you are trying to keep the evidence in, argue as follows: "Of course the evidence is prejudicial, Your Honor, in the sense that it damages my opponent's case"; or, more succinctly: "He's objecting because the truth hurts."

§12.7 5. Hearsay and the State-of-Mind Exceptions

To Update

Perhaps because the hearsay rule is virtually engulfed by its exceptions, many attorneys and some judges are confused by it. Hearsay simply is evidence of a statement that:

a. is offered to prove the truth of the matter stated; and
b. is made by someone other than a witness testifying at the hearing. Evid C §1200; Fed R Evid 801(c).

Statements made out of court, even if being repeated by the declarant witness on the stand and under oath, are hearsay, unless they fall under specific exceptions, *e.g.,* prior inconsistent testimony (Evid C §§770, 1275), or statement of identification of a party or person who participated in a crime or other occurrence when the statement was made at the time of the crime or other occurrence. Evid C §1238; Fed R Evid 801(d)(1).

Exceptions to the hearsay rule are legion. See Evid C §§1220-1341; Fed R Evid 803-804. By far the most important single exception is usually stated by the proponent as: "Your Honor, the statement is not offered for its truth, but to show the state of mind of Mr. Jones." The phrase "state of mind" casts a wide net, and can include pain, fear, knowledge of criminality, lack of knowledge of criminality, and on and on. See Evid C §1250 and Fed R Evid 803(3) for definition of the state-of-mind exception. One useful principle, which is often ignored, is that a declarant's out-of-court statement of an intention to do something in the future may be proved if it "explains acts or conduct of the defendant." Evid C §l250(a)(2); Fed R Evid 803(3). See also the classic case of *Mutual Life Ins. Co. v Hillmon* (1892) 145 US 285.

Counsel is normally barred from putting into evidence statements of memory or belief to prove a fact remembered or believed. Fed R Evid 803(3); Evid C §1251. The rule is that the state-of-mind exception to hearsay applies to then-existing emotions or states of mind, including future intentions or plans, but excludes states of mind looking backward to the past.

To see sections added to this chapter since publication of the book, click To Update

§12.8 6. Limited Admissibility Evidence

To Update

Evidence Code §355 and Fed R Evid 105 both permit evidence to be admitted as to one party or for one purpose, even though not admissible as to another party or for another purpose.

> PRACTICE TIPS
>
> If you succeed in having the evidence admitted for a limited purpose, the jury will probably disregard limiting instructions, however well intended, and use the evidence for all purposes in deliberations. If you are opposing admission of evidence for limited purposes, underscore this psychological truth to the trial court in urging exclusion.

Typically, the proponent of such evidence will use the following formula: "Your Honor, we are trying to prove that Mr. Jones murdered three people, not as proof that he must have murdered the victim in this case, but rather to show that the victim in this case had reason to fear him, providing motive for the victim to go into hiding."

Source: Civil Litigation/Effective Direct and Cross-Examination Book/12 Basic Evidence Rules/§12.9 7. Use of Depositions

§12.9 7. Use of Depositions

To Update

Trial judges often claim that lawyers fail to correctly use depositions (or preliminary hearing transcripts in a criminal trial). Depositions are generally admissible under one of the following three distinct circumstances:

Unavailable Witness

Evidence Code §1290 and Fed R Evid 804(b)(1) permit use of a deposition if the declarant is unavailable as a witness, and the party against whom a testimony is offered had a full opportunity to participate in the deposition.

> PRACTICE TIPS
>
> Be sure you have lodged the original deposition with the court (or have arrived at a stipulation for use of a copy); provide copies to the court and opposing counsel, and identify the portions which you will read before commencing use of the deposition unless you want to underplay a deposition. You should always use the "antiphonal" method of presentation, if the court will permit it. That is, someone sits in the witness chair and reads back answers to questions read by counsel. Selection and training of the mock witness will aid greatly in presenting a deposition transcript forcefully.

Admissions of Party

Depositions given by a party are admissions. As such, deposition testimony can be read to the jury at any appropriate juncture. There is no requirement to show the party the deposition extracts and give him a chance to explain, as in the case of prior inconsistent statements. It is usually most effective to cross-examine the party, and immediately after particular testimony is given, read conflicting deposition testimony into the record. Counsel should argue that the jury will grasp the testimony's significance only if it is read side by side with the live testimony it illuminates. The court has discretion to require that reading of such testimony be delayed until the proponent's case begins.

If the admission is being admitted against counsel's client, counsel should insist on the right to read additional portions of the deposition if that would place the testimony in context or into proper perspective. See Evid C §356; Fed R Evid 106.

Prior Inconsistent Statements

If a witness's deposition contradicts testimony of that witness at trial, counsel may use the deposition as a prior inconsistent statement. Protocol for this use of a deposition is different from using the deposition as an admission. If an admission, counsel may confront the witness with the deposition transcript, to ask if there is any explanation, or simply read the testimony into the record.

A prior inconsistent statement, however, cannot be used without either confronting the witness with the statement, or providing the witness with an opportunity to explain it. Evid C §770; Fed R Evid 801(d)(1)(A). In the court's discretion, it may be sufficient simply to keep the witness under subpena after being excused, so that the witness is available to be called back by opposing counsel to explain the deposition testimony. In most courts, the judge will insist that the witness be shown his deposition testimony, and given a chance to explain it.

But, before proffering the deposition testimony as a prior inconsistent statement, counsel may lay a trap for the witness without revealing counsel's possession of contradictory testimony. Evid C §769; Fed R Evid 613(a). The court in its discretion may permit the witness to examine deposition testimony before being asked about his specific statements under oath, and, on request, in federal court, opposing counsel has a right to be shown the relevant deposition extracts. Fed R Evid 613(a).

> PRACTICE TIPS
>
> Find out from your trial court in advance what procedure the court uses for prior inconsistent statement deposition testimony. Ideally, you will be able, in impeachment, to simply ask the witness: "On December 3, 1982, while under oath, were you asked the following questions and did you give the following answers: [Read relevant

deposition extracts]." Some judges will insist that a nonparty witness be allowed to silently read his deposition testimony before he is asked whether or not he gave such testimony.

§12.10 8. Admissions

To Update

When cross-examining a witness who has made a damaging out-of-court statement, counsel should freely use the hearsay exception of admission by a party-opponent.

All out-of-court statements by a party offered against that party are admissible, under Evid C §1220 or Fed R Evid 801(d)(2). These provisions also cover statements made out of court by an agent or employee of a party on a matter within the scope of the agency or employment during the existence of the relationship. See §5.25.

The opportunities are obvious. In criminal cases, if counsel is the prosecutor, he can take advantage of the "Cleveland Hearsay Rule." This is a facetious way of referring to adoptive admissions in criminal cases, covered by Evid C §1221 and Fed R Evid 801(d)(2)(B). Prosecutors routinely put before the jury any statement made in the presence of a defendant, on the theory that, if the defendant remained silent, he was not denying the statement, and therefore his silence was an adoptive admission. See, *e.g., People v Richards* (1976) 17 C3d 614, 131 CR 537; *U.S. v Robinson* (EP NY 1981)523 F Supp 1006. And, if conspiracy has been established, the adoptive admission can extend to those co-conspirators, as long as the "silence" of the co-conspirators furthered the objects of the conspiracy. Evid C §1223; Fed R Evid 801(d)(2)(E).

Source: Civil Litigation/Effective Direct and Cross-Examination Book/12 Basic Evidence Rules/§12.11 9. Habit, Custom, and Routine Procedure

§12.11 9. Habit, Custom, and Routine Procedure

To Update

Evidence Code §1105 and Fed R Evid 406 are important aids in cross-examination, and are under-utilized. Negligence, ill will, honesty, and many other things which would otherwise be inadmissible can be proved, as, *e.g.,* a character trait, habit, custom, or routine practice. For example:

> Q. Didn't you drink five whiskeys after work every weekday?
> Q. Wasn't it your habit to go down those stairs two at a time every morning?
> Q. Didn't you make it a habit to attend church every Sunday between 10:00 and 12:00?
> Q. Didn't you always promise to give the buyer's money back if he was not satisfied?

Source: Civil Litigation/Effective Direct and Cross-Examination Book/12 Basic Evidence Rules/§12.12 10. Bias or Prejudice

§12.12 10. Bias or Prejudice

When a witness cannot be impeached by usual means, *e.g.,* contradictory testimony of other witnesses, prior inconsistent statements, or attacking the witness's character for truthfulness, you may attack the witness's bias against your client, or favoritism toward the opposing party. Evidence Code §780 and Fed R Evid 607 (*U.S. v Glover* (2d Cir 1978) 588 F2d 876) permit impeachment by showing bias or prejudice. A sample examination on bias is set out in §5.14. The following are common demonstrations of bias:

a. Blood relationship or friendship with a party;
b. Payment of money for testimony, or hope of gain if one party wins;
c. Employment by a party, actual or prospective;
d. Prior statements of bias for or against a party;
e. Previous dispute, feuds, or litigation with a party;
f. A "sportsman's" interest in winning. This is often true of FBI agents or experts who identify with one side.

Modern rules of evidence permit counsel to impeach any witnessincluding one's ownwithout any restrictions, such as the former requirements of "surprise." Evid C §785; Fed R Evid 607.

§12.13 11. Scope of Examination

To Update

Normally, cross-examination may not go beyond the scope of direct examination. Evid C §775; Fed R Evid 611(b). The court has discretion, which will usually be exercised, to permit the cross-examiner to take the witness as if on direct to ask questions outside the scope of the previous examination.

The primary consequence of thus taking a witness on direct will be a bar on the use of leading questions. However, if the witness is hostile or an expert, leading questions can be used.

> PRACTICE TIPS
>
> If, for some reason, the court is reluctant to permit you to question beyond the scope, suggest to the court that the alternative will be to keep the witness under subpena, and call him back days later, to clarify matters which may have faded from the jury's mind.

In state criminal cases, Evid C §772(d) prevents a defendant from being directly examined by a co-defendant without the witness's consent. There is no similar hard-and-fast rule in federal practice. Under Fed R Evid 611(b), the court, as an exercise of its discretion, may permit such examination. See Advisory Committee's Note, Fed R Evid 611(b), for a discussion of constitutional questions raised.

§12.14 12. Lack of Foundation

To Update

Much evidence can be proffered only after establishing the proper foundation. For example:

a. A business record is not admissible until the custodian has properly authenticated it and established that it is subject to the business-record exception to do so (Evid C §1271(c); Fed R Evid 803(6));

b. A co-conspirator's statement cannot be admissible until a conspiracy has been sufficiently established (Evid C §1223; Fed R Evid 801(d)(2)(E));

c. A hand-written note is not admissible until the handwriting has been authenticated (Evid C §1401; Fed R Evid 901);

d. Agency must be established before statements made by the agent in negotiations can be attributed to the principal (Evid C §§1222, 403; Fed R Evid 801(d)(2)(D); *Zenith Radio Corp. v Matsushita Elec. Indus. Co.* (ED Pa 1980) 505 F Supp 1190).

PRACTICE TIPS

In trial, as in life, it is often impossible to present evidence quite as required by the rules of evidence. Sometimes evidence must be proffered at a vital point in the trial without first laying a foundation. In those situations, competent counsel will object to testimony or evidence which does not have adequate foundation. The proper response to such objection is invariably "we request the evidence be accepted, subject to establishing its foundation later." Evid C §403(b); Fed R Evid 104(b). A similar practice is used by counsel when questions are raised about the relevance of a fact which seems at the time of the presentation to be peripheral, but which will later prove to be directly relevant. Counsel should advise the court: "I request the testimony be accepted, subject to a later linking up to the issue of intent."

If you are opposing counsel, do not yield to this formula if the issue is important and if you have doubts about whether or not foundation or relevance can be established. Insist upon an in limine hearing, and demand a full offer of proof from opposing counsel. If you must fight this battle before the jury, think twice. A jury will be doubly impressed by evidence which you have fought vigorously to keep from their ears.

To see sections added to this chapter since publication of the book, click To Update

II. LESS COMMONLY NEEDED RULES

§12.15 A. Surprise

In a civil case, if counsel is surprised by testimony or witnesses who aver to facts that were hidden from counsel during discovery, he should immediately, out of the presence of the jury, move to strike such testimony and bar further such evidence. *Thoren v Johnston & Washer* (1972) 29 CA3d 270, 105 CR 276; *Scott & Fetzer v Dile* (9th Cir 1981) 643 F2d 670.

There is far less evidence produced in most criminal cases than in civil cases. Both the prosecution and the defense do have some discovery by right and can protest the other side's holding out such evidence until trial. Federal criminal law authorizes the prosecution to hold back most witness's statements until the witness has testified at trial. 18 USC §3500 ("Jencks Act").

§12.16 B. Rule of Completeness

If the opponent reads part of a deposition into trial, presents a document, or (in state court) provides evidence of part of an act or conversation, the adverse party can immediately require production of such other writing, recorded statement, or remaining conversation, as is necessary to fairly present the entirety of the act. Evid C §356; Fed R Evid 106. Under the federal rule, the adverse party may require the proponent to introduce "at the same time" any other part "which ought in fairness to be considered contemporaneously with it." Under the California rule, the *adverse* party may inquire into the whole on the same subject. Timing is left up to the judge.

Evidence Code §356 covers oral statements and conversations, including depositions, but Fed R Evid 106 is limited to writings or recorded statements. Evid C §356.

§12.17 C. Character Witnesses

To Update

Many trial lawyers believe character witnesses are worth presenting in many cases unless there are embarrassing skeletons in the client's closet which could be rattled on cross-examination. Character witnesses generally testify to a party's truth and honesty. Evid C §780(e); Fed R Evid 608(a).

Proof of a character trait to show that a person acted in a certain way at a specific time is generally inadmissible, except when offered by defendant, or used by the prosecution in a rebuttal in a criminal case. Evid C §1102; Fed R Evid 404. This exception is valuable to a defendant: "Charlie would never forge a check." "Sam wouldn't hurt a fly." "Mary's word is her bond." Prosecutors can effectively use past bad acts of a defendant to rebut such character testimony. For example:

> Q. You testified that Charlie would never be physically aggressive. Did you know that he was arrested four years ago for assault?
> A. No.
> Q. And were you aware that he slashed his neighbor's tires five years ago?
> A. No.
> Q. And you did know that his first wife divorced him for physically abusing her?
> A. No.
> Q. If you knew all of these things, would your opinion about his non-aggressiveness change?
> A. [There is no good answer.]

Another line of questioning prosecutors have used, although disapproved by at least one court, is:

> Q. You have given us your opinion that the defendant was not an aggressive person. If, as we have charged in this case, Mr. Jones took a 2x4 and broke a man's leg in three places, would that change your opinion of his non-aggressiveness?
> A. [Not strictly responsive but the best answer] I can't believe Sam did what you charged. It would be totally out of character.

The case criticizing questions which assume the truth of the charges at issue on trial is *U.S. v Morgan* (2d Cir 1977) 554 F2d 31.

Although character traits are inadmissible for almost all purposes in civil cases, keep in mind the "habit and routine" rule discussed in §12.11.

Generally speaking, in both state and federal court you may prove the character of a witness by evidence of reputation in the community, opinion, or specific instances of the person's conduct. Evid C §1100; Fed R Evid 405. But specific instances of conduct are not normally permissible evidence to support or attack the credibility of a witness. Evid C §787; Fed R Evid 405(a).

Should opposing counsel use the old-fashioned "reputation in the community" method to establish character, the witness can often be effectively cross-examined by asking the character witness to list each and every person in the community with whom the witness has discussed X's reputation for honesty, and what was said. Unless the character witness has been well-prepared, he will usually admit that he has never discussed the specific character trait at issue with anyone in the community.

§12.18 D. Prior Bad Acts, Criminal Convictions

To Update

Evidence Code §1101 and Fed R Evid 404(b) permit use of other crimes, or wrongs or bad acts, to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. This rule comes into play most often during criminal cases. Prior bad acts are fruitful hunting grounds for the prosecutor; a large body of case law has developed in both state and federal courts. See 2 Jefferson, California Evidence Benchbook §33.6 (2d ed CJA-CEB 1982); Saltzburg & Redden, Federal Rules of Evidence Manual: A Complete Guide to the Federal Rules of Evidence p 124 (3d ed 1982). In any criminal case, defense counsel ought to determine in advance whether or not the prosecution will proffer such evidence. If so, a vigorous motion in limine should be made, barring the evidence.

A witness may be impeached by evidence that he has been convicted of a felony; or, in federal court, any crime involving "dishonesty or false statement." Evid C §788; Fed R Evid 609. Before permitting such impeachment, the court must make a balancing test, which is set out in Fed R Evid 609, and spelled out for state courts in Evid C §352. See *People v Barrick* (1982) 33 C3d 115, 187 CR 716; *People v Beagle* (1972) 6 C3d 441, 99 CR 313 (pre-Cal Const art 1, §28(f) (Proposition 8) case).

Source: Civil Litigation/Effective Direct and Cross-Examination Book/12 Basic Evidence Rules/§12.19 E. Sample Questions Attacking Character for Truthfulness

§12.19 E. Sample Questions Attacking Character for Truthfulness

To Update

Under Evid C §780(e) and Fed R Evid 608(a), you may ask any witness about any other witness:
Q. Would you believe "X" under oath?
A. No.
Q. Why not?
A. I believe him to be a man incapable of telling the truth. He will lie when it suits his purposes.

During trial, surprising opportunities may arise to use this examination, especially when the witness on the stand has had a falling out with another witness. There appears no bar to such opinion evidence about a criminal defendant who testifies. Evid C §101(c); Fed R Evid 404(a)(3).

Source: Civil Litigation/Effective Direct and Cross-Examination Book/12 Basic Evidence Rules/§12.20 F. Excluding Witnesses

§12.20 F. Excluding Witnesses

In state court (discretionary) and in federal court (mandatory), at the request of a party, the court will order witnesses excluded so that they cannot hear the testimony of other witnesses. Evid C §777; Fed R Evid 615.

PRACTICE TIPS

Do not make this motion, if it is to your advantage to have some of your witnesses hear testimony of other witnesses. A party cannot be excluded from hearing testimony, and, if you represent an entity such as a corporation, or the state or federal government, you may designate a person to sit at counsel table throughout all the proceedings. Should you believe that the exception barring exclusion of a party prejudices you, you may try to have the judge alter the order of proof, to force the non-excluded person to testify in advance of all others. Evid C §320; Fed R Evid 611. If this fails, do not hesitate to cross-examine the party-witness about the witness's opportunity to absorb other witnesses' testimony before being forced to give his side of the story.

§12.21 G. Professional Texts (Expert Witness)

To Update

An expert who testifies in the form of an opinion may not be cross-examined regarding learned treatises or other professional texts unless the witness referred to or relied on the publication in forming his opinion. Evid C §721(b); Fed R Evid 803(18). The normal formula is: "Dr. Jones, do you consider the text "Gray's Anatomy" authoritative in the field of _ _ _ _ _ _?"

PRACTICE TIPS

Experienced expert witnesses are often reluctant to concede that any text is authoritative. You may want to stack up twenty books on counsel table, one by one, as they are rejected by the expert, to dramatize this evasiveness. Or, begin your examination by getting a listing of all books the expert does consider authoritative, hoping that he will name one of the texts you intend to use in cross-examination. Thorough deposition of the expert before trial will assist here.

If a text has been adopted as authoritative, counsel may not put the text, or any portion of it, into evidence. Rather, counsel must read into the record those portions counsel wishes to use for cross-examination. Fed R Evid 803(18). See 2 Jefferson, California Evidence Benchbook §29.8, p 1040 (2d ed CJA-CEB 1982): "X, therefore, is not entitled to have Dr. B's entire report read aloud or into the record, but only those portions pertaining to A's hearing loss, which are the portions that Dr. B considered in forming his opinion."

A text may also be used in cross-examination of an expert if it has been "admitted into evidence." Evid C §721(b). See Fed R Evid 803(18). It is rare for texts to be admitted into evidence. See annotations following Rule 803(18) in Saltzburg & Redden, Federal Rules of Evidence Manual: A Complete Guide to the Federal Rules of Evidence p 617 (3d ed 1982).

Federal Rule of Evidence 803(18) permits an attorney to read into evidence statements contained in published treatises, periodicals, or pamphlets, on the subject of history, medicine, or other science or art, which have been established as reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. Although there is no similar provision in the Evidence Code, there is no reason why provisions of judicial notice cannot be used to put statements in learned treatises into evidence. See Evid C §§452(h) and 453, concerning judicial notice.

§12.22 H. Summaries

To Update

The greater part of most trials, even short ones, is boring and sometimes incomprehensible to a jury. Counsel should alleviate jury boredom by taking advantage of Evid C §1509 and Fed R Evid 1006, permitting the use of summaries of voluminous writings. In state court, the court has discretion to require the voluminous accounts or writings to be produced for inspection by the adverse party; in federal court, the original voluminous writings must be made available for examination or copying at a reasonable time and place, and the court has discretion to order that they be produced in court.

Imaginative use of summaries can include:

1. Lengthy depositions;
2. lengthy contracts;
3. transcripts of wiretaps;
4. records of phone calls; and
5. financial statements.

Consider the use of charts-summaries to keep the jury's interest. A more detailed discussion of this topic appears in §§1.6, 7.8.

§12.23 I. Bases for Expert Opinion

To Update

An expert is someone whose specialized knowledge will assist the jury to understand evidence. Evid C §801; Fed R Evid 702. The expert need not base his opinion on material which would be admissible evidence, as long as the material which forms his basis is of a kind reasonably relied on by similar experts. Evid C §801(b); Fed R Evid 703.

Counsel may impeach an expert, particularly one who is testifying about a new area (*e.g.,* psychological factors affecting eyewitness testimony), by trying to find out whether other specific experts have relied on similar facts to form opinions, and what literature verifies this.

An expert has an option as to whether or not he need testify about the basis for his opinion on direct examination. In state court, the judge may require the witness to provide the matter on which the opinion is based, before the expert expresses the opinion. Evid C §802. In federal court, the expert is not required to disclose underlying facts until cross-examination. Fed R Evid 705.

It is better practice to elicit the primary basis for the expert's opinion during direct examination, after expression of the opinion. Ideally, direct examination will establish qualifications first, followed by the opinion, then the factual basis, and then repetition of the opinion. State law has one provision not contained in the federal rules: If the expert has based his opinion on the statement of another, that other person can be called and cross-examined by any adverse party. Evid C §804(b).

Even though the out-of-court matter relied on by an expert is otherwise proper, the court may bar the expert's opinion if it relies heavily on matters not before the jury. Evid C §§801, 803; *Pineda v Los Angeles Tub Club, Inc.* (1980) 112 CA3d 53, 169 CR 66; Fed R Evid 703; *Bryan v John Bean Div. of FMC Corp.* (5th Cir 1978) 566 F2d 541. If the expert has very little direct evidence to rely on, it may be proper to rely on circumstantial evidence which would not normally be used. *Buckwater v Airline Training Center* (1982) 134 CA3d 547, 184 CR 659.

To see sections added to this chapter since publication of the book, click To Update

§12.24 J. Judicial Notice

To Update

Often, judicial notice is a swift solution to vexing proof problems. For example, how can counsel prove: the weather on June 13, 1982; that "Gone With The Wind" was playing at the Roxie Theatre on July 15th; or the phase of the moon the last Friday in March? Judicial notice.

Evidence Code §§451-455 and Fed R Evid 201 cover both mandatory and discretionary judicial notice. The most useful provision for imaginative counsel is spelled out in Evid C §452(h) and Fed R Evid 201(b)(2), *i.e.,* facts which are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Those sources would include almanacs, certified weather reports, newspaper listings of motion picture times, learned treatises, or testimony of knowledgeable persons.

The code sections spell out the requirements for advance notice to opposing counsel and the court before judicial notice may be taken.

In state court, you do not need judicial notice for historical works, maps or charts, or books of science or art, when they are offered to prove facts of general notoriety and interest. Evidence Code §1341 permits use of such publications. It has very limited scope, however. Most of the kinds of material listed in Evid C §1341 are rarely admitted under this exception. See *Gallagher v Market St. Ry.* (1885) 67 C 13, 6 P 869; 1 Jefferson, California Evidence Benchbook §18.7 (2d ed CJA-CEB 1982).

The Federal Rules lack a similar provision, but the "generally trustworthy exception" of Fed R Evid 803(24) may apply. See also Fed R Evid 803(18).

§12.25 K. Trade Lists

Stock market quotations, price lists, telephone directories, and other similar publications, may all be offered into evidence for direct or cross-examination, if they are generally used and relied upon by persons in particular businesses. Evidence Code §1340, however, seems to require that the record be used by a "business" as defined in Evid C §1270, covering business records. The Federal Rule, Fed R Evid 803(17), also permits admission of compilations used by the "public."

To see sections added to this chapter since publication of the book, click 

§12.26 L. Missing Evidence

To Update

Many attorneys are not aware that as a foundation for admission of hearsay or evidence that is not the best evidence, they have a right to prove to the trier of fact their reasonable efforts to secure missing witnesses or evidence. Evid C §240(a)(5) (unavailable witness); *People v Linder* (1971) 5 C3d 342, 96 CR 26; Evid C §§1505, 1508 (lost or unavailable writing); Fed R Evid 804 (unavailable witness), 1004 (lost or destroyed writing). Many judges may be reluctant to allow counsel to put on witnesses and establish efforts to get missing evidence. Reference to commonly used instructions will help make your point.

For example, Devitt & Blackmar, Federal Jury Practice and Instructions, Civil and Criminal §17.19 (3d ed 1977), permits the prosecution or the defense to comment adversely on the opponent's failure to call a material witness not equally available to the other side. *U.S. v McCaskill* (8th Ct. 1973) 481 F2d 855, says it may be reversible error to prevent the non-calling party from explaining the failure to call the witness. Devitt & Blackmar §15.27, permits comment on production of weak evidence when strong evidence is available, as does BAJI 2.02. See also *People v Gomez* (1972) 24 CA3d 486, 100 CR 896 (error not to permit defense investigator's efforts to find a missing alibi witness).

PRACTICE TIPS

For example:

1. Your investigator can testify to the lengthy efforts made to find the missing alibi witness;
2. A police officer can testify to attempts to find the five other eyewitnesses to a robbery;
3. Your paralegal can describe twenty hours of search through musty file cabinets looking for a letter your client has sworn existed.

To see sections added to this chapter since publication of the book, click To Update

§12.27 M. Prior Consistent Statements

To Update

Any time counsel's witness has been confronted with a prior inconsistent statement, counsel should try to rehabilitate the witness with a prior consistent statement. Evidence Code §§791 and 1236 and Fed R Evid 801(d)(1) govern. Counsel can put a prior consistent statement into evidence even if the opponent has not directly impeached the witness, but has only implied recent fabrication, bias, or other improper motive.

The prior consistent statement must have been made before the bias or motive for fabrication. Evid C §791(b); Fed R Evid 801(d)(1)(B); *U.S. v Knuckles* (2d Cir 1978) 581 F2d 305.

Note: Although it may not matter to the jury during deliberations, neither the prior inconsistent statement nor the prior consistent statement can be *substantive* evidence in federal court, unless given under oath at the trial, hearing, other proceeding, or in a deposition. Compare Fed R Evid 613(b) with 801(d)(1)(A). In state court, prior inconsistent statements and prior consistent statements may be substantive evidence if the witness is given a chance to explain the inconsistency while in court. Evid C §§770, 1235, 1236; *California v Green* (1970) 399 US 149; *People v Chavez* (1980) 26 C3d 334, 161 CR 762. For detailed discussion, see 1 Jefferson, California Evidence Benchbook §§10.1-10.2 (2d ed CJA-CEB 1982). Of course, a prior inconsistent statement can be used to attack the credibility of a witness. Evid C §780(h).

To see sections added to this chapter since publication of the book, click To Update

§12.28 N. Exercise of Privilege Before Jury

To Update

PRACTICE TIPS

You should never permit your opponent to require a witness to take the privilege against self-incrimination in front of the jury, when it will benefit the opponent. Case law safeguards against this, and there are cases stating it is improper to call a witness to the stand, knowing the witness will take the fifth amendment. Witkin, California Evidence, *Witnesses* §917 (2d ed 1966).

Normally, it is to counsel's advantage to compel exercise of a privilege in front of the jury, if the witness is hostile. The jury will believe that the witness is using a technicality to keep important information secret. Evidence Code §913(b) seems to contemplate exercise of the privilege before the jury, because it directs the court, at the request of the party, to instruct the jury that no presumption should arise because of exercise of the privilege.

PRACTICE TIPS

If you foresee a problem arising because a witness's exercise of privilege will be held against your client, raise it in advance with the court out of the presence of the jury, and point out that Evid C §402(b) contemplates out-of-the-presence hearings on some questions of evidence. See, *e.g., Mize v Atchison, T. & S.F. Ry.* (1975) 46 CA3d 436, 120 CR 787.

In federal court, Congress did not enact proposed Rule 513(b), which states that proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury. There is good authority for the proposition that destruction of the privilege by innuendo can and should be avoided. *Tallo v U.S.* (1st Cir 1965) 344 F2d 467.

§12.29 O. Best Evidence Rule

To Update

The best evidence rule:

1. Does not require the use of a document to prove an event, if oral testimony is available. For example, payment may be proved without producing the written receipt which was given;

2. does not apply to photographs, as normally used in trial;

3. does not apply if the writing is in the possession of the opposing party who knew that the contents would be a subject of the trial.

The best evidence rule pertains only when proving the contents of a writing. Evid C §1500; Fed R Evid 1002 (which also embraces recordings or photographs). Both state and federal provisions are liberal on the subject of duplicates. See generally Evid C §§1501-1511 and Fed R Evid 1003-1004. Indeed, in federal court, a duplicate is admissible just as an original unless there is a genuine question raised as to the authenticity of the original (or, if it would be unfair to admit the duplicate in lieu of the original). Fed R Evid 1003. The state Evidence Code has been amended to similar effect. Evid C §1511.

PRACTICE TIPS

Many attorneys misunderstand the best evidence rule: It does not require use of a writing in lieu of alternative evidence to prove an event. For example, if you wish to prove that Uncle Jed intended to leave his farm to Nephew Jim, you may call a dozen witnesses who attest to Uncle Jed's statements to that effect. But, if you want to prove the will, you must provide the original will, or rely on one of the exceptions permitting use of a duplicate, or explain the absence of the original.

§12.30 P. Incompetence

To Update

If it becomes clear during the testimony of a witness that the witness cannot communicate important information on the subject for which he has been called, counsel should move for the testimony to be stricken, and the witness disqualified as retroactively incompetent.

A common example is the witness in a criminal case who, after supporting either the prosecution or the defense, discovers that he must exercise numerous privileges against self-incrimination during cross-examination. Evid C §940. The requirements for competence are discussed briefly in Evid C §§700-701 and Fed R Evid 601. Perception, recollection, and communication are the most important predicates. Possible grounds for insisting on disqualification of a witness during cross-examination include:

1. The witness who, on cross-examination, suddenly has wide-ranging and convenient lapses of memory on crucial topics;
2. the witness who asserts other privileges, *e.g.,* attorney-client, to frustrate complete examination; and
3. the witness who admits that he simply repeated what someone else suggested he should testify to.

§12.31 Q. Otherwise Trustworthy Hearsay

To Update

The federal courts, by fiat, have created an exception to the hearsay rule which permits a statement into evidence if it is evidence of a material fact, is more probative than other available evidence, serves the interest of justice, and has circumstantial guarantees of trustworthiness equivalent to other exceptions. Fed R Evid 803(24), 804(b)(5). Rule 804(b)(5), applying to hearsay exceptions for unavailable declarants, has additional tests to be met, and requires that the adverse party be notified sufficiently in advance of trial to permit preparation. State law does not recognize this "trustworthy hearsay" exception.

The federal courts have not been generous in permitting use of this exception, nor should they be. See, *e.g., U.S. v Gomez* (5th Cir 1976) 529 F2d 412.

§12.32 R. Helpful Presumptions

The California Evidence Code contains some forty presumptions, many of which are useful during examination. Evid C §§600-669.5. Federal law has no similar list of presumptions, but does provide, in Fed R Evid 302, that if state law supplies the rule of decision, the effective presumption will be determined in accordance with state law. In diversity cases, whether or not a state presumption applies is complicated. See Advisory Committee's Note to Fed R Evid 302.

The following are some useful state presumptions:

1. A party leading another to believe a fact to be true cannot, during later litigation arising out of such statement or conduct, contradict the fact. Evid C §623.

2. A writing is presumed to have been truly dated. Evid C §640.

3. A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail. Evid C §641.

4. Official duties are presumed to be regularly performed. Evid C §664.

5. A person is presumed to intend the ordinary consequences of his voluntary act. Evid C §665. This does not apply to specific intent of a defendant in a criminal action. See Evid C §§665, 668.

6. A person causing death or injury to person or property is assumed to have failed to exercise due care if he violated a statute, ordinance, or regulation of a public entity. Evid C §669. Rebuttal factors may be found in Evid C §665.

7. A person causing death or injury to person or property is assumed to have failed to exercise due care if he violated a statute, ordinance, or regulation of a public entity. Evid C §669. Rebuttal factors may be found at Evid C §669(b).

§12.33 S. Lay Opinion

To Update

Both state and federal law permit opinion by lay witnesses. Evid C §800; Fed R Evid 701. The witness must be rendering an opinion rationally based on his perception and the opinion must be helpful to the jury's understanding of the testimony of a fact in issue. This covers a lot of territory. For example:

1. "She was crazy." See Evid C §870.
2. "He was angry."
3. "It was impossible to understand her."
4. "He was confused."

The attorney should not allow a witness to render opinions which are not "rationally" based on his perception. For example, objection should be made to:

1. "He was trying to trick us."
2. "He was ready to kill."
3. "He didn't mean a word he said."

If a police officer testifies that a suspect was acting suspiciously or was high on drugs, counsel should ask for voir dire outside the presence of the jury to find out what the foundation is for the opinion. See Evid C §803. Evidence Code §702 requires personal knowledge to be shown before a witness may testify concerning a matter. See also Fed R Evid 602.

PRACTICE TIPS

Do not permit a lay witness to give legal conclusions, such as: "We had a contract." "She was negligent." "He wasn't my agent." On the other hand, a witness should be able to testify to his belief about legal conclusions, if relevant to a material issue, *e.g.,* "I believed we had a contract."

§12.34 T. Co-Conspirator Hearsay

To Update

Courts have developed a complicated set of rules for admission of the co-conspirator hearsay. See the detailed discussion in 1 Jefferson, California Evidence Benchbook §3.5 (2d ed CJA-CEB 1982). Evid C §1223; Fed R Evid 801(d)(2)(E).

The short practical rule applied by most courts is "anything goes, subject to linking up." Thus, the old saying that "conspiracy is the darling of the prosecutor's nursery." There is no reason why it should not be the darling of any lawyer's nursery. A conspiracy need not be criminal to trigger the hearsay exception. Evid C §1223(a). Nor need counsel charge a civil conspiracy. In a civil or criminal trial, once a prima facie showing of a conspiracy is made, the attorney may seek to admit co-conspirator hearsay. *People v Earnest* (1975) 53 CA3d 734, 126 CR 107; *U.S. v Ragland* (2d Cir 1967) 375 F2d 471.

There has been some limiting of the rule recently by courts determining that statements were not made in "furtherance of the objective" of the conspiracy. *People v Leach* (1975) 15 C3d 419, 124 CR 752. This rule applies most often to confessions of culpability made by co-conspirators to third parties. *U.S. v Wilson* (ED Mich 1980) 490 F Supp 713. Most civil lawyers do not take full advantage of co-conspirator hearsay, but should consider its application in any case.

§12.35 U. Authentication

To Update

Authentication is that evidence which proves that a matter in question is what its proponent claims. Evid C §1400; Fed R Evid 901(a). In many cases, the interests of both sides will be served by entering into a stipulation that specified documents are authentic. Absent a stipulation, the simplest method of proving authentication is by way of testimony from a witness with knowledge that the matter is what it is claimed to be. Fed R Evid 901(b)(1). Quick reference to Evid C §§1411-1454 and Fed R Evid 901-903 will disclose all of the methods of authentication, including self-authentication for acknowledged documents, certified copies of public records, and public forum documents.

PRACTICE TIPS

Do not be intimidated by authentication: nor should you forget the necessity to establish the authenticity of documents or other tangible objects if your opponent has not entered into a stipulation.

To see sections added to this chapter since publication of the book, click To Update

13

Appendix: Organizing for Trial

§13.1 I. MECHANICS OF GETTING TO TRIAL

To Update

Pretrial preparation is a broad topic. It is covered in detail in 1 Civil Procedure During Trial chap 2 (Cal CEB 1982). Basic checklists are contained below and in §§13.2-13.5.

The following checklists of key statutes and cases should not be regarded as requirements; they are designed for review to ensure that counsel does not leave out any significant item of preparation.

At-Issue Memorandum

- Cal Rules of Ct 209 (basic rule)
- Cal Rules of Ct 377 (describes procedure for requesting jury trial on equitable issues)
- 7 Witkin, California Procedure, *Trial* §§70-75 (3d ed 1985) (lists common matters given preference for early trial)
- Applicable Local Rules of Court

Certificate of Readiness

- Local Rules of Court
- CCP §§583, 583.110-583.160 (mandatory dismissal for causes not brought to trial within five years of filing)

Trial Setting/Status Conferences

- Cal Rules of Ct 217-222 (basic rules)
- CCP §§631, 631.01 (possible waiver of jury trial if not demanded when trial date set on notice or by stipulation, or within five days of notice)
- Cal Rules of Ct §§1600-1617 (pretrial arbitration guidelines)
- CCP §§1141.1-1141.30 (judicial arbitration code sections)
- Applicable Local Rules of Court
- *Pretrial Conference*
- Cal Rules of Ct 211 (basic rules)
- Applicable Local Rules of Court Settlement

Settlement

- 2 California Civil Procedure Before Trial chap 33 (Cal CEB 1978).
- CCP §998 (offers to compromise)
- *Wear v Calderon* (1981) 121 CA3d 818, 175 CR 566 (CCP §998 requires good faith offer, not a $1.00 offer by defendant)
- Fed R Civ P 68 (similar to CCP §998, but for defendants only)
- *Brown v Nolan* (1979) 98 CA3d 445, 159 CR 469 (defendants sued joint and severally may join to make an offer to plaintiffs)
- *Hutchins v Waters* (1975) 51 CA3d 69, 123 CR 819 (CCP §998 applies only when an unconditional settlement is offered to plaintiffs)
- *Randles v Lowry* (1970) 4 CA3d 68, 74, 84 CR 321, 325 (defendant must specify amount offered to each plaintiff)
- Cal Rules of Prof Cond 5-105 (attorney must relay to client amounts, terms, and conditions of all written offers)
- Cal Rules of Ct 222 (re settlement conference)
- Evid C §1152 (offer to settle not admissible at trial)
- Fisher & Ury, Getting to Yes: Negotiating Agreement Without Giving In (1981) (excellent book on tactics)

- CCP §§877, 877.5, 877.6 (problems with "collusive" settlements, sliding scale agreements); *Tech Bilt, Inc. v Woodward-Clyde & Assoc.* (1985) 38 C3d 488, 213 CR 250 (standards for sliding scale agreements); *Riverside Steel Constr. Co. v William H. Simpson Constr. Co.* (1985) 171 CA3d 781, 217 CR 569.
- Applicable Local Rules of Court

To see sections added to this chapter since publication of the book, click 

II. PROCEDURE PRIOR TO TRIAL

§13.2 A. Motions To Consider in Final Preparation

To Update

- CCP §437c (summary judgment)
- 2 California Civil Procedure Before Trial chap 29 (Cal CEB 1978)
- Evid C §§1500-1511 (rules of evidence potentially useful in supporting motion)
- CCP §2015.5 (out-of-state declarations; declarations in lieu of affidavits)
- See CCP §2016(e) (party's use of own deposition barreduse declaration adopting deposition instead)
- CCP §1005 (time requirements for motion papers and responses)
- CCP §§473, 576, 594a (motion to amend pleading; see also CCP §471.5)
- CCP §1048 (motion to consolidate or sever)
- CCP §§579-579.5 (motion to bifurcate)
- Cal Rules of Ct 375 (motion to continue trial)
- Cal Rules of Ct, Standards of 1 Adm (grounds for continuing trial)
- CCP §473 (motion for relief from order taken against party through mistake, misadventure, surprise, or excusable neglect)
- Cal Rules of Ct 375(b) (motion to advance trial date)
- CCP §36 (motion for preference)
- Applicable Local Rules of Court

Final Discovery

- Cal Rules of Ct 333(15-30-day rule)
- CCP §2037 (times for requesting and getting discovery of expert witnesses)
- CCP §2033 (60-day rule for requests for admissions)
- CCP §§2037-2037.9 (identification and discovery of expert witnesses)
- Fed R Civ P 26(b)(4) (expert witnesses in federal court)
- *Sanders v Superior Court* (1973) 34 CA3d 270, 109 CR 770 (pre-CCP §2037 case suggesting court may order early exchange of expert lists)
- *South Tahoe Pub. Util. Dist. v Superior Court* (1979) 90 CA3d 135, 154 CR 1 (by implication holding that CCP §2037 may be exclusive method to get expert discovery)
- CCP §2016, Evid C §240 (unavailable witnesses and use of depositions)
- CCP §1987 (notice instead of subpena for opposite party)
- CCP §1985.1 (statutory authority for subpenaed witness to reschedule appearance)

Source: Civil Litigation/Effective Direct and Cross-Examination Book/13 Appendix: Organizing for Trial/§13.3 B. Preparing the Case for Trial

§13.3 B. Preparing the Case for Trial

To Update

Documentary Evidence

- Evid C §§1500-1511 (*e.g.,* best evidence, summaries)
- Evid C §§1560-1566 (*e.g.,* production of business records, subpenas)
- CCP §1985.3 (subpenas for "consumer records," and special notice and time requirements)

Oral Testimony

- CCP §1986.5 (witness fees)
- CCP §1987 (notice instead of subpena for opposing party)
- Evid C §1220 (dismissed party probably not bound by admissions)
- CCP §2016, Evid C §240 (defines unavailable witness and describes use of depositions)
- CCP §1985.3 (consumer records)
- CCP §1987.5 (proper format for subpena duces tecum)
- Govt C §68097.2 (special rule for subpenas to law enforcement officers)

Discovery for Use at Trial

- CCP §2019 (disposition and filing of depositions)
- CCP §2030 (disposition and filing of written interrogatories)
- CCP §2033 (disposition and filing of admissions)

Jury Trial

- Cal Rules of Ct, Standards of Adm 8 (sample questions for examination of prospective jurors in civil cases) requested issues when right not guaranteed by law)
- CCP §631 (posting of jury fees)
- CCP §631.01 (waiver of jury trial)
- Devitt & Blackmar, Federal Jury Practice and Instructions, Civil and Criminal (3d ed 1977) (alternative to BAJI for jury instructions)
- *United Farm Workers of America v Superior Court* (1980) 111 CA3d 1009, 169 CR 94 (same nine jurors need not agree on each special interrogatory). But see *Borns v Butts* (1979) 98 CA3d 208, 159 CR 400.
- CCP §196 (amount of jury fees)
- Applicable Local Rules of Court

Motions in Anticipation of Trial

- Evid C §§450-460 (judicial notice)
- 2 Jefferson, California Evidence Benchbook §47.4 (2d ed CJA-CEB 1982) (judicial notice information)

Selecting the Court

- CCP §170.6 (challenge for bias)
- Arnold, California Courts and Judges Handbook (4th ed 1985) (best comprehensive source of judges' biographies)
- CCP §170.6 (peremptory challenges)
- *Miscellaneous Concerns*
- *E.g.:* Santa Clara Super Ct R 10 (call a trial calendar)
- San Francisco Super Ct R 2.8 (assignment for trial)

Source: Civil Litigation/Effective Direct and Cross-Examination Book/13 Appendix: Organizing for Trial/§13.4 C. Time-Line Checklist

§13.4 C. Time-Line Checklist

To Update

100 Days

1. Penultimate discovery. (Last hearing on discovery motions 15 days before trial, Cal Rules of Ct 333.)

a. Wrap up admissions.

b. Interrogatory and document update; include request for documents. Ask for all witnesses and documents.

2. Summary judgment motion.

3. Obtain stipulations.

a. Copies instead of originals.

b. Authenticity.

c. Business records.

d. Other foundational facts.

e. Use of interrogatory answers and admissions without calling verifying party.

4. Request to inspect originals and surrounding files *on site.*

75 Days

1. Final discovery.

a. Witness list.

b. Experts and qualifications.

c. Obtain maps, charts, diagrams, models, and illustrations.

d. Demand exchange of experts (CCP §2037). (Last hearing on §2037 motions ten days before trial, Cal Rules of Ct 333.)

60 Days

1. Subpena all witnesses, friendly and unfriendly. Include memo to friendly witnesses.

2. Notices to produce parties and documents.

a. Include custodian of records for all discovery documents.

b. Include person verifying interrogatories and admissions.

c. A broad notice (*e.g.,* "all relevant documents...") may produce new material.

3. Subpena duces tecum to all nonparty witnesses. Make subpena broad (see notice to produce, above).

30 Days

1. Prepare settlement conference sheet; advise client to attend settlement conference.

2. Provide friendly witnesses with a copy of their deposition.

3. Excerpt relevant interrogatories and admissions.

4. Prepare demonstrative aids.

5. Obtain stipulation or file motion for permission to file interrogatories, depositions, or admissions after pretrial conference.

6. Judicial notice.

7. Prepare trial brief.

8. CCP §998 offer.

15 Days

1. Prepare for jury.

a. Arrange for jury book or voter registration check.

b. Prepare voir dire.

c. Prepare jury instructions.

d. Prepare form of verdict, special interrogatories for jury.

e. File jury fees (check local practice).
2. Prepare subpenas in blank for courtroom use.
3. Pre-number exhibits.
4. Prepare trial memoranda.
5. Prepare CCP §170.6 motion; determine trial judge availability and biases.
6. Make extra copies of depositions and documentary exhibits.
7. Prepare exhibit list and index
8. Prepare summary of damages.
9. Prepare copy of calendar for important year.
10. Prepare copies of depositions, interrogatories, admissions, for potential filing with court.

5 Days

1. Prepare individual witnesses, including cross-examination of key witnesses.
2. Arrange for courtroom aids: audiovisual projector, podium, and other equipment.
3. Determine courtroom availability; schedule witnesses.
4. Outline voir dire and opening statement.
5. Verify that there are sufficient copies of exhibits.
6. Verify filing of depositions, interrogatories, admissions.
7. Arrange weekend office help, *e.g.,* copying, typing.

TRIAL DAY

1. Turn over trial brief, witness list, and jury instructions to judge.
2. Give premarked exhibits to clerk and check with clerk for system.
3. Provide depositions, interrogatories, and admissions to the trial court for filing.
4. Verify presence of courtroom aids.
5. Look up biography of trial court.
6. Determine Benchbook used by trial court and acquire same.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/13 Appendix: Organizing for Trial/§13.5 D. Trial Book Categories

§13.5 D. Trial Book Categories

Section A

1. Pleadings
2. Witnesses
3. ExhibitsIndex

Section B

1. Pretrial Motions
2. Voir Dire Examination
3. Opening Statement
4. Leads To Be Covered
5. ResearchEvidence
6. ResearchSubstantive
7. ArgumentMotions During Trial
8. TheoriesOurs/Theirs
9. Cross-Opposition Witnesses
10. Cross-Opposing Party
11. Rebuttal
12. InstructionsOurs
13. InstructionsTheirs
14. Final Argument
15. Jury (Post-Retirement) Matters
16. Notes During Trial

§13.6 III. COLLECTING MATERIALS

Over the course of years (or months, in a criminal case), clusters of documents, physical objects, and pleadings have accumulated. At least 60 days before trial, if practicable, counsel should put them into coherent and retrievable form. A computer litigation management and support system, even for simple cases, can greatly assist in the organization and retrieval of the materials. The following should be collected and organized:

1. Transcripts of preliminary hearing or grand jury proceedings;
2. depositions, with summaries, if any;
3. interrogatories, admissions, and their responses;
4. documents vital to the case, normally not more than 20 in number. Counsel will, of course, collect all documents intended for evidence, or expected from the other side. But for preparation, the attorney should try to concentrate on the small number of "hot" documents;
5. prior statements, letters, or other writings generated by prospective witnesses;
6. attorney notes; and
7. reports prepared by police, government agents, private investigators, doctors, experts.

In larger cases, it may be necessary to inventory, code, and enter these materials into a computer data base. For most trials, the documents can simply be physically filed in expanding wallets, labeled simply, *e.g.,* "Interrogatories and Answers Plaintiff"; "Attorney Notes." The attorney should set up a separate expanding wallet for each important witness, labeled with the witness's name, and containing all material necessary for examination of that witness. Some of the material in this witness file will duplicate material also maintained in other wallet folders. Lesser witnesses can be joined in a single wallet, pegged to a category, such as "Appraisers," or "Record Custodians."

IV. CIVIL TRIAL FILE ORGANIZATION

§13.7 A. Five-Cut File Categories

The following is a list of typical five-cut (tab) file categories contained in the trial file for a civil trial:

"Do" list
Complaint and answer
Other pleadings
Our investigation
Their investigation
Subpenas (blank/holding)
Subpenas (issued)
Subpenas (returned)
CCP §170.6 challenge
Jury list
Trial memoranda
Motions in limine
Voir dire
Judicial notice
Stipulations
Attorney's notes
Legal research
Cases and statutes
Deposition excerpts
Key documents
Expert reports
Exhibit list/comments
Closing argument
Instructions
Post-trial/appeal
Correspondence
Witness information sheets
Admissions
Interrogatory excerpts
Chronology
Settlement conference
statements
Declarations
News stories
Form of verdict

Source: Civil Litigation/Effective Direct and Cross-Examination Book/13 Appendix: Organizing for Trial/§13.8 B. Expanding-Wallet Categories

§13.8 B. Expanding-Wallet Categories

The following is a list of typical expanding-wallet categories for a civil trial:

Supplies

Carry-home items

Control file

Trial file

Legal research

Trial briefs

Summary judgment motions

Pretrial motions

Original pleadings and integrated pleading (interrogatories, etc., arranged chronologically by parties)
Note: these categories will probably require a separate file box

Originals of Interrogatories, etc.

Witnesses
Note: this category will normally require a separate file box

Original exhibits

Investigation

Correspondence

Exhibit acetates and extra exhibits

Interrogatory and deposition extracts

Original trial documents

Instructions

Instructions given and refused

Miscellaneous documents

Attorney's notes

Source: Civil Litigation/Effective Direct and Cross-Examination Book/13 Appendix: Organizing for Trial/§13.9 C. Publications and Other Materials for Trial

§13.9 C. Publications and Other Materials for Trial

To Update

The following is a list of typical publications and materials used in trial (see Table of References Cited for full titles):

Deerings 5-in-one

Jefferson's Evidence Benchbook

Trial Notebooks:

- Trial book
- Narrative book
- Witness book

5 x 8 card index:

- Procedure
- Voir Dire
- Opening
- Closing

Exhibit tabs

Exhibit slips

Opaque/overhead projector

Grease pencil

BAJI/ Devitt & Blackmar

Supply folder

Extra expanding wallet and title stickers

Control file

Yellow pads

Source: Civil Litigation/Effective Direct and Cross-Examination Book/13 Appendix: Organizing for Trial/§13.10 D. Preparing an Examination Book

§13.10 D. Preparing an Examination Book

Counsel should begin assembling the examination books at least sixty days before trial (or later if counsel is fallible). An entire three-ring binder should be dedicated to important witnesses; groups of less important witnesses should be relegated to a single binder. The examination book should contain:

1. Copies of important deposition pages, interrogatory answers, and documents that will be used to impeach or refresh the witness.

2. A list of "props" the attorney anticipates using with the witness. Transparencies, typewritten hypothetical questions, the bloody shirt. This list of items will be used as a check before beginning examination. Physical evidence and visual aids must be at hand for a smooth, unruffled examination.

3. Examination questions and answers: inked or typed, in detail or general outline, depending on counsel's style. References to deposition pages or exhibit documents should be written in contrasting ink. Marginal comments can include optional questions with notations, *e.g.,* "dangerous," "press this." "Don't miss" items should be marked with asterisks.

4. Applicable tables, *e.g.,* perpetual calendars (was May 26th a Thursday?); speed tables; compound interest table; life expectancy table; anatomical drawings; weights and measures; and a chronology of the case. Counsel can maintain these recurring tables in the master examination book, or in the trial book.

§13.11 E. Examination Book

It is important to have all questions (and answers, if necessary) detailed in the examination book, to be sure no important point is missed.

If you block out themes only, you will be more spontaneous, and more flexible.

Some questionssome entire lines of questionswill duplicate themselves from witness to witness. Shift the examination sheets from book to book, or photocopy as necessary.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/13 Appendix: Organizing for Trial/§13.12 F. Eve of Trial Logistics

§13.12 F. Eve of Trial Logistics

A few days before trial, counsel must make arrangements to transport to court on time all support material, particularly:

EXHIBITS

The attorney should consider pre-marking and duplicating exhibits. Generally, counsel will be required to pre-mark, duplicate, and exchange exhibits in federal court. An original and three copies of all exhibits will be needed. The original is marked and presented to the court, a copy is kept for counsel, a copy for opposing counsel, and a copy for the witness.

Diligent counsel will arrange to have documents organized by issue early in the case. This will be very cumbersome in a multi-document case. Practically, counsel should consider such organization only for a limited number of documents in difficult cases. A computer litigation support system can be of great assistance in developing an index. Below is a sample of an Exhibit Index:

IssueRepresentation by Defendant

Number	Date Document Bears	Description and Summary (original or copy)	Source	Date Obtained	Date Inspected by Other Party	Location	Removal
1	12/10/74	Financial Statement of Def. Co. (Copy) contains the following info.	Def's depo.	8/10/75		File #1	9/11/75 sent to CPA Jonesreturned 11/1/75removed to Pl.'s trial witness file
2	1/31/75	Letter from Def. to Pl. (Orig.) states Co. is in "terrific" financial condition	Pl.	3/5/75	7/10/75	File #1	Removed to Pl.'s trial witness file
RESERVED FOR FUTURE DOCUMENTS							
3							
4							
5							
6							
7							
8							

In most federal courts, the counsel must pre-mark exhibits, and provide a trial index. Even in state court, where this procedure is usually not mandated, it is sensible to pre-mark exhibits, and bind them all together with a covering Trial Index. Having done this, the attorney can move through exhibits much more rapidly. No one needs to fumble, because everyone (opposing counsel, witness, and the trial judge) has all the exhibits in order, numbered, with an index. On the negative side of the ledger, the attorney who pre-marks exhibits and provides them to opposing counsel at the beginning of trial may give away important elements of the trial plan. There is a simple solution for this: the attorney

prepares the trial exhibit and pre-marks all exhibits, maintaining the entire package for counsel's own use only.

Exhibit Number	Deposition Exhibit No.	Description	Marked for Identification	Admitted
1	Dated	Memorandum from Smith to White, dated 2/5/82 (repooling of assets)	11/25/85	11/26/85

PRACTICE TIPS

It is essential to maintain some correlation between documents as they are introduced as exhibits, and the document files. Thus, if Document No. 2b was marked in evidence as Plaintiff's Exhibit No. 1, the attorney should have a record of that fact, so that if he subsequently looks for that document, he will know exactly where to find it. If counsel does not keep this information on a trial index, a separate correlation table might be necessary.

Counsel should be allowed to withhold exhibits strictly reserved for impeachment, but runs the risk of having the exhibit excluded if it should have been part of counsel's case-in-chief.

§13.13 G. Visual Aids

If the attorney will be asking questions about any important documents, he should have an overhead projector or transparency projector in court. Counsel must remember to bring the screen. Dry runs on the machine should be conducted in an empty courtroom, and lighting and jury sight-lines should be checked. Blank transparencies should be kept in counsel's office. The office photocopy machine should produce new transparencies.

Charts, enlarged photos, and document blow-ups must be delivered to court. If the case is in a master calendar system, these materials (and others to be delivered) must be held until counsel has been assigned a courtroom. Counsel should examine the courtroom. If it does not have a chalkboard or flip-chart, counsel must find one or provide one.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/13 Appendix: Organizing for Trial/§13.14 H. Other Material

§13.14 H. Other Material

In a small case, the attorney may be able to carry all evidence to court in a briefcase, or a single carton. In a large case, a van will be needed. If counsel cannot carry trial materials alone, someone reliable must pick up and deliver all material needed to try the case.

In state court, counsel should hold back voluminous backup materials until he has explained the case to the judge, and received permission to store materials. Dozens of boxes of materials may alarm or offend an overworked judge who knows little about counsel or the case. Limited material will be needed for the initial in chambers conference, in limine motions, and voir dire.

Source: Civil Litigation/Effective Direct and Cross-Examination Book/Table of Statutes and Rules

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