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The Art of Cross-Examination in a DUI Case

Why do lawyers cross-examine? While cross-examination can be performed for many reasons, in the end, the goal is the same: to "de-convince" the trier of the validity of the proponent's position. Under this broad purpose, there exists numerous directions in which the cross-examination should go. In a DUI case, the most important thing is to demonstrate that the witness was incorrect in her conclusions, did not hear or see what she testified to, or that the testimony was incomplete. With an understanding of the purpose of cross-examination, let's move on to a methodology through which it can be undertaken.

The Tools of Cross-Examination

Numerous tools of cross-examination exist, but none are as powerful as the internal programing of the human mind. A stark fact about human beings is that memory is one of our weaker talents. One theory of human memory is that it was not developed for the purpose of recalling things that have occurred. Suddendorf and Corballis theorized that the only reason people retain some image of the past is to give them an understanding of a dimension outside of the present, which translates to an ability to predict future events[1] and leaves them without the ability to recall real-time events in excruciating detail.

This frailty of human memory opens yet another door for the astute cross-examiner. Most human beings are only able to recall, with any degree of precision, 25% of what they have heard earlier in the day.[2] Hence, "sweating the details" can be counterproductive. It can have the effect of recalling and reaffirming whatever the witness said on direct.

How does all this factor into cross-examination? It means that the method of cross-examination need not necessarily be geared toward questioning minute details. Instead, the cross-examiner should paint with a broader brush. She should undertake to convince the trier of agreement with her position. While 75% of the details will be lost, agreement will not. One of the crucial goals of the nimble cross-examiner is to establish agreement with her position. Doing this seems difficult at first. What witness is going to routinely agree with the cross-examiner? As will be seen later, it is easier done than said.

Corresponding with memory is spontaneity. As a tool of cross-examination, spontaneity will peak the trier's interest. A spontaneous eruption in the cross-examination will most certainly raise a point that can and should be utilized in the next tool, which is summation.

While summation occurs outside of the cross-examination, it is nonetheless an integral part of cross-examination. Why is that? Simply because summation is the reason lawyers cross-examine!

BY EDWARD L. FIANDACH

Lawyers cross-examine to bring out points that they will drive home in the summation. Success in the summation demands a cross-examination that establishes the points in a fashion that forces the trier to recall and agree.

The next tool of cross-examination is the leading question. The profound effect of agreement and the leading question is indeed the "bull in the china shop" at any trial.

The final tool is the inherent recency of cross-examination. While the adversary can always engage in re-direct, the fact of the matter is that the opposing party will always be afforded the luxury of having the last word. People tend to solidly remember the last thing heard because there simply is nothing left to distract them. Recency has long been recognized as quite possibly the most valuable tool a speaker can have.[3]

The Big Mistake

While cross-examination is an art form fraught with error, the biggest mistake the would-be cross-examiner can make can occur long before he walks into the courtroom. That mistake — believe it or not — is in preparation. When counsel meticulously prepares his cross-examination outside the presence of the witness, he has forsaken the aforementioned tools. Outside preparation casts aside the obvious — spontaneity. More importantly, it plays directly into the witness's hand. How so? Simply because it covers what was expected. When counsel prepares a cross-examination in advance of the trial, he is undoubtedly basing it on what he expects to be said, not what will be said, and therein lies the rub.

Cross-examination prepared in this fashion will appear to be cold. It will rarely face the testimony head-on. Further, it throws away all opportunities to "latch in" to what the trier of fact just heard.

If all this seems strange, think of it from the trier's perspective. Every trier, and jurors in particular, have seen "lawyer movies." As a result, they have innate expectations. They not only want to see conflict, but they also expect to see conflict. Just as one who attends a movie or a Broadway play with expectations of being entertained; the trier expects and perhaps even craves the anticipated "entertainment" of cross-examination. This hope can be accomplished in only one fashion: surprise. When the lawyer simply rehashes or asks questions about what everyone in the courtroom already knows, hence what was already said, the lawyer defaults on this sought-after expectation. The cross-examination is boring, or worse yet, it simply serves to reinforce what the trier heard on direct examination.

Also not to be ignored is the effect that "scripting" a cross-examination has upon the mind of the cross-examiner. Delivery, hence reading, of the "scripted" cross-examination utilizes the temporal lobe of the brain,[4] whereas thinking and speech production utilizes Broca's area, which is in the frontal lobe.[5] While this seems complicated, it simply means this: when lawyers are reading, they are not thinking about what they are hearing!

This abandonment is crucial. It utterly removes lawyers' ability to confront the witness on their terms. As will be explored in the next section, cross-examination should be on the lawyer's terms and not dictated by the direct testimony. When lawyers "script" based upon the expected testimony, they inevitably gear their cross-examination upon the expected, that is to say, exactly what the adversary wants them to cover.

Listening

So you have abandoned the script, now what? The first step in successful cross-examination is to listen carefully to the direct examination. How many times have you found yourself in a conversation, thinking about what you want to say, only to have the other person say, "You're not listening to a word I'm saying." Aside from welding yourself to a pre-planned cross-examination, this is probably one of the biggest mistakes one can make. The most important thing to do during direct examination is to listen carefully to every word that is spoken. This is the essential step to effective cross-examination. Without effective listening, the cross-examination will be irrelevant and unfocused. It will not confront the direct testimony, hence, the points that the cross-examiner must put down if the cross-examination is going to be successful. During direct, stay away from files, notes, and tell the client to leave you alone. Listen carefully to each word that is spoken. What is the lawyer listening for? The lawyer is listening for two things — allegations that are favorable to the client and the facts that are left out. The rest is just static and must be ignored.

Thinking

The lawyer has listened intently. For that matter, so has the client. The difference between the lawyer and the client is that the lawyer knows what to listen for. Hence, as the lawyer is listening, she is mentally sorting out what she can use and what she needs to discard. One of the gravest errors that defense counsel can make in her "mental arranging" is to allow herself to mentally pursue a dead end brought out by a "red herring" thrown her way by the prosecution. A lawyer's thought time during direct testimony is valuable; do not waste it on points that will mean nothing when the time comes to sum up.

Given the foregoing, what should counsel think about? In a case involving a DUI charge, counsel should concentrate on three essentials. First, pay attention to the points that the witness is putting forth to establish the impairment of counsel's client. Second, focus on those items consisting of common experience. Third, concentrate on the actions that denote sobriety and have been left out.

The first point, which is adverse, needs no explanation. Nevertheless, as the witness testifies concerning the field sobriety tests (FSTs), counsel should be asking himself, "What's missing here?" Also ask, "What portion of this test mitigates intoxication?"

The second category, common experience, includes normal movements and actions carried out by the client that are not necessarily put forth in the NHTSA manuals. Among other things, actions in this category include exiting the car, walking and getting into the cruiser handcuffed, and walking unassisted into the police station. As these are put forth, counsel should mentally frame these actions in a way that is conducive to sobriety while simultaneously asking himself how these actions comport to the client's particular condition. In this instance, "condition" means physical condition rather than sobriety.

Last, counsel must look at what was left out. Does she have a latent injury, recent surgery, or medical condition? Is she on medication? Is she wearing footwear or clothing that is not conducive to the conditions? Be creative. Utilize everyday movements and experiences that belie intoxication and were

skipped on direct. Working through this mental checklist thoroughly will prepare counsel for the next step.

Note-Taking

Now, and only now, the point has been reached where counsel can prepare the cross-examination. Begin with that simple technique taught in law school: Draw a line down the center of a digital notebook or old-fashioned legal pad. On the right side,[6] scratch a brief word or two that ties to the two items set forth above. Thus, if the witness describes the Walk and Turn but omits raising the arms, write the word "arms." When the witness sets forth that the defendant missed heel to toe on three occasions, write "H/T 15" — meaning that the client successfully touched on 15 occasions, and so forth. Likewise, if the testimony comports with some medical deficiency like a ligament repair, write "knee."

The big mistake here is to take detailed notes. Again, think about how the brain works as well as how fast you can take notes. If counsel takes the time to write "he successfully touched heel to toe on 15 occasions," or "the manner of walking could have been impacted by the knee surgery he had three months ago," counsel is going to miss the next gem to come down the pike. By the time the trial date arrives, counsel knows the details. Counsel knows that the client suffers from a bad knee or that the client suffers from seizures. Hence, a single word is all counsel needs to note the point for counsel's cross-examination.

Formulating the Question

Almost as important as the question itself is how counsel asks it. This is important for two reasons. The first reason concerns how the human mind works. As noted above, the human mind only recalls about 25% of a conversation. This is boosted by the fact that human beings tend to unconsciously think in terms of percentages. That's right, people subconsciously process comparisons as percentages. Don't believe it? Here is a test. Think back to when you were six years old. Your birthday seemed to take forever to come around. Now that it represents one-thirtieth, one-fortieth or one-sixtieth of your life, it seems to come faster and faster each year.

The confluence of this phenomenon and the lack of retention above 25% creates real opportunities for the skillful cross-examiner. The key to bringing both elements together is the power of the agreement. Even though jurors will retain only 25% of what they just heard for any significant period, they will remember the frequency with which the witness agreed with the propositions proffered by the cross-examiner. Recognition of this fact means that the skilled advocate will, with every question, emphasize agreement with her assertions.

How is this done? It is simple. Each "question" is posed as a statement or an assertion, i.e., "It's true that a person does not immediately absorb alcohol." That statement is followed by that magical little word "correct," with the entire phrase being uttered in the cadence of a question: "It's true that a person does not immediately absorb alcohol, correct?" Thereafter, it is followed by another and another, all followed by the word correct, or in the alternative, led with the phrase, "You will agree that … ."

It is imperative, however, that each question is a "safe" question. Counsel must base each question on an area where only the most obtuse or uneducated witness would voice a disagreement or on pretrial hearing testimony where, if the witness attempts to resist, counsel can immediately impeach him with the transcript.

Pacing

In this context, pacing refers to the pacing of counsel's questions. How do you do it — fast, slow, or medium? Counsel should do it as fast as she possibly can. Because in the discourse known as cross-examination, only one person should be thinking, and that person is the cross-examiner. When she fires one question right after another, inviting a simple "yes" or "correct," the witness will fall into a very comfortable pattern. The witness will rapidly lose the anxiety that cross-examination entails and conveniently slide into a pattern of agreement. Moreover, when the witness reaches this "semi-hypnotic state," counsel may encounter another advantage. Consider a situation in which counsel has a point that she would like to make, but it may or may not result in an agreement. After she has the witness falling into rapid agreement, she can try to slip in her "dicey" point. She may be pleasantly surprised at the result she receives.

The 'Pincer' Movement

This is the point when defense lawyers put it all together. They have ditched the written script and taken brief notes, and they understand the psychology of what they are about to do and how to pace the examination. Now the big question becomes, what questions should be asked?

Here are two cardinal rules of cross-examination: Never try to get the witness to recant his testimony and never try to get the witness to admit that he is wrong. Why? Because human beings are imbued with human pride. People will find some justification, no matter how inane, to support their actions. Add an audience — the jury — and an oath, and there is no way defense counsel will get that witness to say she is wrong or mistaken or lying. Defense counsel will fall flat on his face and the trier will see it.

In military parlance, there is a maneuver known as the "Pincer Movement." A "pincer" is a device with two prongs that grabs an object from the sides. It means the enemy is not hit "straight on" but is hit upon the flanks.

In the courtroom, counsel should employ the pincer maneuver in every cross-examination. Hit the witness on the flanks. Cross-examine on those things that the witness has conveniently left out. For example, the witness testified concerning the performance on the so-called nine-step Walk and Turn test. He testified that defense counsel's client missed three steps on the way out and two on the way back. She stepped off the line on three occasions and raised her arms twice for at least six inches. Great! Guess what — the client successfully completed 13 heel-to-toe steps; stayed on the line for 16 steps; and kept her arms down the majority of the time, raising them only on two occasions for six inches! Reduce these facts to a couple of question: "So my client successfully touched heel to toe on 13 occasions, correct?" "You will agree with me that she stayed on the line for 15 steps, correct?"

None of this will have been covered in direct examination. There is no shame in agreement. There is no testimony to recant or be disputed on re-direct. Rest assured that the witness was never "prepped" for this line of cross-examination. Safety in agreement is the shore to which the witness will safely succumb as you rescue her from the horrors of cross-examination.

Dealing with the Unexpected

The utterly unexpected is the cross-examiner's nightmare. An easy answer exists, but one has to be constantly thinking. Defense counsel must continuously look for what was left out of that "killer" pronouncement. Seldom is anything perfect, and that includes testimony. Instead of sitting there thinking that "this guy just killed us," counsel should think and think again about exactly what was said.

A recent example of this strategy arose in a case[7] in which a client was involved in an accident. The entire case was predicated on what defense counsel perceived was the inability of the state to establish operation. The client was injured and, prior to the deputy arriving at the scene of the wreck, he was placed in an ambulance. The deputy could not testify that she saw the client operating the vehicle, but the emergency medical technician (EMT) testified at trial that the client said he came from the Bill's game in Buffalo.[8] Thereafter, the state confidently rested, believing that the EMT's statement was enough to establish operation.

Instead of panicking, defense counsel thought a moment and on a motion for a Trial Order of Dismissal counsel said, "Two days ago I came from San Francisco, that doesn't mean I was flying the plane."

Dismissed.

In another case, the trooper, in attempting to establish a refusal to submit to the Draeger AlcoTest, testified that the client reached down and hit the "refusal" button on the display. On summation, defense counsel turned this point by initially noting that the exercise was an exhibition of good physical and cognitive skills. Further, defense counsel said that simply pushing the button did not establish the "persistent refusal" mandated by the statute.

Not guilty.

In both cases the statements were unanticipated, and counsel recognized that there was no way he could turn either witness. Accordingly, defense counsel held his fire and saved the shot for a motion or summation.

Conclusion

Cross-examination is a fine art. It is a highly sophisticated extemporaneous conversation brought about to prove a specific point. Like riding a bicycle for the first time, it is both frightening and difficult, but like riding a bicycle, once people do it right, they will never forget how.

Notes

1. Thomas Suddendorf & Michael C. Corballis, The Evolution of Foresight: What Is Mental Time Travel, and Is It Unique to Humans? 3 Behav. Brain Sci. 299-313 (June 30, 2007); Thomas Suddendorf et al., Mental Time Travel and the Shaping of the Human Mind, 364(1521) Philos. Trans. R. Soc. Lond. B. Biol. Sci. 1317-1324 (May 12, 2009); D.L. Schacter & D.R. Addis, Constructive Memory: The Ghosts of Past and Future, Nature (Jan. 4, 2007), https://doi.org/10.1038/445027a.

2. Ralph Nichols &Leonard Stevens, Listening to People, Harvard Bus. Rev. (September 1957).

3. N. Miller & D.T. Campbell, Recency and Primacy in Persuasion as a Function of the Timing of Speeches and Measurements, 59(1) J. Abnormal & Soc. Psychol. 1-9 (1959); C.A. Insko, Primacy Versus Recency in Persuasion as a Function of the Timing of Arguments and Measures, 69(4) J. Abnormal & Soc. Psychol. 381-391 (1964).

4. https://my.clevelandclinic.org/health/body/16799-temporal-lobe.

5. https://www.simplypsychology.org/broca-area.html.

6. Use the left side if you are left-handed.

7. The author, Edward Fiandach, was the defense lawyer in the two cases discussed.

8. Because the statement was not made to law enforcement, it was not subject to notice requirements. ■

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