

Sitting in the Hot Seat

By Brett A. Tarver

The associate supporting a cross can make or break a successful cross-examination, through drafting the outline, to being ready with exhibits and prior testimony for impeachment during the cross.



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So You've Got to Draft a Cross-Examination for Trial—Now What?

While there are many exciting and entertaining moments that lawyers experience on their feet during trials, most trial lawyers will tell you that the most exhilarating and fun moments occur during cross-examination. There are

multiple components that have to come together for a cross-examination to be successful. This is particularly true when the witness being cross-examined is a polished expert who has testified multiple times and is ready for anything that the lawyer might try during the examination. For the lawyer delivering the cross to move smoothly through the presentation, it is highly important for the lawyer supporting the cross to be just as prepared. For most associates, their first time in trial will require them to be that supporting lawyer. Known as the “hot seat,” the associate supporting the cross can make or break a successful cross-examination, through drafting the outline, to being ready with exhibits and prior testimony for impeachment during the cross itself. This article works through the creation and delivery of a successful cross-examination from the viewpoint of the supporting associate.

Where It All Truly Starts: The Deposition

The substance and format of a witness’s deposition testimony is the bedrock foundation of a successful cross-examination. It is often advised that a lawyer should never ask a question during cross-examination that he or she does not already know the answer to, and this advice is generally appropriate. And the only way to know those answers before trial is by taking an effective and thorough deposition. For many young lawyers, they will begin cutting their teeth on examination of witnesses during the deposition process. What some may not realize is that as a trial lawyer, you should be thinking about trial and how you plan to use the deposition at trial before a deposition even begins. A well-thought-out and executed deposition can become a springboard to a piercing cross-examination while a lazy and run-of-the-

mill discovery deposition can leave the trial lawyer without any punches to throw. So how can associates ensure that the deposition testimony that their trial lawyers will need for their cross-examinations is effective?

First, it is vital to determine the key admissions that need to be obtained from the witness. Each witness who testifies at trial provides a different piece of evidence that a plaintiff needs to prove his or her claims. As a defense lawyer, it is important to identify before a deposition which pieces of proof a plaintiff will seek to use a particular witness for and to identify admissions that are needed from the witness to undermine the plaintiff's evidence. These can range from admissions that the witness does not recall key facts, to statements demonstrating the witness's lack of credibility, to agreement in opinion from an expert on other risk factors an injured party may have had that played a role in the injury. By determining what these key admissions are and structuring a deposition around obtaining these key admissions, associates can be sure that they have the deposition testimony that they will need to bring out at trial.

Second, the lawyer taking a deposition must work during the deposition to create a clean and crisp transcript. This is particularly something that young lawyers may not think about during a deposition because they may be focused solely on getting information from a witness. But, as most trial lawyers know, a messy transcript results in headache at trial, especially during cross-examination. Without a clean transcript, impeachment of a witness with his or her prior statement will be, at best, difficult for the jury to follow, and at worst, it will be impossible to execute. Say that a deposing lawyer needs a key admission from a deponent that the deponent's physician discussed the potential side effects of a medication with the deponent. Here is an example of an unclear, vague answer from a witness, containing multiple layers of potentially important information:

Lawyer: Did your doctor talk to you about the potential side effects of the new medication?

Deponent: Well, I had a lot of conversations with my doctor over about six months while he was trying to figure out

what was wrong with me and what could help. So it's hard for me to remember exactly when I talked to him and when he talked to me about stuff. But, you know, I do think I remember the second time we talked about the medication, he mentioned some of the things that I should look out for when I went on the medication. Yeah, I do think I remember him telling me in May of 2009 that there could be some side effects. But he said that they weren't a big deal and unlikely to happen so I shouldn't stress too much about them. That's the only conversation I remember having with him about the side effects.

The answer here contains many pieces of information. The deposing lawyer should then take this answer and break it down into bite-sized, leading questions, which will result in a clean transcript. These bite-sized admissions will be perfectly teed up to be put into a cross-examination outline, leaving no wiggle room for the witness when he or she is cross-examined at trial. Here is an example of breaking down this long-winded type of testimony:

Lawyer: Thank you. I'd like to follow up on some of what you just said. You recall having many conversations with your doctor over six months, right?

Deponent: Yes, that's what I remember. Lawyer: You cannot remember what was said in all of those conversations?

Deponent: Yeah, like I said, we talked a bunch of times and I don't remember all of the discussions.

Lawyer: But you do remember that you had two conversations about the medication?

Deponent: Yes, I remember two conversations.

Lawyer: During the second conversation you had about the medication, your doctor talked to you about the potential side effects, right?

Deponent: Yes, he went over side effects.

Lawyer: And that conversation happened in May of 2009?

Deponent: I remember it in May of 2009, yeah.

These shorter, leading questions will lock the witness into his or her testimony and be easy to use during impeachment of the witness if he or she attempts to change his or her testimony during a trial.

Finally, it is important during a deposition to "close out" all topics with a witness during the deposition. The purpose of this is to ensure that a witness does not have any room in his or her testimony to give new answers at trial. For a fact witness, such as the one in the example above, questions such as these two will help finalize the testimony: "Have we now discussed

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every conversation that you remember having with your doctor about the side effects of the medication?" or "Are there any other conversations you recall having with your doctor about the side effects of the medication?" For an expert witness, questions such as the following will protect against the expert witness being able to claim that the opinion that pops up for the first time during the trial is not new or undisclosed: "Have we now talked about all of the opinions you have in this case?", or "Have we now talked about all of the opinions you intend to testify on at trial?"

The Outline: More than Just the Deposition

A solid outline is the next layer of a successful cross. An outline should flow in such a way as to draw a jury's attention to key admissions that a lawyer wants to highlight, while also burying discussion that must be covered for closing argument but might not be the most helpful to the defense. Attorneys should not be wedded to the organization, flow, or language used by the lawyer who took the deposition. In most depositions, it makes chronological sense to begin with background information about a witness, including whether he or she has been deposed or involved in litigation before, and then to move into the substance of the issues of the case, carefully following each rabbit trail on a subject before moving to the next. However,

at trial, a jury pays the closest attention during the beginning and the end of a cross-examination.

As the cross-examination outline is drafted, the associate putting the outline together should talk frequently with the lawyer who plans to deliver the cross about which topics he or she wants to start with and which topic he or she wants to use

The difficulty and complexity of preparing exhibits and documents before a cross-examination will depend on the type of witness. For most fact witnesses, there will not be too many exhibits or transcripts of prior testimony that will be needed during the cross. For many expert witnesses, however, there may be boxes of exhibits and transcripts to contend with.

as the “walk off” section. These sections should be drafted early during trial preparation so that both lawyers have time to review and brainstorm on the best ways to begin and end the cross.

If the right work has been done in deposing of the witness, drafting the questions in the outline will be quite straightforward. However, the drafter of the outline should not simply copy and paste the questions from the deposition into the outline. Leading questions are best for cross-examination and should consist of short,

one fact statements. It is not necessary for each question to end with “correct?” or “right?,” which can become repetitive in an annoying way when delivered. Further, the best leading questions are those that directly mirror the *witness’s answer* during the deposition, not the *lawyer’s question*. Consider, for example, the following exchange:

Lawyer: When did you first notice any symptoms from the medication?

Deponent: I first noticed a rash sometime in April of 2011, I think.

For the cross-examination outline, the question should read, “You first noticed a rash in April of 2011?” If the witness tries to change his or her answer, the above exchange will be used to impeach the witness, and the jury should pick up on the fact that the question asked by the cross-examiner exactly matches the witness’s prior testimony.

Young lawyers should also look for creative ways to make the points that the defense needs during a cross-examination. Depending on the jurisdiction and how the trial court judge interprets the rules of evidence, there are many different avenues that a lawyer can use to achieve key admissions that were not or could not be elicited during the deposition of a fact or expert witness. For example, if allowed, sections of the cross-examination can be built around information from an article or other documents relied on by the defense experts by confronting the plaintiff’s expert with the article and drawing out agreement pertaining to the reliability of the article and the article’s statements. If this is a chosen strategy, the young lawyer must be sure to read the entire article or document to discover if there are any statements that would not be helpful to the defense and to try and anticipate how the plaintiff’s counsel will try to use the document during re-direct. Thinking ahead in this way will help keep the plaintiff’s attorney from using a document admitted by the defense against the defense.

The Documents: Identify and Organize Ahead of Time

In addition to questions, an outline should also contain clear references to the exhibits that should and will be used during the cross-examination. Color-coding exhibit

numbers and page numbers within an outline will help draw the questioner’s eye to these items, flagging that the use of an exhibit or demonstrative is coming up during the cross. Color-coding will also help the supporting associate follow the cross and be prepared to pull the exhibit or direct the graphics team member to pull up the desired demonstrative. Under each question of the cross outline, the prior testimony that will be used in case of impeachment should be included and clearly identified by case name, volume number, and date of the testimony.

The difficulty and complexity of preparing exhibits and documents before a cross-examination will depend on the type of witness. For most fact witnesses, there will not be too many exhibits or transcripts of prior testimony that will be needed during the cross. For many expert witnesses, however, there may be boxes of exhibits and transcripts to contend with. A young lawyer needs to work with the paralegals and other trial staff members to make sure that each exhibit that will be used during the examination is in the boxes, that it is clearly labeled, and that there are multiple copies on hand for the lawyer conducting the cross to provide to opposing counsel, the witness, and the court. The lawyer delivering the cross may already have a preference about how exhibits are prepared, but it is usually most helpful to pre-highlight whichever portions of the document will be read to the witness or shown to the jury. This will help draw the examiner’s eye directly to the part of a document to be used. If a document has multiple pages, putting tabs on the pages where the highlighted text occurs will also lessen page-flipping and searching by the examiner during the cross.

At the end of the day, it is the supporting lawyer’s job to make sure that each of the exhibits and transcripts of prior testimony that may be needed during the cross-examination are included in the boxes that come to the courtroom the day of the cross. Checking the boxes against the outline the night before the cross will help ensure that the supporting lawyer does not come up empty-handed when the examiner asks for a document or transcript mid-questioning and that all of the evidence that the defense needs to use or admit makes its way into the cross.

Time for the Hot Seat: In the Courtroom

Now that the outline is finalized and the boxes of exhibits and transcripts have made it into the courtroom, the supporting associate's job is not finished. This is when the term "hot seat" truly is defined. During the direct examination of the witness, the supporting lawyer should help follow along with the witness's answers, noting any departures from the testimony that the witness has given previously and identifying areas in the cross-examination where this testimony can be examined. The supporting associate should know the facts of the record, and particularly the witness's testimony, cold. The supporting associate should be able to notify the examiner when objectionable questions pop up or when objectionable testimony is being given—such as when an expert starts to give new and undisclosed opinions. Listening, responding, and objecting to inappropriate questions or testimony during a direct examination is a team sport and both lawyers should work together.

Once the cross-examination begins, the supporting lawyer should be seated closely behind the lawyer delivering the cross-examination. The boxes containing the exhibits and transcripts should also be close at hand. The supporting lawyer should have a copy of the outline that mirrors the one used by the lawyer conducting the cross. As the cross progresses, the supporting lawyer will follow along in the outline. It will help if the supporting lawyer checks two to three questions ahead as the cross progresses to keep an eye out for upcoming exhibits that need to be pulled from the box. However, the supporting lawyer still needs to pay attention to the question being asked and how a witness is answering. If a witness is straying far from the impeachment contained in the outline, the supporting lawyer should move to find the pertinent transcript of prior sworn testimony in case impeachment is necessary. The supporting lawyer is referred to as "sitting in the hot seat" because all these actions occur simultaneously. But while many young lawyers will feel the pressure of wanting to have each exhibit perfectly in hand when the examiner needs it, young lawyers should remember that a

jury understands that lawyers are humans, too, and occasional moments of pause while a document or transcript is located will not make or break the case.

Conclusion

With a clean and crisp deposition, a punchy outline, and well-organized boxes of exhibits and transcripts, the associate in the hot seat should have everything that he or she needs to help support the delivery of an effective cross-examination. Although it

may seem that multiple steps are required, these tips will help ensure that all a jury sees is a smooth and seamless presentation, during which exhibits are ready when the examiner needs them and a witness is quickly impeached with prior testimony whenever he or she tries to change the story. This will keep a jury focused on the entire point of the examination: the key admissions that a defense lawyer needs to undermine a plaintiff's case and argue for a defense verdict. 



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