V. COMPREHENSIVE CROSS-EXAMINATION

A. Developing Causes of Action and the Case Theme

Sometimes we limit ourselves with respect to what we can accomplish on cross-examination. My attitude is: the sky is the limit. But only if you know what you are doing. An intelligent and/or sophisticated adversary witness is not going to help you develop your causes of action or case theme knowingly. However, a cardinal rule of cross-examination is that everyone must agree to certain things in order to avoid looking stupid, stubborn, or argumentative. The sun will rise in the east at a certain time every morning and set in the west at a certain time in the evening (unless you are in the land of the midnight sun). I use this as an example because you must anticipate every inch of wiggle room your adversary witness will try to use (see Destroying Safe Havens, *infra*). Ironically, this kind of wiggle room can seriously damage the credibility of a witness if utilized in the extreme. If a witness takes a technically correct but largely indefensible position on the stand, the witness looks like all he or she wants to do is fight with you. This casts a pallour on the witness and the jury may choose to disregard the witness's direct testimony. One goal of any good cross-examination is to convince the jury to disregard what it heard on direct examination from the witness.

Imagine a commercial litigation case involving a covenant not to compete. When the top salesman left the plaintiff, the plaintiff's gross revenues immediately plummeted to 50% of their former levels. Although you must establish causation, this should largely be a no-brainer. The defendant salesman and the new company he started cannot deny the effect they had on plaintiff's revenues when they started competing with plaintiff. Going through the accounts of each and every customer who switched from plaintiff to defendants is another set of facts defendants cannot deny.

When you pick areas of inquiry with so little wiggle room a witness going there is easily impeached, you can develop your causes of action and case theme through comprehensive cross-examination.

Imagine a personal injury case where defendant's negligence caused plaintiff disabling injuries. Although you may be able to get the defendant to admit it was his acts which were negligent and thereby develop your liability cause of action and case theme, what about damages? It is very unlikely that the defendant even knew the plaintiff before and after the accident causing plaintiff's injuries. Comprehensive cross-examination of the defendant can still elicit supporting testimony. Although properly objected to if you overuse it, you can ask the defendant, "Did you know the plaintiff was an outstanding amateur softball player before November 16, 2004 (the date of the accident)? Do you know that Dr. Soandso says plaintiff will never be able to play softball again?" Even with the expected "No" answers, you have made everyone in the courtroom link defendant's negligence with plaintiff's damages, through comprehensive cross-examination.

There are many ways to use adverse witnesses (even adverse experts) to establish common ground for your case or theme. Use your imagination! Even though some points may seem small, they help build your case and are coming in through the opposition. Pick subjects and areas of inquiry with which no reasonable witness can disagree, and you can develop your causes of action and case themes through comprehensive cross-examination.

B. Rules of Evidence You Need to Know

There are several rules of evidence you encounter in virtually every trial. Of course, this is no excuse for not knowing all the Rules of Evidence. If you are going to be a trial lawyer, you should be working with the Rules of Evidence every day. On the other hand, you have no business being in the courtroom unless you have a working knowledge of at least the following:

- Relevance (Article IV). Does the proof (testimony or document) tend to prove the fact you are seeking to prove?
- Leading questions (Rule 611(c)). An amazing number of even seasoned trial lawyers tend to try to lead their witnesses through minefields. Don't let it happen on your watch. You can't ask a question that suggests an answer except on cross-examination.
- The document speaks for itself (Rule 611(a)). Once admitted into evidence, don't let anyone read more from a document aloud than is absolutely necessary.
- Hearsay (Article VIII). A witness can testify to what he or she senses (i.e. saw, heard, smelled, tasted or felt). Statements made outside the courtroom are hearsay, except for admissions by a party-opponent and certain prior statements. Study the exceptions!
- Misstating prior testimony or assuming facts not in evidence (Rule 611(a)). If a question misstates the facts or makes them up, object!
- Past recollection recorded (Rule 612). If a person wrote it down when fresh in the memory and the memory is otherwise gone, it's in.
- Refreshed recollection (Rule 612). If the memory is dead but can be brought to life again, you can resurrect it.
- Prior Inconsistent Statements (Rule 613). Study all prior testimony and/or interrogatory answers and impeach as allowed by the rules. Make sure you have something before you put on this sideshow. Embarrassment awaits the anxious or ill-prepared.
- Argumentative (Rule 611(a)). Don't let anyone beat up on your clients.
- Subsequent Remedial Measures (Rule 407). Be careful, but this well-intentioned Rule can be detoured around.
- Non-Responsive Answers (Rule 611(a). Keep control of your witness on cross-examination.

- Foundation (Rule 611(a) and Article IX). Is this testimony or document really what you say it is? How do you know it and why should we rely on it.
- Experts (Article VII). Opinion is admissible, but only after proper foundation and within accepted scientific parameters. Each case requires its own study and legal research.

As you can see, from a review of the above, several of the most often used objections are not completely spelled out nor formally contained in the Rules of Evidence themselves; rather, they have been carved out by the trial courts out of necessity and are amazingly consistently applied by our judges. Of course, there are notable exceptions to this and only familiarity with a particular judge will let you know in advance if you drafted a normie. Remember that Rule 611(a) is a catch-all which allows the court to keep anything out which smells funny or is inherently unreliable.

Although there are important differences in the Federal and Minnesota Rules of Evidence (e.g., c.f. FRE412, MRE 412), this guide is based upon the law of Minnesota. If I misstated a rule, obey the rule and disregard what I said. In Minnesota, we sit behind the counsel table on direct-examination and we stand behind the counsel table for cross-examination. We rise whenever we object. We stand whenever addressing the court. We use the podium as the court instructs. Documents allow us to wander around, but only as the court permits.

Finally, there are several things in Minnesota you simply do not bring up when the jury is present. Never use the word insurance. Never quote from or try to introduce a traffic report, expert report, or other hearsay except with very careful cross-examination which does not refer to it. Never utter anything in a question or statement which you know is otherwise not admissible. Never ask the jury to put itself in the position of your client (i.e. violate the golden rule).

Although this is by no means an exhaustive treatise on the subject of evidence, paying attention to the most often encountered evidentiary problems will help keep you out of trouble.

C. Plotting Your Strategy Beforehand

This is not my choice of sub-topic. With that disclaimer; I cannot imagine starting cross-examination without plotting my strategy a long time beforehand. I like to limit myself to three major areas of inquiry on cross-examination. Sometimes more must be done, but prolonging cross-examination usually gets me only into trouble. It is very important you plot the strategy for each of your selected areas extremely carefully, knowing exactly which questions you will ask when and which documents you will use, in the order you intend to use them. Trial books (or your version of them) are a must. Rehearse your cross-examination in your mind. Control your witness. This is your arena and the game is played by your rules.

I do not completely subscribe to the cardinal rule that you should never ask a question on cross-examination for which you do not know the answer; there are exceptions to this rule. One exception is outlined in other sections of these materials; you can always ask questions with which no reasonable witness can disagree. Another exception is a question which can be followed-up to your advantage regardless of the answer to the original question. For example, "Did you know about the 20 foot deep 10'x10' unmarked hole in front of the entrance to your property before my client fell into it?" If the witness answers "No", you can follow-up with questions eliciting the negligent care afforded the property by the owner. If the answer is "Yes", you can follow-up with questions about why no marking or warning signs were erected or even why the hole wasn't ever filled in.

D. Selecting an Effective Sequence for Cross-Examination

There are three competing schools of thought with respect to an effective sequence for cross-examination. The first school of thought favors primacy; hit the adverse witness with your best stuff first. The jury will be certain to remember it and the remainder of the cross-examination will flow easily. The second school of thought favors recency; set things up for a grand finale so the big bang is the most recent thing for the jury to remember. Finally, a third school of thought (to which I like to adhere) says figure out your best three or more points. Pick the best one to start or finish with, the next best one to take the position you did not choose for the best one, and put the rest of your points in the middle of your cross-examination. Minor housekeeping points can be interspersed in the middle as well.

Selecting one of these three effective sequences for cross-examination depends upon the material you have for cross-examination and the documents you have to support it. I like to start with a bang because the witness will be well-trained for the remainder of the examination. I believe that saving something for the end sometimes fizzles and makes you look a bit foolish. Some attorneys try so hard to go out strong it gets embarrassing. Remember to narrow down your best points to a few and work them into your overall scheme. Get in the proof that establishes your client's causes of action and supports your case theme. Timing is everything.

Again, visualize your cross-examination as a play, movie, or television show. You must have something to get your viewers' attention. You must keep your viewers from falling asleep during the middle. You must have something which qualifies as an ending, although it need not be your best material. Again, no plot is the same, and you must think through your show based upon the material you have prepared for your adverse witness.

E. Taking Control of the Cross-Examination

Control on cross-examination is mandatory. Although you can ask questions for which the witness may have different answers, you must know where you are going. If witnesses' oral testimony varies from documents they must adopt, you can control them

with the documents. You also have a measure of control using your common sense, logic, and reasoning. If the adverse witness must seek refuge in trivial or unsupportable wiggle room (safe havens), you can demonstrate the weakness of that position by showing that it doesn't make sense, is illogical, or is unreasonable.

Documents are a key to controlling your adverse witness. Remember that oral testimony is of no greater or less probative value than documents. So why the axiom, "Get it in writing"? It is hard to disagree with a document, particularly if you have authored it, signed it, or somehow adopted it. If your witness strays from the content of such a document, take control of the witness with the document. Remember that the document speaks for itself. However, you should consult Rule 612 on recollection refreshed and past recollection recorded to obtain more tools for using documents to control (or assist) your witnesses. It is best to show the documents to the judge, jury, opposing counsel, and witness simultaneously through a PowerPoint or equivalent multimedia device in the courtroom. If the witness is forced to disagree with or explain what is black and white in front of everyone, control is easy.

The other measures of control always afforded you are common sense, logic, and reason tools outlined above. Although you can't ask a witness to comment on another witness's testimony, you can use your common sense, logic and reason, as well as documents authored, signed or otherwise adopted by the witness, to achieve and maintain control of the cross-examination.

F. Destroying Safe Havens

Safe havens are places witnesses hide to shield themselves from your cross-examination. For example, imagine the witness answers "I don't know" to every question you ask on cross-examination. Although extreme, many witnesses attempt to find a version of this safe haven. How do you destroy it?

Remember the attorney calling this witness wanted to establish certain points to build his or her case. After listening to the direct-examination, you should have a list of these points. You want to neutralize as many of these points as possible. Yet the witness

will only claim he or she doesn't know anything when you attempt your cross-examination. You must remember what the witness has already claimed he or she knows enough about something to be called by opposing counsel as a witness. Although you should not redo direct-examination if at all possible, this is an exception. You must have a starting point, and the witness cannot deny what he or she has already stated on direct-examination. From there, you need to build brick-by-brick the knowledge of the witness and bridge it to the points you want to make on cross-examination. If the witness continues to seek the "I don't know" safe haven, simply ask questions which will demonstrate this answer is a lie. "Didn't you tell opposing counsel [insert direct testimony here]? And now you're claiming you can't remember? Can't you remember your own testimony?"

Many other safe havens can be sought by adverse witnesses. "You would have to ask so and so" or "I'm not qualified to give you an answer." Remember that if a witness wants to disqualify himself or herself, who are you to refuse? You can negate anything such a witness says on direct-examination by disqualifying the witness on cross-examination through destroying these safe havens. At least the witness has been neutralized. If the witness claims not to remember, defers to someone else, claims not to know, or claims he or she is unqualified, make it so. In the process, you will destroy these safe havens too.

G. Handling and Introducing Exhibits

I love to introduce exhibits through an adverse witness. To do so, I usually call the adverse witness in my case-in-chief using Rule 611(c). Of course, you must have a complete working knowledge of all of your documents at your fingertips. With each point you wish to establish and each document provided to the witness, opposing counsel, and the judge if requested, question the witness about each point and contrast it against the exhibits. Save your key documents which have been authored, signed, or adopted by the adverse witness to introduce them into evidence through the adverse witness. Lay the

foundation using the enemy. This will underscore the fact this is the oppositions' document that you are now using against them.

As discussed with respect to controlling witnesses, handling and introducing exhibits during cross-examination is one of the two most important tools available to you to remain in control. Prepare for it by deciding which portion of each document you intend to either get the adverse witness to admit he or she understood, or disagreed with, or even failed to understand. Any of these items can assist you in building your case-in-chief.

It is axiomatic you must know where you are going with each point – an admission, an agreement to disagree, or exposure of a witness who does not understand a document. Go slowly so the jury can follow each point and your cross-examination will illuminate your client's causes of action and case theme.

H. Effective Cross of Experts

Of course, this is a seminar subtopic in itself. For an in-depth look at this issue, consider joining me for another seminar to be conducted in Minneapolis on January 21, 2005, dealing solely with experts.

For the most part, experts can be handled the same way as lay witnesses. Use your common sense, logic and reasonableness to force agreement on universal truth issues and demonstrate the nonsensical, illogic, or unreasonableness of disagreeing with you. Experts are particularly loath to embarrassment on the witness stand. Although they try never to give you an inch, sometimes you can work their arrogance against them.

Don't let experts hide in safe havens. Use your documents to your full advantage to control the expert witness as well. Use what you have learned to achieve agreement on the basics.

Experts do differ significantly on several issues. First, the expert is giving only opinion testimony and must base it upon facts he or she takes as true from somewhere else. If you can destroy the underlying facts, you can destroy the expert opinion. Second, an expert is a professional witness paid for opinions by the opposition to kill

your causes of action and theme. Make sure the jury understands the expert's role in the trial.

You have one great advantage over experts, but only if you know how to exploit it. First, try to know the expert's field as it relates to forensics as well as you can – know the definitions, the lingo, and the general operating principles with which the expert must agree. Use your expert to help teach you. Then remember the jury probably knows squat about what this expert is talking about. While the expert bathes in the glory of his supreme and uncontestable knowledge, you are the one who can help interpret his testimony for the jury. Of course, it is perfectly legal and ethical to help interpret in favor of your client by using carefully crafted leading questions. Go for it!