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TRIAL ADVOCACY

Redirect Examination

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Redirect is the examination of your own witness after he has been cross-examined by your adversary. While trial lawyers often painstakingly prepare for direct and cross-examination, far too little attention has been given to this crucial phase of trial. Rarely will lawyers prepare for or even think about preparing for redirect prior to trial. This is a mistake.

The dynamic of the psychological concept of 'primacy and recency' is readily demonstrated by an effective redirect examination. After all, if there is any validity to the idea that that which the jurors hear first and last is that which they remember the most, then a properly conducted redirect examination could prove to be one of the most potent weapons available to the direct examiner. A strong, and oftentimes dramatic, redirect examination could be the last time the jurors hear from a particular witness and therefore, the testimony that the jurors will most likely retain in their memory.

The general purpose of redirect is to rehabilitate the witness and to explain or rebut any adverse proof, whether direct, circumstantial or inferential that arose during cross-examination. On redirect it is appropriate to examine a witness on any matter which tends to refute, challenge, weaken or remove the unfavorable inferences brought out on cross. For example, the cross-examination may have elicited damaging testimony that has discredited a witness through contradictions and inconsistencies. Cross may have also brought out the witness' interest, bias or motive to testify in a certain manner. Additionally, a witness' credibility may have been hurt through innuendo and insinuation. Redirect examination is not the time to merely repeat that which was brought out during direct, although it can be an opportunity to emphasize testimony that was unintentionally or mistakenly elicited on cross that is damaging to the cross examiner's own cause.

Scope of Redirect

Generally, the scope of redirect examination is limited to the scope of cross-examination. Courts consistently exclude testimony on redirect that goes beyond that which was brought out on cross. Given the possibility of exclusion, it is a risky strategy to withhold an important piece of testimony from direct because you might prefer, for dramatic effect, to bring it out on redirect. Although courts do have the discretion to allow new matters to be brought out on redirect even if these matters were not touched upon during cross and should have been brought out on direct, [FN1] courts generally frown on such 'trial by ambush.'

While many lawyers think of redirect as one broad category of witness examination, in reality there are two types of redirect; 'anticipatory' and 'spontaneous' redirect. There is a temporal difference between the two. Anticipatory redirect allows the trial lawyer to prepare for and solve potential problems well in advance of trial. In this area, counsel must try to anticipate the areas in which the witness is vulnerable and prepare the witness in advance with positive spins and explanations in the event the anticipated issues are brought out during cross. Spontaneous redirect, on the other hand, is a consequence of surprise cross-examination testimony. To be ready to meet this challenge, counsel must listen very carefully to the cross-examination because she certainly would not want to miss the opportunity to rehabilitate negative testimony that was spontaneously or unexpectedly elicited during the cross-examination.

Anticipatory Redirect

The strategy underlying anticipatory redirect examination starts with a firm understanding of direct examination. By anticipating certain issues in advance of trial and assuming it is something of which your adversary will be aware and will want to use against your witness, the direct examiner is generally better served by being the first attorney to bring the witness' weakness to the attention of the jurors.

This tactical maneuver serves essentially three purposes. First, it allows you to paint the weakness in the most favorable brush stroke possible. Second, it allows you to maintain your credibility by showing the jury that you are not hiding anything and that you are a lawyer who can be trusted. Third, by dealing with the issue on direct, the consequential predictable cross-examination testimony provides you with the chance on redirect to make sure you leave the jury with a favorable lasting impression.

There are times, however, when this tactic might not work to your advantage. Consider the situation in which your adversary might not know about the potential weakness. A prior vicious, criminal or immoral act by your client or witness, for instance, or any other such negative fact, might have never been known by your adversary unless you let the proverbial cat out of the bag by eliciting the information on your direct examination. In this instance you have just handed your adversary a gift, a gift that has the potential to destroy your case. This is the one situation where reserving evidence until redirect might be advantageous. By reserving, you can wait and see whether your adversary knows of the problem area. If she does not know, obviously, there is nothing to respond to on redirect. Your strategy worked. It was clearly a prudent decision to withhold the explanation rather than inserting it, on direct, in a defensive manner. Without a crystal ball, however, it is a decision to be made after careful analysis on a case-by-case basis.

Consider the following example that does not deal with a crime committed by your client but deals with something far more subtle: A hospital, anesthesiologist and pediatric surgeon are being sued for malpractice in connection with surgery performed on a three-month-old infant who, the plaintiff claims, suffered brain damage during surgery. The night before surgery, however, the surgeon's son was arrested for driving while intoxicated. The surgeon spent the entire night comforting his wife while trying to get his son out of jail. Not one allegation was made in plaintiff's bill of particulars about this event other than one generic

allegation, among many, stating: 'The surgeon was not fit to perform the operation on the day of the surgery.' During discovery, not one question was asked at the surgeon's deposition about the events of the night before surgery. At trial, the plaintiff's lawyer chose not to conduct an adverse direct of the surgeon electing instead to put in a bare-bones prima facie case essentially compelling the surgeon's attorney to call this defendant to the stand during his case, and allowing for cross-examination.

Absent clairvoyant abilities, the surgeon's lawyer must make an educated guess. If he brings this undoubtedly harmful information out on direct, he has unquestionably 'opened the door' to a potentially devastating cross by plaintiff's counsel which may or may not be effectively rehabilitated. If he does not bring it out during his direct, there is a possibility he may escape this line of attack altogether. Either way, it is a risk. However, defense counsel has the opportunity to minimize the effects of the risk. Here is where anticipatory redirect becomes helpful. In advance of the trial and in anticipation of a cross-examination bringing out the events that occurred the evening before the surgery, the sharp defense lawyer can prepare his client, the surgeon, for a redirect examination that would have the consequence of alleviating, if not eliminating, a negative impact.

Imagine plaintiff's cross-examination:

Q: Doctor your most important concern is the health and well being of your patient, true?

Q: You would never do anything to put a baby's life at risk would you?

Q: You recognize the importance of being fully alert during a surgery like this, correct?

Q: You understand the need to be able to concentrate during this type of surgery?

Q: You would never perform surgery if you were too tired, true?

Q: Or too distracted, correct?

Needless to say, these questions have provided the appropriate clues to the surgeon to prevent surprise. Undoubtedly, the plaintiff's cross will continue exploring the facts surrounding the night before surgery:

Q: Doctor you did not get a good night sleep before this surgery, did you?

Q: Indeed, you were up all night?

Q: And, you were upset by the events that unfolded that night, weren't you?

By preparing the doctor for this cross, the defense lawyer has also anticipated the redirect. Thus, the questions that would eventually be asked on redirect, as well as the doctor's explanations, were known and carefully considered by the doctor and his attorney way before the doors to the courtroom ever opened.

Consider the redirect:

Q: Doctor much has been made about your inability to concentrate and your being too tired to perform surgery. Were you too tired to concentrate during this surgery?

A: Absolutely not.

Q: Explain that doctor.

A: I would never perform surgery if I was too tired. This was a delicate operation and it needed my expertise. Indeed, the surgery was a success and the injury that occurred to this child had nothing to do with my surgery. The events of the night before surgery were unfortunate but I would never jeopardize the health of a patient if I felt I was not up to the task. I did not hide the facts of the night before from anyone and I told everyone at the hospital what had taken place.

Here, anticipatory redirect has allowed for a carefully considered response to a potentially harmful line of cross-examination.

Spontaneous Redirect

The two purposes of spontaneous redirect are to minimize or undo the damage that was unexpectedly elicited during your adversary's cross, that hurt your case, or to hammer home areas that your adversary inadvertently stumbled upon during his cross of the witness, that hurt her case. There is little time to prepare the spontaneous redirect. Listening to the questions posed to the witness and the answers given by him on cross are crucial to a successful spontaneous redirect. One of the easiest ways to create an effective examination is to consider the offensive and defensive uses of spontaneous redirect.

Offensive Use

Often a cross-examiner will unintentionally bring out information on cross that hurts his own case. Many times the cross-examiner 'opens the door' to an area that would otherwise be off-limits to the direct examiner due to a pretrial ruling precluding testimony on that particular subject. When this occurs, the cross-examiner will attempt to run from that area by moving to a subject in which he can elicit helpful testimony. The problem for the cross-examiner is that he can not unring the bell; the damage has been done. No matter how fast he turns away from that subject, the direct examiner, if he had been listening, has been given a chance to exploit this unexpected gift and an opportunity to capitalize on this information, offensively, in redirect. Specifically, the trial lawyer can revisit this particular subject during redirect by exploring it in greater detail and setting up an argument for summation that would never have materialized but for the cross-examiner's unintentional blunder.

Defensive Use

Redirect allows an attorney to explain and clarify perceived contradictions, inconsistencies and improbabilities. Unquestionably, one of the most frustrating things that can happen to a witness is when he is prevented from explaining or giving a complete answer on cross-examination. The instruction by a cross-examiner -- 'My question simply calls for a 'yes' or 'no' -- is one that is widely used by

the skilled trial lawyer. Indeed, the court, during cross-examination, should force the witness to answer 'yes' or 'no' if such an answer is responsive to the question. But the direct examiner should be listening for cues or signals that can be used as a basis to provide further explanation during redirect. Consider the following answers. Each provides for a fertile line of inquiry on redirect:

A: That's not completely true.

A: That's not exactly correct.

A: Yes, but...

A: Yes, I said that however...

A: May I explain?

A: That was not the only thing that happened.

A: Under certain conditions I agree.

Each of these answers cries out for explanation. The trial technique used for rehabilitation is similar to that used on direct examination; however, counsel is generally permitted more latitude to lead on redirect to move the testimony along. Despite the ability to lead, the redirect examiner is better served by calling for explanation than seeking one-word answers. Direct the witness' attention to the area in need of repair and ask, point blank, for explanation:

Q: Let me direct your attention to the point where you stated it was not completely true. Explain what you mean by that.

Q: You told us on cross that was not the only thing that happened. What else happened?

Q: You indicated that under certain conditions you agree. What are the conditions?

Q: When do you disagree?

Needless to say, appropriate follow-up on redirect can turn the tables in your favor.

Conclusion

Whether the issues are anticipated and prepared for, or an unexpected surprise, a properly conducted redirect examination can right any wrongs and turn negatives into positives. A word to the wise: never underestimate the power of redirect examination.

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FN1. [Gleason v. Metropolitan St. Railway Co., 99 A.D. 209, 90 N.Y.S. 1025 \(1st Dept. 1904\)](#); [People v. Bailey, 159 A.D.2d 862, 553 N.Y.S.2d 512 \(3d Dept. 1990\)](#).

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