TRIAL PRACTICE

THE ABCS AND BEYOND (PART 2)

BY DENNIS R. SUPLEE

An earlier article in this magazine (Summer 2014, p. 9) offered some random tips to up-and-coming trial lawyers about various aspects of trial practice. Older lawyers also might find this of interest, and we pick up where we left off:

PREPARING FOR TRIAL

a. Determine issues for a motion *in limine*. [By the way, *in limine* does not mean that the purpose of the motion is to limit, though that is sometimes the case; rather, it means "at the threshold," that is, at the beginning (of the trial), which is typically when such motions are dealt with.] Keep in mind that judges do not like surprises. So, if there's a knotty evidentiary issue that is bound to come up during the trial, think of filing a motion *in limine*.

b. Two qualifications: first, if the court is likely to rule your way if the issue arises for the first time during trial, you may decide simply to prepare a short trial memo just in case; and, second, if the evidence at issue will be blurted out all at once and you're pretty confident it's admissible, you may decide not to file the motion to avoid the risk that the judge will rule against you.

c. An example makes the point. Years ago, Tom Carroll, a superb trial lawyer, had a tape recording in which the key witness on the other side made statements directly contrary to his expected trial testimony. However, because of the circumstances under which the recording was made, there was an argument to be made by the other side that it should not be usable, even to impeach. Rather than filing a motion *in limine* to determine his right to use the tape, Tom cross-examined the witness by saying, "Didn't you say just the opposite when you told the defendant ***" – at which point Tom pounded the play button on the tape recorder so that the witness's voice (making a statement that contradicted his trial testimony) filled the courtroom. If you are going to do things that way, be sure that there is a plausible basis for using the evidence because the judge's first reaction may be annoyance (or even a mistrial) because you did not flag the issue by filing a motion *in limine*.

d. Decide on which issues to prepare a short trial memo, preferably no more than three pages, to deal with issues

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that may come up during the trial. Reaching into the file for your trial memo when such an issue first surfaces helps to create the illusion with the judge, opposing counsel and your client that you're completely prepared. Usually you'll hand up fewer than half of the trial memos you've prepared. You'll carry the rest back to the office at the end of the trial.

DON'T CALL A WITNESS JUST BECAUSE YOU CAN

a. Every witness you call is a target for the other side.
b. So, if the witness is going to do nothing more than corroborate what another witness has said or will say, think whether you need him. Sometimes corroboration is important. Sometimes it isn't. If it isn't, drop the witness or narrow the scope of your questioning, thereby narrowing the scope of cross-examination.

KEEP YOUR EYE ON WHO GETS THE LAST CLOSING SPEECH

a. In some jurisdictions, the order of closing speeches will be affected by whether defendant has put on a case, that is, presented evidence that has been admitted. For example, under E.D. Pa. LR Rule 39.1 and Phila. Cty. LR 223.1, the order of closings is plaintiff, defendant, then plaintiff on rebuttal. But if defendant has not put on a case, plaintiff gets no rebuttal, and so defendant has the last closing speech, which many defense lawyers believe is worth a lot. So, if you represent defendant in a court with that rule and don't absolutely have to present evidence, don't. Most times you won't have any choice about putting on a defense case but the odds get better if counsel for plaintiff calls defendant as a witness as part of his case. If you decide not to put on a defense, be careful not to do so inadvertently. In one case, counsel for defendant presented no testimony or other evidence but then at the very end of a two-week trial moved a single not-very-important exhibit into evidence. The judge admitted the exhibit but later ruled that by such action counsel for defendant had put on a case and so had given counsel for plaintiff the right to a rebuttal closing speech. (Counsel for defendant literally smacked his forehead when he recognized his blunder.)
b. Counsel for plaintiff, too, should be just as alert to the last closing speech. So, rather than just ignoring that counsel for defendant's cross is arguably going beyond the scope of direct, counsel for plaintiff might say, "I object to the question as beyond the scope of direct, but have no objection if it is understood that the answer is part of defendant's case." If the judge rules that it is beyond the scope of direct, counsel for defendant will usually decide not to press for an answer, thereby preserving, at least for the time being, his right to the last speech.

CROSS-EXAMINATION

"Interrogation is more art than science." ("The Wire," No. 108). If that is so, then one should be dubious about rules for cross-examining. That said, here are a handful of tips:

a. Generally, keep it short and to the point.
b. You don't have to cross on everything the witness said. Pick out the points on which you are confident you can win a verbal duel with the witness. That's easier said than done. Recently, my opponent played at trial the portion of a trial video deposition that contained the direct examination of one of his key witnesses. I had crossed the guy for two hours at his deposition but, in truth, the only issue on which I had scored was in confronting him with prior statements in which he said that he did not recall the conversations about which he was now testifying with such certainty. So at trial, I played only the four minutes of cross on that subject. It was very effective. I doubt that I would have had the good sense and courage to limit my cross-examination to just four minutes on one subject if the trial deposition had never been taken and the witness had shown up live at trial. But that's what I should have done.
c. While you don't want your cross to be a mishmash, you don't have to cover the issues in a logical or chronological way. If the witness testified on direct on subjects A, B, C, D and E in that order, there's nothing wrong with crossing him on D, A and C in that order.
d. Think about where to start: (i) Do you want to start by asking the witness to agree that he does

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Sometimes the witness will concede the point that you're trying to make but will do so in a way that suggests reservations, as in a begrudging "probably." If there really can be no uncertainty, think about asking, "is there any doubt about that fact [or proposition]?" If he concedes there is no doubt, you've made your point as well as can be. But resolve doubts against asking the "is there any doubt" question.

not dispute certain facts and propositions? If there are points that you think the witness will concede, it may be best to ask about them at the outset before the tone of the cross becomes more contentious. (ii) Or do you want to start with the last thing the witness said on direct if you think you can make a strong showing that it is wrong? That way, the direct testimony is shown to be wrong even before the jurors have fully taken it in. Starting that way conveys a sense that you can't wait to show how wrong this guy is. There are countless other ways to start. Think about it.

e. If the witness refuses to concede a point that he ought to concede, ask if he denies it. If your witness says that a certain fact or proposition is true and the other side's witness says he does not deny it, you ought to win the point.

f. It is sometimes said that you should craft your cross-examination so that every question is a leading question that can be answered, "yes," with "yes" being an answer helpful to your side of the case. And, further, that you should never ask the witness "Why" – because all you will get is a self-serving speech that you cannot interrupt and that will hurt your side of the case. That's generally sound advice. But, if the cross-examination is carefully crafted, you may get some very helpful admissions by seeking an answer of "No," instead of "Yes," and then asking "Why."

Take a case in which you are cross-examining a witness (e.g., a doctor in a medical malpractice case or an engineer in a construction dispute) about certain test results. Assume that the results were equivocal and could not plausibly be described as reassuring. Rather than saying, "Those test results raised concerns, right," looking for a "Yes," try it this way:

Q. Were those test results reassuring?
A. No.
Q. Tell us why those test results were not reassuring.

Or, depending on what your intuition tells you, before getting to the "why" question, you might try, "Did they raise concerns?" or "Were they troubling?" And then, "Tell us why * * *." Often the result will be a narrative explanation that is far better for your side than a "yes" to a leading question; it will be far better because it was given by the witness in his own words, rather than as a one-word response ("yes") to a question that "puts words in his mouth."

g. Sometimes the witness will concede the point that you're trying to make but will do so in a way that suggests reservations, as in a begrudging "probably." If there really can be no uncertainty, think about asking, "is there any doubt about that fact [or proposition]?" If he concedes there is no doubt, you've made your point as well as can be. But resolve doubts against asking the "is there any doubt" question.

h. George Lavin, a first-rate product liability defense lawyer, perfected a technique for dealing with garrulous, uncooperative witnesses, especially experts. To get control of such a witness, George would write out his specific questions down the left-hand side of a poster board; to the right were four options for the witness's answer: Yes, No, Don't Know, Can't Answer. George would then read the questions to the witness one-by-one and then put a checkmark in the appropriate space on the chart as the witness gave his answer. So, for example, in the case in which the executor for the estate of Jerome Brown, the Philadelphia Eagles defensive tackle who died in a 1992 car crash, sued GM, the questions went something like:

- Was Mr. Brown driving his vehicle?
- Was Mr. Brown's vehicle traveling at over 80 mph when it left the road?
- Was it daytime when the accident happened?
- Was the roadway dry?
- Did the accident happen two blocks from the dealer's lot?
- Was Mr. Brown wearing a seat belt?
- Does the road bend to the left where the accident happened?
- Did Mr. Brown's vehicle go off the road to the right?

Often the checkmarks on the poster board told the story.

More in an upcoming issue. ■

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