"COURTROOM ETHICS"

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1999 through 2005

"**THE ETHICAL PARAMETERS OF DIRECT AND CROSS EXAMINATION**"

THE SIGNIFICANCE OF DIRECT EXAMINATION

In my opinion, cases are won as consequence of direct examination. Juries believe what they hear on direct, suspect what they hear on cross and often ignore statements and arguments. Accordingly, the ethical parameters of direct examination bear a direct relationship to the importance of direct in greater context of the trial.

Direct examination is the fulcrum of the trial. Everything else that happens is balanced against what comes from the direct testimony of the important witnesses.

The trial lawyer has six basic goals in the ethical presentation of direct testimony:

1. Establish the foundation for pivotal exhibits.

2. Establish the credibility of the direct witness.

3. Introduce undisputed facts.

4. Enhance the likelihood of disputed facts.

5. Establish final argument points.

6. Attract and hold the attention of the jury.

THE DUTY TO OFFER ONLY RELEVANT AND TRUE EVIDENCE

All six of these goals are controlled by the lawyer's ethical duty to present only that evidence which is true and probative of the issues in the case.

A large part of the ethical considerations in direct examination have to do with the requirement of fairness to the opposing party and opposing counsel. E.R. 3.4 prohibits any allusion to a fact or an inference the offering lawyer does not "reasonably believe is relevant" or is not "supported by admissible evidence."

It is axiomatic that untrue evidence is not admissible. Unfortunately, the rule does not expressly state that true evidence is all that you can offer in court, that being assumed by ethical trial lawyers.

E.R. 3.4 is the central rule of "truthfulness" in court. Interestingly, it is not couched in terms of truth; rather, it flatly prohibits false evidence or the counseling or assisting of any witness to testify falsely. Many think that we also need a specific rule that would expressly mandate lawyers to offer in court only that which is "true."

E.R. 3.5 focuses our attention of the Impartiality and Decorum of the Tribunal. This rule prohibits lawyers who seek to influence jurors by "means prohibited by law." Again, it is axiomatic that false evidence is prohibited by the criminal laws regarding perjury.

Lastly, E.R. 4.1 mandates "truthfulness in statements to others". Many skilled advocates believe that direct examination is the opportunity for the witness to tell his "story" to the jury. They also believe the lawyers job is to make sure that this "Story" is presented in an interesting and informative fashion. On occasion, we forget that the "story" must also be true.

THE DUTY TO CALL ONLY COMPETENT WITNESSES

As noted earlier, access to the witness stand is uniquely the ethical Province of the trial lawyer. Under E.R. 1.2, the client makes the decisions concerning the objective of the trial; the lawyer makes the decisions concerning the means by which the objectives are to be pursued. Of course, the lawyer should consult with the client regarding the means, but the decision as to which witnesses are to be called is traditionally made by the lawyer.

Part of the reason for this is that only "competent" witness can be called to the stand. Clients

rarely are in a position to make the legal judgment regarding competence to testify.

Legal competence generally requires that the witness possesses personal knowledge of the facts and is able to perceive and relate these facts to the jury. Rules of Evidence are not often thought as rules of conduct or rules of "ethics" but Evidence Rule 603 requires witnesses to be capable of recognizing the difference between truth and falsity. That Rule also requires that witnesses understand the seriousness of testifying under oath or on affirmation. Trial lawyers also must understand this critical difference and the seriousness of calling witnesses who are legally competent to give testimony.

As an aside, it seems incongruous to hear some lawyers argue that they are not arbiters of truth and that it's not their job to prevent witnesses from telling lies on the stand. Those same lawyers occasionally put young children on the stand and work hard to establish the credibility of the child-witness. That is done by proving that the child can distinguish reality from fantasy and appreciates that it is "wrong to tell a lie."

THE ETHICAL DUTY TO ASK NON-LEADING QUESTIONS

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THE ETHICAL PROBLEM OF REFRESHING RECOLLECTION

The central rule on direct examination is that the trial lawyer may not "lead" the witness. This rule is grounded in the understanding that leading questions either contain or suggest the "right" answer.

The judicial rationale against leading on direct is based on the presumption that the lawyer calling the witness is presumed to have conducted a pretrial interview. That presumption, in turn, leads to the inference that the lawyer knows what the testimony will be. Leading questions are therefore prohibited to insure that the testimony will come in the witness's own words.

Skilled trial lawyers know that "leading" is more than just mentioning the answer in the question. Tone of voice, inflection, facial expressions, body language and courtroom position are all elements of extracting testimony on direct.

There is no direct reference in the Ethical Rules, but the ethical trial lawyer knows that it is unethical to lead on direct (except for stated exceptions like preliminary matters, etc.). The ethical trial

lawyer also knows that it is unethical use techniques for avoiding a leading objection because the trial testimony might not be admissible unless "led in.'

There is an almost inherent tension between the duty not to lead and the duty to refresh recollection where necessary to present a true picture of an event or a fact. The procedural rules and the ethical precepts require trial lawyers to refrain from leading on direct but expect them to cure the memory lapses due to stress, fatigue, absentmindedness or inability to hear or understand the non-leading question.

Witnesses on direct have to use their own words but they rarely have perfect recall of important facts or events. Consequently, it ethical for the trial lawyer to "refresh" the recollection of forgetful or a stressed-out witness.

One of the most effective ways to refresh a witness's recollection is with a document that contains the true statement of the fact or event in question. The ethical dilemma often comes about in how and when the document is used.

The ethical trial lawyer will first establish the witness's memory is exhausted concerning the questioned fact or event. Next, the lawyer will carefully inquire, in a non-leading manner, to determine whether the witness's memory might be refreshed by reference to a certain document. Then, and only then, is it proper to show the document to the witness. Sufficient time must be given to the witness to allow him to examine it. If the document refreshes the memory of the witness, the document should be removed from the witness so that the testimony comes from the restored memory, not the document itself.

THE ETHICS OF INCLUSION AND EXCLUSION OF FACTS ON DIRECT EXAMINATION

It bears repeating to say that lawyers cannot make false statements of material law or fact to "third persons". Likewise we cannot fail to disclose material facts to "third persons" when disclosure is necessary to avoid assisting a criminal or fraudulent act. These ethical precepts are found in E.R. 4.1 but are rarely cited or considered in the context of witness examination in trial.

Jurors are many things, among which is their rightful claim to be "third persons." They would like trial lawyers to give them ALL of the relevant facts. They hope that trial lawyers will not hold back relevant facts just because they don't fit the lawyer's view of the case. What jurors are not told is that we have an ethical duty to do just what they want. Give them all the facts, including those that

might not be as favorable as we would like them to be.

The comment to E.R. 4.1 notes that lawyers are required to be truthful but generally have "no affirmative duty to inform an opposing party of relevant facts." That comment is no longer valid in Arizona in light of the disclosure requirements of ARCP 26.1. Even if it were, the comment does not likely apply to a court proceeding where the lawyers role includes balancing his duty to the judicial system with his duty to his client.

The significant ethical dilemma comes about when the lawyer on direct is making the decisions about which facts or events to include and which to exclude. The decision making process often conflicts with the tactical and strategic decisions inherent in offering persuasive testimony to the jury.

There is no bright line that will identify which facts or events must "ethically" be offered in any given case. The only test known in the rules and the case law deals with "material omissions such that the testimony becomes criminal or fraudulent" without offering the fact or the event.

THE ROLE OF ETHICS IN CROSS EXAMINATION

While it is true that direct examination wins cases, cross examination is decidedly more exciting. It plays a dramatic role in our system of adversarial justice. Consequently, it is imperative to survival of that system that it be conducted in a scrupulous and ethical manner.

The ethical challenge on cross examination is quite different than what is faced during direct examination. That is largely because the witnesses on cross are often uncooperative or outright hostile. Cross examination often becomes a contest of will between lawyer and witness. And, because it is inherently risky, there is always the temptation to imply that you know more than you actually do to win the contest.

The starting point for the ethical standard in cross examination is Rule 41 of the Rules of the Arizona Supreme Court. That rule requires trial lawyers to employ only such means as are consistent with the truth, and never to seek to mislead judges by any artifice or false statement of fact or law.

In a jury trial, the jurors sit as judges of the facts and are entitled to the same respect and compliance with Rule 41 as is the Court before whom the case is tried. The "tricks" of cross examination (occasionally taught at trial advocacy programs) often cross the line set by Rule 41.

For example, it is not uncommon for a seasoned trial lawyer to advise keeping your witness "off balance" curing cross. It is occasionally heard that one should keep the witness "confused" during cross. Routinely it is said that you must "dominate" the witness on cross such that they only "validate" what you say as opposed to giving their own version of the testimony.

When pressed, seasoned trial lawyers all agree that unbalancing, confusing and dominating witnesses describe conduct that is inconsistent with "using only means as are consistent with the truth." When not pressed the same lawyers rationalize such conduct with the presumed obligation of "zealous" advocacy. To make matters worse, they often justify such conduct as only "fighting fire with fire". Reducing your own ethics to those of an adversary who constantly engages in sharp practice hardly qualifies as meeting your oath as an officer of the court.

The leading case in Arizona regarding liability of a trial lawyer for mistakes during examination of witnesses is *Lewis v. Swenson,* 126 Ariz. 561, 617 P-2d 69 (Ariz. Ct. App. 1980). In this case the defense lawyer got a non-responsive answer from a witness that was highly prejudicial to the opposing party. A mistrial was granted but the Plaintiff died before the case could be retried. The defense lawyer was then sued by the personal representative of the deceased plaintiff. The second suit was dismissed and affirmed on appeal with this important doctrine established:

For the same reasons of public policy which dictate granting an absolute privilege to witnesses and attorneys from suits for defamation for statements made in the course of trial, we believe there is a privilege to attorneys at trial to ask questions of witnesses which have a relation to the proceedings without fear of subjecting themselves to a civil action for damages by an opposing litigant if the answer to the question ultimately results in a mistrial.

The *Lewis* decision should not be read to imply that it is ethical to try to elicit prejudicial testimony knowing that you are immune from suit. The *Lewis* doctrine is not binding on trial judges who issue sanctions or on the disciplinary process of the State Bar. The *Lewis* decision is important because to hold otherwise would have a chilling effect on the ability of counsel to vigorously represent the client. The case also reminds us that the ethical duty of the trial lawyer runs to the Court not to the adverse party.

E.R. 4.4 also defines the trial lawyers ethical role in cross examination.

That rule states:

> "In representing a client, a lawyer shall not use means that have no substantive purpose other than to embarrass, delay or burden a third person, or use methods of obtaining evidence that violate the legal

rights of such person."

Last but not least, trial lawyers have a fundamental obligation to treat witnesses with respect when conducting any aspect of the trial. *Pool v. Superior Court,* 139 Ariz. 98, 677 P.2d 261 (1984).

THE ETHICS OF LEADING QUESTIONS ON CROSS EXAMINATION

The central difference between direct and cross examination is the permissible use of leading questions. This is what makes cross examination effective. It is justifiably a part of due process in civil cases and is a hallmark of our Anglo-American judicial system.

An important part of the right to lead on cross is the right to insist on a responsive answer. It is in this combination of rights on the part of the examiner that the ethical challenge lies. There is considerable temptation to deceive and manipulate the witness on cross and justify it on the duty of "zealous advocacy". In order to conduct an ethical cross examination, the following guidelines are respectfully offered:

1. Do not attempt to intimidate the witness. Asking good leading questions and insisting on responsive answers can be done without shouting, making threatening gestures or bullying the witness.

2. Do not unfairly characterize prior testimony in your questions to the witness. Leading is a right; misleading is wrong. Tricking the witness is wrong. For example, when the witness has testified to being tired at the scene of the accident, it is wrong to mischaracterize the testimony to begin with a question, "So you admit that you were so tired that you couldn't really see what. . ."

3. Do not argue with the witness. Asking questions, suggesting answers, asserting propositions are ethical ways to cross examine. Arguing with the witness is not. Argumentative questions can be based on the content or the tone of the examiner. Argumentative questions are disrespectful of the rights of the witness. The danger of crossing over into the argumentative world is highest when the examiner insists that the witness agree with an opinion or a characterization as opposed to a statement of fact.

4. Do not use compound questions on cross. It is not only tactically wrong to use more than one inquiry in a single question, it is ethically questionable. The purpose for multiple subjects in one question can only be to confuse the witness into giving an inconsistent answer. Cumulative questions often pose an ethical question in the mind of the Court: Are you asking the cumulative question to get at the truth or to confuse the witness and make him or her look "bad" in the eyes of the jury?

5. Do not assume inadmissible facts in your question. Skilled trial lawyers often are allowed to assume facts not yet in evidence in cross examination. The Court is told that the lawyer will "connect up" in due time. The ethical problem comes about when the examiner uses a non-record fact as a premise rather than as a separate subject of inquiry. This denies the witness the opportunity to deny its validity. Consequently, it is ethically questionable. This practice is not per se unethical because it can be done such that the witness is given an opportunity to refute the premise at a later time. Where that opportunity is lacking, the question should not be asked by the ethical trial lawyer.

THE ETHICS OF DISCREDITING A TRUTHFUL WITNESS

One of the most widely debated ethical questions in trial practice is the extent to which cross examination may be used to discredit the testimony of a witness whom counsel knows to be telling the truth.

The problem is most serious in criminal cases because of the obligation on the part of the prosecution to prove the case beyond a reasonable doubt. This always raises the argument that the defense lawyer has an "obligation" to test the governments case at every level including, where necessary, the discrediting of truthful witnesses.

To compound the problem there is an important difference between the relative duties of the prosecutor and the defense lawyer in criminal cases:

1. The defense lawyer is ethically obligated to insist that the government prove its case beyond a reasonable doubt. That means that the government witness must not only be truthful but they must also be convincing to the required

degree of certainty. Thus, discrediting the truthful witness might be ethically permissible in some criminal cases where the testimony is known to be truthful to the defense lawyer but the witness is not credible "beyond a reasonable doubt."

2. The prosecutor has a ethical duty to avoid conviction of the innocent defendant. This is separate and apart from the duty to present incriminating evidence that is persuasive beyond a reasonable doubt. Consequently, the truthful witness cannot be discredited by the prosecutor simply for the sake of the exercise.

In civil cases the burden of proof is only a preponderance of the evidence. Additionally, there is no ethical duty on the part of the plaintiff's lawyer to avoid a civil judgment against a "non-liable" defendant. Thus, in civil cases there is no distinction between the duties of counsel on opposing sides.

The obligations of trial counsel in civil cases include:

(a) to counsel no other action except those which appear to be legal and just.

(b) to employ only such means as are consistent with truth.

(c) to never mislead judges or juries by any artifice or false statement of fact.

(d) to advance no fact prejudicial to the honor or reputation of a witness.

(e) to refrain from bringing or defending cases or asserting or controverting issues in such cases unless there is a basis for doing so that is not frivolous.

(f) to refrain from making false statements of material fact to tribunals.

(g) to refrain from offering evidence that the lawyers knows to be false.

(h) to refrain from seeking to influence a judge or a juror by means prohibited by law.

(i) to refrain from knowingly making false statements of material facts to witnesses.

(j) to refrain from using means that have no substantial purpose other than to embarrass or burden a witness.

The ten duties noted above all stand for the proposition that it is unethical to discredit a witness in a civil case when the examining lawyer knows the witness is truthful. The truthful testimony can be challenged on relevancy grounds or ignored as part of your theory of the case. But the witness who offers it cannot be discredited on collateral grounds such as bias or prejudice because that directly implies that the witness is untruthful.

If the ten duties noted above (as extracted from Rules 41 and 41 of the Arizona Supreme Court) are thought to be insufficient to dissuade the civil trial lawyer from discrediting the truthful witness, there is one more tenant to be cited. It is not an ethical rule, it is a moral one. It is immoral to debase and disguise the truth.

THE SPECIAL ETHICAL PROBLEMS IN IMPEACHMENT

Impeachment is merely a specialized form of cross examination. But it presents unique ethical challenges. The purpose of cross examination is to rebut the direct testimony. That often includes demonstrating weakness or inaccuracy. However, impeachment in intended to actually discredit the witness as a reliable source of information.

Viewed from the perspective of the witness, impeachment is always a personal attack. It is never clinical. It is resented and remembered. It is appropriate for the trial lawyer to remember these emotional responses of the witness before engaging in the impeachment process. Remembering these may remind the trial lawyer of the fundamental ethical duty to treat the witness with respect and to not deceive or mislead solely to make the witness look bad.

While there are at least three different forms of impeachment, they all share the same objective: to give the jury a reason to place less credence in the testimony of the witness.

The most common form of impeachment is the use of a prior inconsistent statement, action or omission. Trial lawyers believe that extracting prior inconsistencies proves that the witness's current testimony is not worthy of belief. That is because it is at odds with the prior position. What we are telling the jury is that they should not believe the witness because his story has changed.

The ethical challenge exists when the trial lawyer knows or reasonably should know

that the prior statement is actually the true fact. It exists when the trial lawyer has no good faith basis to believe either the prior position or the current testimony. And, it exists when the trial arbitrarily assumes that the prior position is true solely for the purpose of impeaching the witness.

These are ethical dilemmas because the trial lawyer has a duty to seek the truth, a duty not to embarrass the witness unnecessarily, a duty respect the witness, and, a duty to use only those means in court that are consistent with a fair and just result. Impeaching a witness with a prior inconsistent statement when you know the current testimony to be truthful is hardly consistent with truth-seeking or a fair and just result.

Another common form of impeachment is to establish on cross examination the existence of facts that appear to make the witness less reliable. This usually involves a financial or personal interest or a direct bias against one of the parties. The trial lawyer here is asserting to the jury that they should give less weight to the witness's testimony because of his or her relationship to the case or a party.

The ethical test in this form of impeachment is one of subjective good faith. If the trial lawyer can, in good faith, put forward the impeaching position, i.e., financial interest, bias, etc., the ethical question is easily answered. If not, the trial judge may have sanctionable conduct to deal with.

From an ethical perspective the most difficult form to analyze is the use of character evidence to impeach. Here the lawyer is trying to demonstrate that the witness possesses some inherent trait or characteristic the makes the testimony less credible. This often takes the form of proving that the witness has a criminal record or has been proven to have been unreliable in the past. When the witness is impeached on this basis, the lawyer is asserting to the jury that the witness is not trustworthy on any matter because of who he is.

The ethical test thus changes from a subjective good faith belief on the part of the lawyer to an objective basis for offering the impeaching fact or event. Is the conviction a felony? Was it recent enough? Is it a matter of record? Was the record expunged? Is there any chance of mistaken identity? These are not just part of the evidentiary foundation. They are the ethical predicates for using the impeachment evidence.

One of the most subtle ethical questions faced by a trial lawyer during a trial often comes up when dealing with impeachment evidence. Impeachment is designed (and allowed) to cast doubt on witnesses' credibility. It is not designed (although occasionally allowed) to accuse a witness of an outright lie. The court, the jury and the mothers of all lawyers would much prefer an argument that a witness has forgotten the facts or has exaggerated the testimony. Going further and

painting the witness as a bald-faced liar is a low blow and a pedestrian tactic.

Unfortunately some witnesses are liars. Impeaching them and then arguing forgetfulness may be unfair to your client in a particular case. The hard part comes in reconciling your obligation to show respect to every witness, whether truthful or not, and your obligation to press forward your client's cause.

One of the best trial lawyers in the country once told me that liars may not worthy of respect but the trial lawyer is. You show little respect for yourself or your client when you call someone a liar in open court

THE GOOD FAITH ETHICAL TEST IN CROSS EXAMINATION

The purpose of cross examination often includes detracting from the opponents case; discrediting the opponents direct testimony; and, reflecting adversely on the credibility of the opponent's witnesses. All of this can be done ethically. To do so requires strict adherence to the dictates of Rule 41, E.R. 4.4 and the fundamental notion that witnesses am entitled to respect on the stand.

Cross examination must be driven by the zeal of truth-seeking, not the zealousness of distortion and obfuscation. It is a powerful rhetorical tool and must not be used to mislead or deceive.

By far the most important thing to remember in ethical cross examination is the absolute need to have a good faith basis for every question asked. This is the predicate of E.R. 3.4. This means that counsel cannot allude to any matter "that will not be supported by admissible evidence".

In the real life of the courtroom this means that you cannot have a good faith basis for questions that are based on rumors, uncorroborated hearsay or pure speculation.