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Litigation Essentials III: *Basic Trial Tips for New Litigators*

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PART II - ADDENDUM

- The Ten Commandments of Direct and Cross Examination
- The Ten Commandments of Direct Examination

Materials provided by:

*Jerrol A. Crouter, Esquire
Drummond Woodsum & MacMahon
Portland*

**THE TEN COMMANDMENTS
OF DIRECT AND CROSS
EXAMINATION**

**THE TEN COMMANDMENTS
OF DIRECT EXAMINATION**

I

ORGANIZE THE EXAMINATION
LOGICALLY

II

PREPARE THE WITNESS

III

ALWAYS ACCREDIT THE WITNESS

IV

USE REGULAR WORDS, NOT "LAWYER
JARGON"

V

USE NON-LEADING QUESTIONS

- How, When, Where, What, Why, Describe
- Exceptions:
 - Foundation
 - Moving to a new area
 - To refresh recollection
 - The “hostile” witness

Remember, the witness and not the lawyer should be the center of attention

VI

SLOW TIME DOWN

VII

USE LOOPING CLAUSES TO REINFORCE
YOUR POINTS AND TO IMPROVE THE
FLOW OF THE EXAMINATION

VIII

USE EXHIBITS TO HIGHLIGHT THE
TESTIMONY AND SUSTAIN JUROR
INTEREST

IX

ANTICIPATE OBJECTIONS IN ADVANCE AND BE PREPARED TO RESPOND

- Never end a direct examination immediately after an objection has been sustained

X

TO VOLUNTEER WEAKNESSES OR NOT?

THE TEN COMMANDMENTS OF CROSS EXAMINATION

I

BE BRIEF – MAKE YOUR POINTS AND SIT DOWN

- For new lawyers, try to limit the cross examination to no more than three topic areas
- When interviewed, jurors repeatedly say that they get it, and that lawyers make the same points over and over

II

ALWAYS, ALWAYS USE LEADING
QUESTIONS....

....BUT THERE ARE EXCEPTIONS

III

ONE FACT PER QUESTION

- This means short questions, plain words
- Helps to control the witness
- Helps develop a flow to the examination

IV

GET THE GOOD STUFF OUT FIRST

- Almost every witness can say something helpful for your case on cross examination, and that should be done first
- The theory of primacy as it applies to cross examination
- This helps develop a pattern of “yes” answers

V

NEVER ASK A QUESTION THAT YOU DON'T KNOW THE ANSWER TO

- The “don't care” exception
- The “no possible other answer” exception
- The “Hail Mary” exception

VI

LISTEN TO THE WITNESS' ANSWER,
AND MAKE HIM ANSWER THE
QUESTION IF HE TRIES TO BOB AND
WEAVE

- In other words, control the witness
- But don't argue with the witness

VII

DON'T REPEAT THE DIRECT
EXAMINATION

VIII

AVOID THE ONE QUESTION TOO MANY

- Heath's Trial (1744)

HEATH'S TRIAL

Mrs. Cole testified on direct examination that one Mrs. Heath was present in the house at the relevant time period.

The following is taken from the cross examination (somewhat modernized):

- Q. Madam, you testified on direct examination that Mrs. Heath came to awaken your mother?
- A. I do remember that she came.
- Q. There was no light in the room?
- A. There was not.
- Q. Mrs. Heath had no light with her?
- A. She might have had a candle in her hand.
- Q. You testified there was no light.
- A. There was not, but there might have been a fire.

- Q. She had no handle in her hand, did she?
- A. I cannot be sure.

Drum Roll

- Q. How can you be sure it was her when there was no light?

A. I knew her voice.

IX

USE DOCUMENTS TO COMMIT THE
WITNESS TO YOUR VERSION OF THE
FACTS OR TO IMPEACH THE
TESTIMONY OF THE WITNESS

- People v. Armstrong (1857)

PEOPLE V. ARMSTRONG

The case: Armstrong had a fight with Metzger on August 29, 1957, which he later claimed only involved fists. That same night Metzger was struck on the back of the head with a hard instrument by Norris. Marks on Metzger's body showed that at least two blows had been struck by a blunt instrument, either of which could have killed Metzger. Armstrong and Norris were indicted.

Allen, the key prosecution witness, testified that he saw Armstrong hit Metzger on the head with a slingshot at about 11:00 that night.

Abraham Lincoln, representing Armstrong, cross examines Allen:

Q. Did you actually see the fight?

A. Yes.

Q. You stood very near them?

A. No, I was about 150 feet away.

Q. In the open field?

A. No, there was timber there.

Q. What kind of timber?

A. Beech.

Q. The leaves on it are thick in August?

A. Yes.

Q. What time did all this occur?

A. 11:00 at night.

Q. Did you have a candle there?

A. No, what would I want a candle for.

(At this point, what should happen in most cross examinations?)

Q. How could you see from a distance of 150 feet without a candle at 11:00 at night?

A. The moon was shining real bright.

Q. A full moon?

A. Yes, a full moon.

From his pocket, Lincoln pulls a blue covered almanac, asks the judge to take judicial notice, opens the almanac, and hands it to the witness.

- Q. Does not the almanac say that on August 29, the moon was barely past the first quarter instead of being full?
- A. (No response)
- Q. Does not the almanac also say that the moon had disappeared by 11:00?
- A. (No response)
- Q. Is it not a fact that it was too dark to see anything from 50 feet, let alone 150 feet?
- A. (No response)
- Q. No further questions (and Armstrong is acquitted)

X

ASK YOURSELF, SHOULD I CROSS
EXAMINE AT ALL?

