


IMMER FOR THE TRIAL LAWYER

THE TRIAL OF A MATRIMONIAL ACTION

STRATEGIES, TECHNIQUES, FOUNDATIONS

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5 ROLES OF TRIAL LAWYER

- OPENING STATEMENT
- VOIR DIRE
- CROSS EXAMINATION
- DIRECT EXAMINATION
- CLOSING STATEMENT

INTRODUCTION

- DISCLAIMERS
- THEMES

INTRODUCTION

- Non-jury trial
- Sloppy
- Lack of drama, suspense, coherent presentation

TOXIC BOREDOM



“Judges are human, and not immune from psychological and unconscious influences.” *People v. Best*, 19 NY3d 739, 744 (2012).

- Trial is a microcosm of human nature

TELL A STORY



The illustration shows a person sitting cross-legged, reading a red book. Surrounding them are several floating icons: an hourglass, a skull and crossbones, a ghost, and a hand holding a scroll.

CONSIDERATIONS – ALL TRIALS

- ❑ THEME TO CASE
- ❑ BIG PICTURE CASE
- ❑ BUILDING BLOCK PROOF
- ❑ THINK LIKE THE TRIBUNAL

CONSIDERATIONS ALL TRIALS

- ❑ THE BIG “3”
 - **UNDERSTANDABLE CASE** – we like what we know.
 - **“LIKEABILITY” OF CLIENT**
 - **CREDIBILITY** (client’s and you).

JURY TRIAL v. BENCH TRIAL



BUILDING BLOCK PROOF

- INTRODUCE STORY IN OPENING
- WITNESSES AND DOCUMENTS – BUILD STORY
- SUMMATION – ENDS AND SUMMARIZES STORY
- STORY TELLER PROFICIENCY
- DIFFERS FROM “HOLLYWOOD” PORTRAYALS

CONSIDERATIONS – ALL TRIALS

- TRIAL LANGUAGE
 - TO COURT
 - TO WITNESS

CONSIDERATIONS – ALL TRIALS

- ❑ ANTICIPATING EVIDENTIARY ISSUES
- ❑ ORGANIZATION
- ❑ PATENT WEAKNESS IN CASE
- ❑ OPENING & CLOSING DOORS

LISTS, LISTS, LISTS

- ❑ EXHIBIT LIST
- ❑ TRIAL PREPARATION CHECKLIST
- ❑ WITNESS LIST
- ❑ POINTS TO PROVE
- ❑ DENIAL LIST (*Hull v. Littauer*, 162 NY 569 (1900))
- ❑ SUBJECT TO CONNECTION LIST

ATTORNEY PROTOCOLS

- ❑ THINK LIKE THE TRIBUNAL
- ❑ SECOND CHAIR ROLE



CLIENT PROTOCOLS

- 3 INEXORABLE RULES
- TAKE NOTES
- BEHAVIOR DURING RECESSES



WITNESS PROTOCOLS

- EXPLAIN PROCEDURES
- OBJECTIONS
- INSTRUCTIONS RE: ANSWERS



KNOWING WHEN TO STOP

- “A measure of a great trial lawyer is what the lawyer leaves in the briefcase.”
Edward Bennett Williams

ALL TRIALS – CONT'D


- OBJECTIONS
- SEQUESTRATION OF WITNESSES
 - *Levine*, 83 AD2d 606 (2d Dept. 1981)
 - *Strategy*
- WILDCARD FACTOR
- 2 CARDINAL RULES

INTRODUCING AN EXHIBIT


- Exhibit marked for I.D.
- Exhibit Shown to Witness
- Witness Identifies Exhibit
- Lay Foundation
- Offer Exhibit into Evidenc
- Shown to Adversary (may voir dire
- Ruling from Court
- Once Marked and Admitted, testimony re: exhibit

TRIAL PREPARATION

- MOTION IN LIMINE
- TRIAL NOTEBOOK
- COMPUTER-ASSISTED PREPARATION
- TRIAL MEMO
- LIFE STYLE ANALYSIS




“Preparation transforms nervousness into confidence.” Anonymous




MOTIONS IN LIMINE

- Definition
- Examples
- Value




A RULE TO CONSIDER

**OVER PREPARE
UNDER TRY**




COMPUTER ASSISTED PREPARATION

- Matlaw
- Family Law Software
- Finplan (a/k/a Divorce Planner)
- Case Map
- Time Map (Appendix “F”)
- Text Map
- Divorce Math



TRIAL MEMO

- Not just facts, but how to get facts and data into evidence
- EBT Digest (Appendix “G”)
- Verbatim testimony used incorporated into trial memo
- Exhibit Sheet (Appendix “D”)
- Trial Notes
- Life Style Analysis




TAPE RECORDINGS

- STATUTE – CPLR 4506
 - Illegal Eavesdropping
 - One party consent
- MOTION TO SUPPRESS
- CPLR – DISCOVERY OF OWN STATEMENT




MISCELLANEOUS

- VOICE
- STAGE FRIGHT



CHAPTER 3

OPENING STATEMENT



OPENING STATEMENT

- DO NOT WAIVE!!!
 - “You don’t get a second chance to make a first impression.”
 - Unique Opportunity

**OPENING STATEMENT
"RULES"**

- Do not read!
- Telling your story and themes for first time
- Take the sting out of obvious bad evidence
- Language of Opening Statement
- Personalize your client
- Order transcript of adversary's opening
- Biggest mistake – over promising

OPENING STATEMENTS

- What can you leave out?
 - The Power of Less
- Painting a picture of your client's story
- Persuasive Story
 - Cinematic → Memorable
 - Memorable → Persuasive



OPENING STATEMENT - INCLUDE

- ❑ Facts necessary to win
- ❑ Bad facts that must be answered or you look shady.
- ❑ Foreshadowing of great facts

FORESHADOWING

“If in the first act you hung a pistol on the wall, then in the following one it should be fired. Otherwise don’t put it there.”

Anton Chekhov

ASKING QUESTIONS



- ❑ Keeps suspense
- ❑ Engages the trier of fact as investigator
- ❑ Lets the case build as evidence unfolds
- ❑ Gives you an out



IMPACTFUL START OF OPENING

One way:

“The parties were married in 1995. Both were 25 years old at the time of the marriage. Neither had been married previously. At the time of the marriage, the Wife was a financial advisor and the Husband an associate at a prominent New York City law firm. They have 3 children...”




MORE IMPACTFUL START

This is a case about sacrifice and contributions. The personal sacrifices made by the plaintiff-wife to better the family unit; the herculean contributions she has made as the primary caretaker of the 3 children, while simultaneously being at her Husband’s side, and frankly at his beck and call, to aid in the advancement of his illustrious professional career and financial success. This is about a woman who subjugated her career; ...




WORDSMITH YOUR OPENING

- Use key words and phrases that conform with your theme
- “Unlike most of us, he needed no ATM machine. He had his own - unreported cash income.”
- Case involving child abuse – “preyed on them like a vulture”




STAPLE APPROACH

- Start and end strong
- Tell a story
- Address weaknesses
- Pictures/Visual Aids
 - Power Point – recent case
 - Underuse
- Law – briefly
- Entertain – make it interesting



Chapter 4

DIRECT EXAMINATION



DIRECT EXAMINATION

- CONTRASTED WITH CROSS-EXAMINATION
- DIRECTOR v. STAR

4 BASIC GOALS


- CLEAR
- MEMORABLE
- CREDIBLE
- INVULNERABLE

PREPARING WITNESS

- FEAR AND ANXIETY
- PREPARE FOR DIRECT & CROSS
- COURTROOM PROTOCOLS

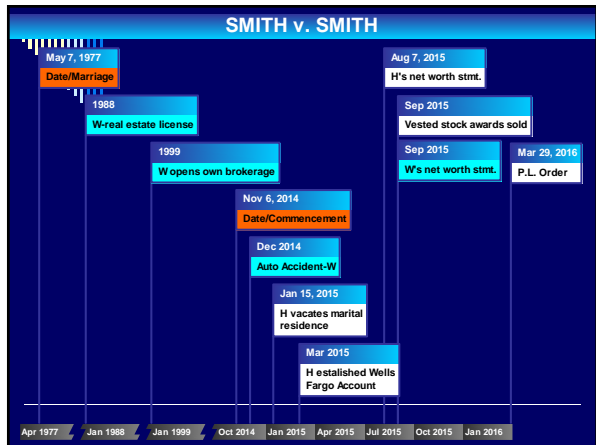
STAGE POSITION

- ANALOGOUS TO STAGE RIGHT OR LEFT
- BEHIND LECTURN
- cf. CROSS EXAMINATION, OPENING, CLOSING
- POSTION OF PODIUM



ASPECTS OF DIRECT

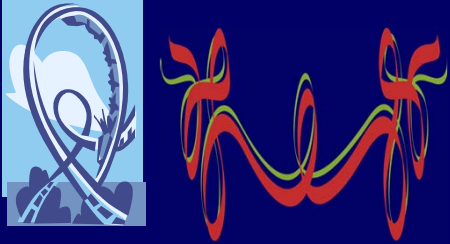
- LISTEN TO ANSWER
- BEGINNING – EASY QUESTIONS
- LEADING WHEN CAN
- COVER ONLY WHAT IS NECESSARY
- CHRONOLOGY



NON-LEADING QUESTIONS

- CLOSED QUESTIONS
- LOOPING
- ADVERSARY ASLEEP AT WHEEL?
- DEALING WITH NON-RESPONSIVE WITNESS

LOOPING



REPETITION

- ADVANTAGE
- OBSTACLE – “ASKED AND ANSWERED”
- STRATEGIES

TRANSITION PHRASES

- DIRECTOR INTRODUCING A NEW SCENE
- DURING AND AFTER COVER A SPECIFIC TOPIC
- EXAMPLES

COMMANDS

- ❑ SPECIFIC DIRECTIONS TO WITNESS REGARDING ANSWER GIVEN OR TO BE GIVEN
- ❑ WHEN TO USE

WHEN LEADING PERMISSIBLE ON DIRECT

- ❑ INTRODUCTORY MATTER
- ❑ UNDISPUTED FACTS
- ❑ YOUNG CHILD, FEEBLE MINDED
- ❑ HOSTILE WITNESS
- ❑ ADVERSE PARTY – HOSTILE *PER SE*
- ❑ *VOIR DIRE* INTERRUPTION ON DIRECT

REFRESHING RECOLLECTION



- ❑ WHAT CAN BE USED?
- ❑ PROCEDURE
- ❑ COMPARED WITH PAST RECOLLECTION RECORDED
- ❑ RIGHTS OF OPPOSING PARTY


**DIRECT EXAMINATION
(CONT'D.)**

- ❑ ANTICIPATE & NEUTRALIZE CROSS-EXAMINATION
- ❑ KEY PART OF TESTIMONY
- ❑ UNEXPECTED ANSWER OR NON-ANSWER
- ❑ "MEMORY" QUESTIONS


"PAT" QUESTIONS

- ❑ MEET WITH OPPOSING ATTORNEY?
- ❑ HERE VOLUNTARILY OR BY SUBPOENA?
- ❑ DISCUSS TESTIMONY WITH OTHER SIDE?
- ❑ COMPENSATED FOR YOUR TIME IN COMING TO COURT?
- ❑ HOW GET TO COURT TODAY?

**VOLUMINOUS
RECORD RULE**




- ❑ FINANCIAL TESTIMONY
- ❑ SUMMARY STATEMENTS
- ❑ REQUIREMENTS



KEY PARTS OF TESTIMONY

- ❑ CHANGE PACE
- ❑ CHANGE PLACE
- ❑ CHANGE INTONATION
- ❑ CRAFT QUESTION WITH PRECISION



ORDER OF WITNESSES

- ❑ INITIAL WITNESS – SET THEME
- ❑ “LESS THAN BRILLIANT” CLIENT
- ❑ CALL OPPOSING PARTY?
- ❑ EXPERTS
- ❑ TAKING ADVANTAGE OF WITNESSES “OUT OF TURN”



OFFER OF PROOF

- ❑ RELEVANCE
- ❑ PROTECT RECORD FOR APPEAL
- ❑ SEEK REVERSAL OF RULING
- ❑ SHORTEN TRIAL
- ❑ PROCEDURE

DEPOSITION TRANSCRIPTS AT TRIAL




- CPLR 3117
- PARTY v. NON-PARTY
- READING ONLY A PART OF TRANSCRIPT

USING LAY OPINION TESTIMONY

- GENERALIZED MEDICAL CONDITION
- VALUATION
- OWNER OF PROPERTY
- HANDWRITING

ATTORNEY Demeanor

- HIGH ENERGY
- WIMBLETON EFFECT
- DON'T WRITE QUESTIONS
- WRITE TOPICS AND ANSWERS




COMMON MISTAKES

- LISTEN TO ANSWER
- PROPERLY INTRODUCE WITNESS
- USE OF LEGALESE
- QUESTIONS CALLING FOR EXACTITUDE
- "FOR THE RECORD"
- "PLEASE NOTE MY OBJECTION"
- NEUTRALITY QUESTIONS



EXPERTS ON DIRECT

- TESTIFY SERIATIM
- TEACHER
- LANGUAGE
- "TOO COMFORTABLE" EXPERT
- DOSE OF HUMILITY



DEMONSTRATIVE EVIDENCE; SUMMARIES

- CHARTS
- SPREADSHEETS
- PHOTOS/VIDEOS
- TAPES
- TIME LINES

DIRECT OF VALUATION EXPERT

- QUALIFICATIONS
- FACTS RE: RETENTION
- APPRAISAL ASSIGNMENT
- DOCUMENTS AND STEPS TO CARRY OUT APPRAISAL ASSIGNMENT
- METHODS OF VALUATION
- REPORT, CHARTS, CONCLUSION
- OTHER USES OF EXPERT

XYZ EQUIPMENT CORP. Annual Sales and Income (2002-2013)		
Table 18		
Year	Annual Sales	Operating Income / (Loss)
2002	35,975,000	(1,203,000)
2003	38,664,000	(2,421,000)
2004	25,005,000	(3,335,000)
2005	32,478,000	(617,000)
2006	39,121,000	18,000
2007	39,156,000	(877,000)
2008	37,496,000	1,406,000
2009	37,964,000	2,520,000
2010	48,000,000	2,902,000
2011	35,405,000	674,000
2012	31,504,000	(1,076,000)
2013	33,094,000	(1,003,000)
Compound Annual Growth Rate (Annual Sales)		
2002-2013	-0.76%	
2009-2013	-3.37%	

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BASES OF EXPERT TESTIMONY

- PERSONAL KNOWLEDGE
- FACTS IN RECORD
- PROFESSIONAL RELIABLE HEARSAY

PROFESSIONALLY RELIABLE HEARSAY

- PART OF BASIS OF EXPERT TESTIMONY
- ELEMENTS
- NOT PRINCIPAL BASIS
- INDEPENDENT REQUIREMENT OF RELIABILITY v. DEEMED RELIABLE IN PROFESSION
- TESTIMONY RE: OUT-OF-COURT DATA (*Peo. v. Goldstein*)

COLLATERAL SOURCES

Straus v. Strauss, 136 AD3d 419 (1st Dept. 2016). “Moreover, where the proponent of the report intends to call witnesses at a future custody hearing, anyone to whom the evaluator spoke, thereby rendering the declarants subject to cross-examination, it renders admissible any opinion evidence based on their statements. “To the extent that any hearsay declarants are not cross-examined, those portions of the report containing inadmissible hearsay should be stricken or not relied upon.” (Emphasis added)

5 MINUTE CONTEMPT CASE




5 MINUTE CONTEMPT CASE

- JUDICIAL NOTICE (ORDER)
- VOLUMINOUS RECORD RULE (ARREARS)
- NO NEED TO SHOW LESS DRASTIC REMEDIES
- SHIFTING OF BURDEN


USE OF HEARSAY ON DIRECT

- USE EXCEPTIONS
- BUSINESS RECORD RULE
- STATE OF MIND
- ADMISSIONS
- PRIOR INCONSISTENT STATEMENTS




ENDING OF DIRECT

- RULE OF RECENCY
- EMOTIONAL IMPACT
- EXAMPLES



CROSS EXAMINATION



CROSS-EXAMINATION

- PURPOSE OF CROSS-EXAMINATION
- GOAL – ESTABLISH CONTROL
 - LEADING QUESTIONS
 - TAG LINES
 - ONE FACT PER QUESTION
 - NO COMPOUND QUESTIONS
 - NO QUESTIONS CALLING FOR EXPLANATION

CROSS-EXAMINATION - TOPICS


- ❑ ORDER OF IMPEACHMENT
- ❑ WHEN NOT TO CROSS
- ❑ ONE ADVERSE WITNESS AGAINST THE OTHER
 - DISCREPANCIES
 - SCRIPTED
- ❑ WIN, WIN QUESTIONS
- ❑ OVERNIGHT TO PREPARE (EXPERT)
- ❑ BUILD-UP METHOD

CROSS v. DIRECT EXAMINATION

- ❑ FOCAL POINT
- ❑ TYPES OF QUESTIONS
- ❑ NARRATIVE v. MONOSYLLABIC ANSWERS
- ❑ ATTORNEY'S ROLE


DIRECT CROSS

- ❑ ASSAULT ON SUBSTANTIVE TESTIMONY
 - LAY WITNESS
 - EXPERT WITNESS




COLLATERAL CROSS

- LAY WITNESS
- EXPERT WITNESS
- DISCLAIMERS IN REPORT



MAJOR THEMES OF CROSS EXAMINATION

- **CONTROL**
- PATIENCE
- DOORS – WHICH TO OPEN; WHICH TO CLOSE
- REASONABLE EXPECTATIONS



REASONABLE EXPECTATIONS

“if you attack the King, you best kill him or you will soon be dead yourself”


Emerson

**YOUNGER'S
COMMANDMENTS**

BE BRIEF



**SHORT
QUESTIONS, PLAIN
WORDS**



**ASK ONLY LEADING
QUESTIONS**

□ TYPES OF QUESTIONS

- OPEN-ENDED
- LEADING
- DECLARATIVE QUESTIONS

NEVER ASK A QUESTION
TO WHICH YOU DO NOT
KNOW THE ANSWER

LISTEN TO THE ANSWER!!!




The Ear

DO NOT QUARREL WITH THE
WITNESS



DO NOT PERMIT THE WITNESS TO EXPLAIN



An illustration of a woman with blonde hair, wearing a green top and a blue skirt, standing in a classroom. She is pointing her right hand towards a chalkboard. On the chalkboard, there are four simple geometric shapes: a rectangle, a triangle, a heart, and a square.



DON'T HAVE THE WITNESS REPEAT DIRECT




An illustration of a courtroom scene. A woman with dark hair, wearing a green top, is seated at a witness stand on the left, looking towards the right. In the background, a man with glasses, wearing a dark suit, is seated at a judge's bench. A microphone is positioned in front of the witness stand.

AVOID THE ONE QUESTION TOO MANY

- DON'T GUILD THE LILY
- ABRAHAM LINCOLN
- CL AUS VON BULOW
- EBT EXAMPLE




A small circular portrait of Abraham Lincoln is positioned to the right of the second list item. Below the fourth list item, there is a small rectangular photograph showing a man in a dark suit (Claus von Bülow) and a woman in a white dress.




STEP 1

**COMMITMENT
TO DIRECT
EXAMINATION**



STEP 2

**ESTABLISH CIRCUMSTANCES
AND IMPORTANCE OF THE
PRIOR INCONSISTENT
STATEMENT WITHOUT
DIVULGING THE STATEMENT**



STEP 3

**IMPEACH WITH PRIOR
INCONSISTENT
STATEMENT**

SAVE THE EXPLANATION
FOR SUMMATION



ADDITIONAL
COMMANDMENTS



WHEN NOT TO
CROSS EXAMINE



"The phrase, "No questions, Your Honor" is the hallmark of a seasoned pro. It takes more experience, courage and self-confidence to use this phrase than to follow the natural impulse to dive in."

F. Lee Bailey, To Be a Trial Lawyer

PREPARATION,
PREPARATION,
PREPARATION




ORGANIZE



DON'T BE OVER-SCRIPTED



NOTES ON DIRECT



ORDER OF CROSS EXAMINATION

- SEQUENCE
- RULE OF PRIMACY
- RULE OF RECENCY

**DON'T SWEAT THE
SMALL STUFF**



**DON'T SHOOT
EVERY MOSQUITO**



**ETIQUETTE OF
CROSS-EXAMINATION**



AVOID GLEE




WITNESSES NOT TO CALL



THE BAD PARTS DON'T GO AWAY




EVERY WITNESS IS NOT A LIAR

An illustration of two men in suits. One man with blonde hair is seen from the back, gesturing with his hand while talking to another man in a green suit who is looking at him.

SENSITIVE WITNESSES

Two photographs side-by-side. The left one shows a young girl with her hand to her chin, looking thoughtful. The right one shows an elderly woman sitting at a desk, typing on a laptop.


COURTESY COPY TO COURT

An illustration of a courtroom scene. A man in a suit is standing and speaking into a microphone at a witness stand. A judge in a black robe is seated at a bench, looking at the witness. Another man in a suit is seated at a desk in the foreground, looking towards the witness.


SILENCE IS GOLDEN



SUMMATION



YOUR OWN STYLE

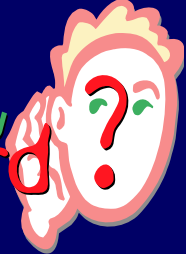


"WIN WIN" QUESTIONS



RULES OF PRIMACY & RECENCY

Have You Heard?



PRIMACY

- WHAT WE HEAR FIRST, WE TEND TO BELIEVE
- START STRONG

REGENCY

WHAT WE HEAR
LAST WE TEND
TO REMEMBER

**PECKING ORDER OF
CROSS EXAMINATION**

- ❑ START WITH STRONG POINT
- ❑ OTHER POINTS - STRONGEST TO WEAKEST
- ❑ END WITH STRONGEST POINT

**STRATEGIC USE OF
RECESSES**




TRIOLOGIES



The slide features three distinct images arranged horizontally. From left to right: three white dice on a blue background, a large orange number '3' with a white outline, and two fighter jets flying in formation against a blue sky.


VERBAL AND BODY LANGUAGE



The illustration shows a speaker at a podium on the left, holding a microphone. Two other figures are running towards the podium from the right, one carrying a briefcase. The scene is set against a dark blue background with a white grid pattern in the top left corner.

WHAT NOT TO DO

- OPENING SALUTATIONS
- NEGATIVE ENDINGS
- POMPOUS VOCABULARY
- "LET ME ASK YOU THIS QUESTION..."
- DIFFERENTIAL AND UNCERTAIN WORDS
- REPEATING THE PREVIOUS ANSWER



WHAT TO DO

- ❑ ONE FACT/QUESTION
- ❑ MEMORABLE WORDS OR PHRASES
- ❑ ADVERSE WITNESS – STATES, CLAIMS – DOES NOT TESTIFY
- ❑ POSITIVE ENDINGS TO QUESTIONS
- ❑ CONTEXTUAL SIGNIFICANCE TO QUESTIONS



WHAT TO DO (Cont'd.)

- ❑ CHALLENGE WITNESS ON HEDGE WORDS
- ❑ PERSONALIZE YOUR WITNESS
- ❑ YOU, NOT WITNESS READ DAMAGING STATEMENTS



BODY LANGUAGE

- ❑ WHERE TO STAND
- ❑ WHEN TO MOVE
- ❑ EYE CONTACT
- ❑ LOSE PROPS
- ❑ IN THE WITNESS' FACE
- ❑ POKER-FACED

MODES OF IMPEACHMENT

- BIAS, INTEREST, MOTIVE,





DEPOSITION AND CROSS-EXAMINATION

- CONFLICTING VIEWS OF PURPOSE OF DEPOSITION
- TRADITIONAL VIEW
- THE USE OF OPEN-ENDED QUESTIONS
- “FEEL” OF THE WITNESS

OTHER MODES

- IMPLAUSIBILITY
- BAD REPUTATION IN COMMUNITY FOR TRUTH AND VERACITY
- PRIOR CRIMINAL CONVICTION
- LACK OF KNOWLEDGE
- PERCEPTION, MEMORY
- RIDE THE LIE
- IMPEACHMENT BY OMISSION

PATIENCE AND PACING




REPETITION

- USAGE OF THE SUBSTANCE OF THE DAMAGING TESTIMONY AS THE BEGINNING OF A SERIES OF SUBSEQUENT QUESTIONS

TYPES OF CROSS EXAMINATION

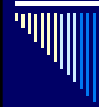
- DESTRUCTIVE v. CONSTRUCTIVE
- PURE CROSS v. COLLATERAL CROSS
- COLUMBO CROSS
- BLANK "INCRIMINATING" DOCUMENT





ADVERSE PARTY AS WITNESS

- EXTENT OF CROSS EXAMINATION
- cf. VOUCHING RULE
- DISCRETION OF COURT
- STRATEGY – WHEN TO CALL ADVERSE PARTY AS YOUR WITNESS



AMNESIAC WITNESS

- “I don’t know”; “I don’t remember”
- RIDE IT OUT
- TEST LACK OF MEMORY



CLOSING ESCAPE HATCHES

- CARDINAL PRINCIPLE OF CROSS EXAMINATION




OBJECTIONS


- BEYOND THE SCOPE
- SPECULATION
- ARGUMENTATIVE
- ASSUMES FACTS NOT IN EVIDENCE
- MISCHARACTERIZES FACTS IN EVIDENCE
- REPETITIVE
- HEARSAY
- LACK OF FOUNDATION
- PRIVILEGED
- RELEVANCE
- COMPETENCE

DEALING WITH OBJECTIONS

- WHEN TO WITHDRAW AND REPHRASE
- AVOID OBJECTIONABLE QUESTIONS
- RELEVANCY OBJECTION - OFFER OF PROOF
- SUBJECT TO CONNECTION


CROSS EXAMINATION OF EXPERTS





CROSS OF EXPERTS

- GENERAL CONSIDERATIONS
- QUALIFICATIONS – *VOIR DIRE*
- CREDENTIALS
- *Wells v. Wells*, 177 AD2d 779 (3d Dept. 1991)



VOIR DIRE - QUALIFICATIONS

PROCEDURE
WHEN TO CHALLENGE
STRATEGIES



DISCLAIMERS

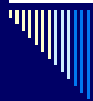
- STATEMENT OF LIMITING CONDITIONS
- USUALLY IN BACK OF REPORT

“We have based our valuation on figures presented by management without a certified statement, nor have we performed an audit of the figures. We have assumed for the purpose of this appraisal that the figures provided by management are correct.”

“[ABC Appraisal Co.] will not express any form of assurance on the likelihood of achieving the forecast/projection or on the reasonableness of the used assumptions, representations and conclusions.”

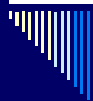
HYPOTHETICAL QUESTIONS

- CPLR 4515
- WHEN USE
- FAIRLY INFERABLE FROM THE EVIDENCE
- EXAMPLE



EXPERT WITNESS ATTACKS

- PROFESSIONAL STANDARDS AND GUIDELINES
- JACK OF ALL TRADES
- PROFESSIONAL WITNESS
- HYPOTHETICAL QUESTIONS – CPLR 4515




CROSS EXAMINATION BY LEARNED TREATISE

- OPINION IN PUBLICATION
- ADMISSION BY WITNESS THAT PUBLICATION AUTHORITY
- USED FOR IMPEACHMENT PURPOSES ONLY




EXPERT REPORTS

- ADMISSIBILITY
 - MOTION IN LIMINE
 - COLLATERAL SOURCES
- MURPHY v. WOODS*, 63 AD3d 1526 (4th Dept. 2009); *STRAUS v. STRAUSS*, 136 AD3d 419 [1st Dept. 2016]




EXPERT REPORTS (Cont'd.)

- ❑ Did expert independently verify any of the key performance indicators underlying the valuation
- ❑ Was a draft submitted to attorney prior to finalization of report
- ❑ Bring entire file to Court



APPRAISERS – CROSS EXAMINATION

- ❑ Did testifying witness prepare the report
- ❑ Sign off on report without being person who did the substantive analysis
- ❑ Did witness prepare the report
- ❑ Peer review – methods and analysis



RE-DIRECT EXAMINATION

- ❑ ONLY TO EXTENT NECESSARY
- ❑ OPENS DOOR TO FURTHER CROSS

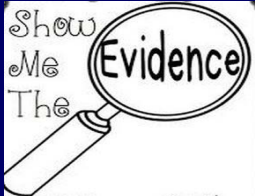
CLOSING

- WRITTEN OR ORAL
- WHY THE FACTS AS EMERGED AT TRIAL MEAN YOU WIN
- ARGUMENT, NOT REGURGITATION

SUMMARY

ACTION	DIRECT	CROSS
Types of Questions	Can be Open-Ended Letting Witness Explain	Leading Questions Only
Answers	Narrative Permitted	Monosyllabic
Where Stand	Behind Lecturn	Peripatetic
Voice	Steady; Changes with Important Part	Vary Inflections, Intonations

EVIDENTIARY TOOLS & STRATEGY



AUTHENTICATION

- THE PROFFERED EVIDENCE IS WHAT THE PROPONENT CLAIMS IT TO BE

BUSINESS RECORDS – CPLR 4518 - 3 METHODS

- TRADITIONAL FOUNDATION
- SELF-AUTHENTICATING RECORDS
- CERTIFICATION OF BUSINESS RECORDS – CPLR RULE 3122-a; 3120


TRADITIONAL FOUNDATION BUSINESS RECORD RULE

- Record Made in Regular Course of Business
- It is the regular course of business to make the record
- Contemporaneous Entry
- Each entrant – business duty (*Mtr. of Leon RR*, 48 NY2d 117 [1979])




CERTIFICATION OF BUSINESS RECORDS

- CPLR Rule 3122-a
- CPLR 3120
- Certification Affidavit with Service of Subpoena *Duces Tecum*
- 30 days before trial – notice of intent to offer records at trial
- At least 10 days before trial – file objections



JUDICIAL NOTICE- Business Record Rule

- A record or document is so patently trustworthy as to be self-authenticating
- Judicial notice forms the foundation
- *Elkaim*, 176 AD2d 116 (1st Dept. 1991); *Merrill Lynch Bus. Financial Serv., Inc. v. Trataros Constr., Inc.*, 30 AD3d 336 (1st Dept. 2006)
- cf. *Peo. v. Ramos*, 13 NY2d 914 (2010)



WEIGHT ACCORDED BUSINESS RECORDS

- PRIMA FACIE PROOF OF THEIR CONTENTS
- BURDEN OF PROVING RECORDS FALSE OR INACCURATE SHIFTS TO THE OTHER SIDE



FOUNDATIONS

- AUDIOTAPES
- PHOTOGRAPHS
- VIDEOTAPES
- VOICE IDENTIFICATION



FOUNDATIONS (CONT'D.)

- HANDWRITING
- VOLUMINOUS RECORD
RULE
- TELEPHONE CALL
- VOICE IDENTIFICATION
