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## **Annual Trial Skills Update Seminar**

"Direct Examinations: Your Witness Tells Your Story  
Cross Examinations: Cross Examination With a Plan, Control, and Confidence"

Saturday, April 6, 2024  
11:30am - 12:30am

Speakers: Alan Yochelson and Marjaneh Maroufi

### **Conference Reference Materials**

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# Examining the Witness: Direct and Cross

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# Examination of a witness

- What is examination?
- Witness examination: two types
  - Direct Examination
  - Cross Examination
- Are all questions created equal?
  - Open-ended
  - Close-ended
    - Leading questions: What does it mean to “Lead”?

# Direct Examination

- Generally done to your witnesses
- The examination is how the witness tells the story
- Your questions engender the witness's answers
  - Witness tells the story thru their answers
  - There should be a flow between the questions and answers
- You are generally not allowed to ask leading questions (See Evid. Code § 764)
  - Trial court can, and often does, permit leading questions when need arises. (See Evid. Code § § 767, 776)

# Cross-Examination

- Generally done to opposing witnesses
- You're asking leading/closed-end questions to pin down details you will use in your argument later
  - Don't expect the "Perry Mason" moment
- Questions are really the "testimony"
- Cross-examination is limited in scope to what was covered on direct examination
  - The Inverted Pyramid
  - If you want to ask questions outside scope of direct, you may call the witness in your case, and direct via closed-end/leading questions

# Preparation is Key: Direct Examination

- What is the story that is being told?
  - Must know it intimately
  - Must know all details
- How will the witness tell the story?
  - Order of events
  - Foundational issues
- Rehearsal, rehearsal, rehearsal
  - Practice makes perfect
- “And then what happened”
  - Your job is to move the story and keep it flowing
  - “Looping”

# Preparation is Key: Cross-Examination

- Know the case; know what's coming
  - Discovery, Fact-gathering, reading the file
- What are the facts you need from the witness?
  - Have your list ready
  - Foundational questions
    - “Did you prepare a report?” “Did you review it?”
- Be dialed in during direct
  - Pounce on mistakes
- Less is more
- “Don't ask a question you don't know the answer to”

# Review: Direct v. Cross

## **Direct**

- Directing your witness
- The answers tell the story
- Questions are generally open-ended

## **Cross**

- Crossing opposing witness
- The questions tell the story
- Questions are generally closed-ended



# Impeaching a witness

- Impeaching occurs during cross-examination
- Can be most exciting/dramatic moment of the trial
- Can be done via establishing:
  - Prior inconsistent statements
  - Prior inconsistent testimony
  - Omissions of important and relevant facts
  - The witness's prior criminal convictions

# How to Impeach

- Have witness confirm the statement you are going to impeach:
  - “You said on direct that....”
  - “You wrote in your report that...”
- Lay the proper foundation for the impeaching statement
  - “When you testified at the preliminary hearing...”
  - “When you wrote the earlier report....”
  - “When you spoke with your wife that evening...”
- Witness must be given the realistic opportunity to explain or deny the impeaching statement
  - Evid. Code § 770

# Evidence Code § 770

- "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:
  - [a] The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or
  - [b] The witness has not been excused from giving further testimony in the action.

# “Prior Inconsistent Statements”

- Evid. Code § 780: "Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has a tendency in reason to prove or disprove the truthfulness of his testimony. . . including but not limited to the following. . . “
  - [h] A statement made by him that is inconsistent with any part of his testimony at the hearing. . . ."
- Evid Code § 1235: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with section 770."

# Other admissible impeachment evidence

- Evid. Code § 771 [refreshing recollection with a writing]
- Evid. Code § 1237 [past recollection recorded]
- Evid. Code § 1238 [prior identification]