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CROSS EXAMINATION: A QUESTION OF CONTROL

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Control is the key to effective cross examination. Preparation is the first step in taking control. Effective cross examination begins with learning about the witness and the subject matter, fully exploring the witness' testimony in deposition, and knowing the applicable law. With this framework, you can develop a cross examination strategy.

PREPARATION

Who Is The Witness

How you prepare and what you do to prepare will depend upon the witness. Is the witness a fact witness or an expert witness? A witness who is not an expert witness may testify only if the witness has personal knowledge of the subject matter. Tex. R. Evid. 602. Consequently, areas of inquiry of a fact witness might include:

- The witness' opportunity to observe or know the facts.
- The witness' ability to recall the facts.
- Whether the witness has a bias.
- Prior inconsistent statements by the witness.

Areas of inquiry for an expert witness could include:

- The witness' qualifications to testify on the subject matter.
- The witness' methodology in forming opinions.
- Whether the witness has sufficient data to form opinions.
- What the witness' opinions are.

- What information the witness used to reach each opinion.
- An explanation of the witness' reasoning for each opinion.
- Any favorable admissions where the witness agrees with your expert or your case theme.
- Whether the witness has a bias.
- Prior inconsistent statements by the witness.

Subject Matter for Fact Witness

It is critical to learn as much as you can about the subject matter about which the witness is going to be testifying. Before deposing a fact witness in a car wreck case, you may want to visit the scene, make sure you have read the crash report, and talk to the investigating officers and any eyewitnesses. If the witness has given a statement to the investigating officer, or anyone else, get it if you can. You may be able to learn some additional information about the witness through social media. If you have an expert on a subject that the fact witness is likely to address, you may want to talk to your expert about any facts that you should try to develop.

Subject Matter for Expert Witness

While you cannot expect to achieve the same depth of knowledge that the expert witness may have on a particular subject, you need to have a good understanding of the subject matter, related concepts, and terminology. If you have your own expert, he or she can help you understand the subject and suggest areas of inquiry. If you do not have an expert, you will have to do your own research on the topic, including finding any articles authored by the witness or his or her coworkers. In addition, if the expert has used software to help formulate opinions, get the operating manual for the software, and get course materials from any courses or training that the expert has attended.

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