Direct and Cross Examination in EEO Cases
EXCEL 2013

Presented by the

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First Things First

WITNESS PREPARATION

Preparing the Witness

- It may sound corny, but first rule of testifying is:
  - Tell the truth.
  - If the truth is not in your client's favor, the case should be settled.
  - Answer "yes/no" questions with "yes, no or cant answer yes/no."
  - Don't volunteer information in response to questioning.

Preparing the Witness

- What judge assesses in determining credibility:
  - Demeanor;
  - Responsiveness to questions;
  - Eye contact;
  - Don't be reluctant to say not sure (documents to refresh recollection);
  - Don't chew gum, tobacco, etc.

Preparing the Witness

- Counsel are expected to prepare witnesses. Make sure your witness knows that:
  - There's nothing wrong with admitting that he or she has spoken with counsel about his or her testimony.
  - If a client, what he or she has discussed with counsel may be subject to attorney-client privilege.

Preparing the Witness

- Best practices for witnesses. Tell the witness:
  - Do not discuss his or her testimony with anyone other than counsel;
  - Do not prepare notes to use during testimony;
  - If a witness feels he or she must prepare notes, do not bring them to a deposition or hearing.

Preparing the Witness

- Lose the attitude!
  - Counsel for the Agency/Complainant is doing a job;
  - It is not personal to the witness, don't let the witness make it personal for counsel;
  - Attitude can reflect on credibility determinations; and
  - Can lead to mistakes.
  - Attitude can distract judge from properly evaluating credibility.

Preparing the Witness

- Basic rules of testifying:
  - Be on time! Counsel can be inpatient with tardy witness, judges even more so.
  - Substantial lateness can result in sanctions.
  - Dress appropriately. Usually, business attire, *i.e.*, what the witness would wear to work or better:
    - Suits;
    - Uniforms;
    - Firearms.

Preparing the Witness

- General rules of direct examination:
  - Tell the witness that you can ask leading questions on preliminary matters.
  - Otherwise, must be done through nonleading questions.

Preparing the Witness

- Exceptions to general rules:
  - The adverse or hostile witness;
    - Leading questions can be asked on direct.
  - Leading is not permissible on cross.

Preparing the Witness

- Let the witness know that judges can, and do, ask questions to:
  - Clarify testimony that he/she didn't understand;
  - Bring out a point he/she thinks counsel has missed;
  - Complete the record.
  - Respond to judge not attorney.
  - Don't make assumptions because judge is asking questions.

Preparing the Witness

- Preparation, at a minimum, should consist of:
  - A review of the questions you will ask the witness on direct;
  - A review of all documents that will be used as exhibits;
  - A review of the questions that you anticipate the witness will be asked on cross examination;
  - Do mock cross examination of witness.

Preparing the Witness

- Inconsistent statements. If the witness has given what are, or appear to be, inconsistent statements, preparation should:
  - Include bringing those statements to his or her attention; and
  - Giving him or her a chance to explain.
- Be prepared for questions about how and why inconsistency was brought to witness' attention.

Preparing the Witness

- Give the witness a stop signal, such as raising your hand to:
  - Stop an answer that is nonresponsive;
  - Stop an answer that goes beyond the question;
  - Stop the witness from answering when there is a pending objection.
- Make the signal obvious

Preparing the Witness

- Communications with opposing counsel—fact witness:
  - Witness may communicate with opposing counsel.
  - Do not encourage or discourage it.
  - Ask witness to tell you if contacted by opposing counsel and what was discussed.

Preparing the EEO Witness

- Communications with opposing counsel—client.
  - Instruct witness not to speak with counsel; and
  - To report contact to you immediately.

Gary & Ernie's 12 Rules

WITNESS PREPARATION

Preparing the Witness

- Rule No. 1 - Listen to the question:
  - Wait for the complete question;
  - Don't anticipate the question;
  - Answer only the question you are asked;
  - Think about the response before answering;
    - Answer in tempo; try not to answer some questions immediately and more deliberate answers to other questions UNLESS there is reason to think, such as "I need to think about who was present at the meeting, . . ."
  - Wait for the next question.

Preparing the Witness

- Rule No. 2 - Trust counsel to:
  - Know what testimony has to be elicited;
  - Determine the order in which the testimony should be elicited; and
  - Determine the manner in which the testimony should be elicited;
  - Determine what testimony needs to be brought out on redirect.

Preparing the Witness

- Rule No. 3 - Do not discuss your testimony with other witnesses:
  - Never worry about minor inconsistencies—no two people remember things exactly the same.

Preparing the Witness

- Rule No. 4 - Remember this is being done for the judge:
  - To the extent possible, direct your answers to the judge.

Preparing the Witness

- Rule No. 5 - Stop if there is an objection:
  - Both counsel will be given an opportunity to argue the objection;
  - It is possible that you may be asked to leave the hearing room;
  - Wait until the judge rules before proceeding.

Preparing the Witness

- Rule No. 6 - Don't answer any question you don't understand:
  - Lawyers sometimes ask confusing questions;
  - Don't be afraid to tell counsel or the judge you don't understand;
  - Don't use as a ploy on cross examination.

Preparing the Witness

- Rule No. 7 - Don't answer a question if you don't know the answer:
  - If you don't know the answer, then "I don't know" or "I don't recall" is the answer;
  - Avoid speculating on the answer;
    - But estimating or approximating is okay if you are reasonable certain. "I don't know the precise number of people at the meeting, but it was about 25 participants."
  - Again, don't use "I don't know" or "I don't recall" as a ploy on cross examination.

Preparing the Witness

- Rule No. 8 - It's okay to actually think before giving an answer:
  - Listen to the question carefully;
  - Don't interrupt question;
  - It's highly possible the pause before answering is noticeable only to you;
  - Beware the question that misstates facts!

Preparing the Witness

- Rule No. 9 - Treat opposing counsel and other witnesses, including complainant, with respect and in a professional manner:
  - This is cross examination; opposing counsel is allowed to ask tough questions;
  - The more you resist answering questions, the tougher the examination is likely to be;
  - If you can't manage respect, try civility.

Preparing the Witness

- Rule No. 10 - Don't argue with opposing counsel:
  - This is cross examination. Counsel doesn't have to give you a chance to explain your answer;
  - Remember, redirect follows cross, so you will get your chance to explain.

Preparing the Witness

- Rule No. 11 - If you've made a mistake, ask to correct it:
  - Witnesses do make mistakes;
  - Better to correct it yourself rather than have it exposed on cross examination.
- If you have finished testifying notifying counsel immediately.

Preparing the EEO Witness

- Rule No. 12 - When in doubt:
  - Forget the first eleven rules;
  - Tell the truth.

Telling Your Client's Story

DIRECT EXAMINATION

Two Tasks Involved

1. Substance
   - Introduce legally sufficient evidence into the record
   - Supporting your case theory
   - Avoiding objectionable questions
2. Style
   - Making testimony clear
   - Making testimony memorable
   - Not just what you say, but how you say it

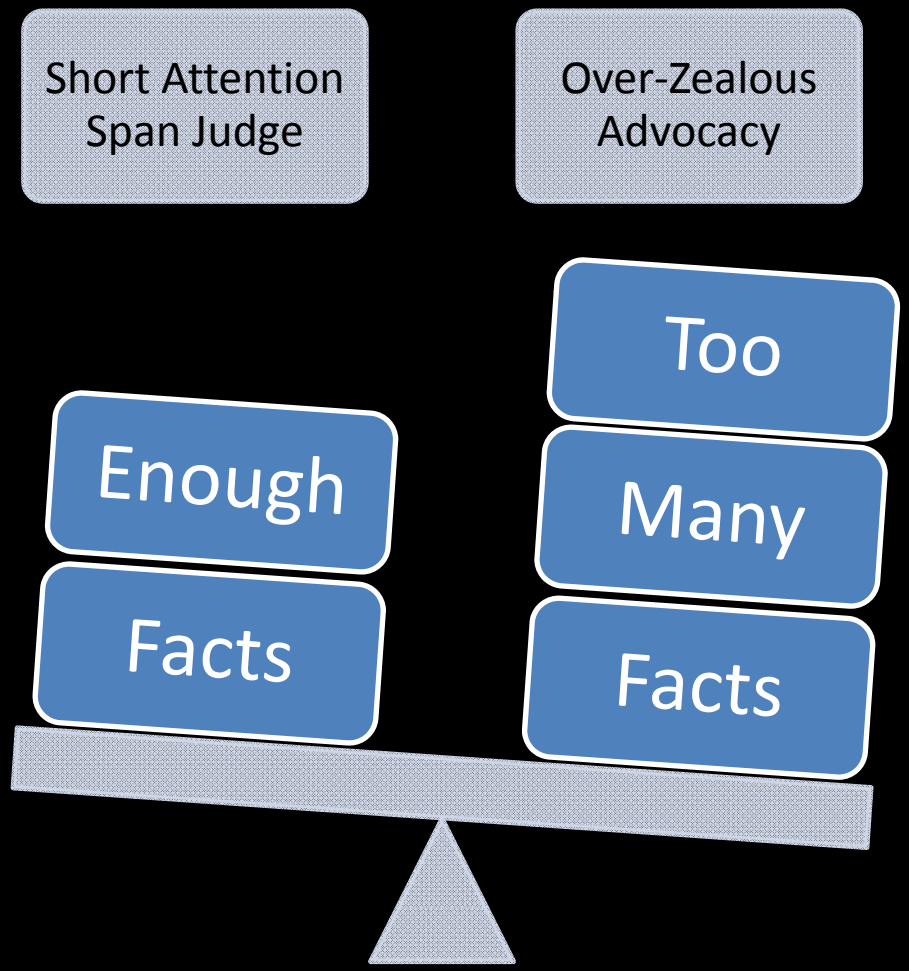
The Oral Learning Challenge

- Make your case dramatic
  - People learn best visually
    - Seeing things
    - Reading things
  - Only about 5 - 10% of learning comes from hearing
    - Must work hard to make oral testimony memorable
    - That's why we use PowerPoints in seminars

Primacy and Recency Principles

- Always put your best foot forward. Start and finish with your strongest witnesses
  - Finish each witness with a strong or helpful question and answer whenever possible
- Pop quiz: Think about these two people
  1. Generous, trustworthy, self-centered, humorless, obnoxious
  2. Obnoxious, humorless, self-centered, trustworthy, generous
  - Did you form early impressions and did it affect your final impressions?

The Beginner's Mistake



Why We Make that Mistake

- Concern for the client
  - Fear that you will not make that one good argument that would have won the case
- Education
  - Lawyers and other practitioners spend years learning lots of stuff; the desire to look smart
- Case uncertainty
  - When you don't know what you need to win, you tend to throw in the kitchen sink and hope it sticks

How to Avoid Being Boring

- Focus only on relevant facts
- Avoid unnecessary, but relevant, detail
- Do not clutter the judge's brain
  - Watch the judge's demeanor as you question
- Get to your legally-significant point quickly
  - Example: Suppose you are trying to establish what time the appellant left the office on a particular date. >

Bad Because Its Boring

1. What time do you usually leave work?
2. Do you notice usually when Ed goes home?
3. And what time does Ed usually leave?
4. Are you always able to hear Ed leave?
5. On July 1, did Ed sneak out or did you hear him?

1. Oh, around 4:30, maybe 4:35 on a busy day.
2. Yes, his cubical is next to mine.
3. He leaves about the same time I do mostly.
4. No, sometimes he sneaks out quietly.
5. Oh, I heard him alright; he was very loud yelling "I hate you, Boss," and slamming the door.

Good Because Its Focused

1. Where were you about 4:30 on July 1?
2. How do you remember where you were that day?

1. I was in my office cubicle.
2. Because Ed's cubicle is next to mine and I heard Ed yell, "I hate you, Boss," and slam the door on his way out.

Good vs. Bad and Boring

1. Why is it you so clearly recall the specifics what Jim said during the meeting? (Good and focused.)

1. And you remember that even though it was two years ago? (Don't' ask. Bad and boring.)

Decisions Decisions

- Order of evidence
- Order of witnesses
- Begin with a witness who can give an overall picture of what the case is about
  - Use later witnesses to fill in the necessary details
  - For direct examination, provide context for the judge by asking questions that tell the story chronologically
    - We tend to remember things in sequence

The Ideal Questioning Protocol

1. Closed questions to set the scene, lay the foundation
   - Were you at work on July 1 of this year?
   - Did anything unusual happen that day?
2. Open questions to allow the witness to tell the story
   - What happened that morning?
   - What did you do after that?
3. Closed questions to bring out relevant details
   - Exactly what “curse words” were used?
   - How far away when you heard the shouting?

The Value of the Open Question

- An open question calls for a narrative answer
  - Draw the witnesses attention to a subject, then
  - Allow the witness to talk about it
  - Essentially, "Tell me …"
- Frees the witness from answers being suggested by the questioner, highly credible
  - Provides more of an opportunity for the witness to demonstrate credibility
- But be careful
  - Antagonistic witness or rambler

Overly Open-Ended Questions

- A question that is too open is objectionable as "Calling for a narrative."
  - "What happened that day?"
- However, rephrasing to a more limited, but still open question, usually obtains the same result.
  - "Did anything unusual happen that day?" [Yes.]
  - "Please tell us about it."

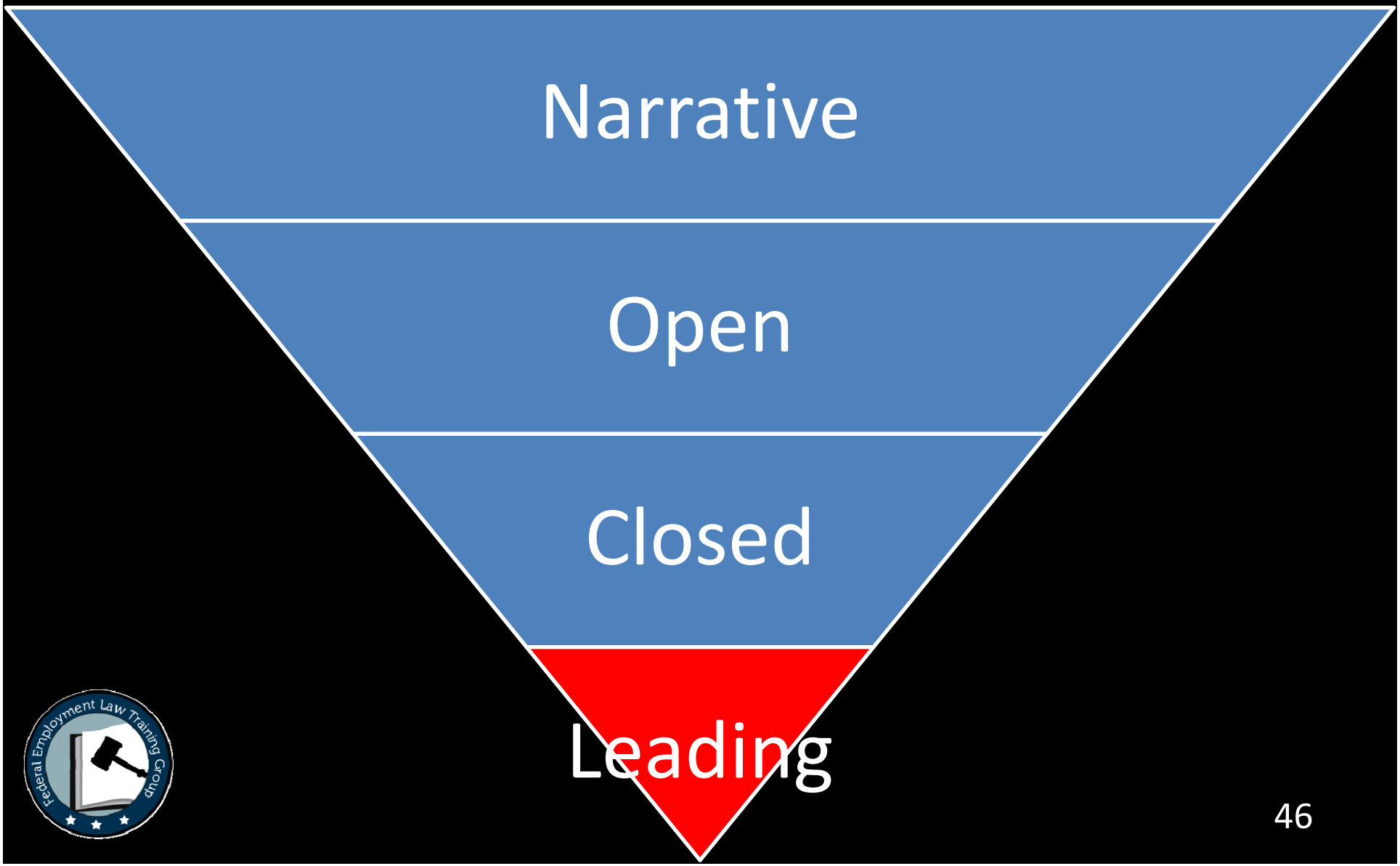
Compare: Open and Closed Questions

- Narrative questions ask for the full story.
  - "What did you do next?"
- Open questions are simply more focused narrative questions.
  - "Why did you call security?"
- Closed questions ask for a very focused response.
  - "How long did it take for security to arrive?"

Stop Short of Leading Questions

- A leading question states the desired answer, then calls for a yes/no answer.
  - You hate your supervisor, don't you?
  - The safe was left open, wasn't it?
  - You have never used vulgar language, have you?
- On direct exam, it is almost always objectionable
- On cross exam, it is almost always preferred

Direct Exam Questioning Arsenal



Make Your Examination Clear

- Avoid legalese and verbiage.
  - "Did he exit the vehicle sua sponte?"
- Use points of reference.
  - "After she took the scissors out of the drawer, what happened next?"
- Emphasize key points in a narrative answer.
  - "So you are saying that she held the scissors high over her head as she shouted?"

Getting Started

1. Personal background
2. Relationship to the case
3. Identity of location and date
4. Identity of event
5. Scene change, if relevant
   - The Direct Exam Questioning Arsenal can be used to develop each scene change.

Optional Approaches to Foundational Questions

1. Mr. Smith, please tell us the title of your position, how long you've held that position, and your organizational relationship to the complainant.
2. Mr. Smith, you've been the Director of Administration for about five years, haven't you? [Yes] And during all that time, you were the complainant's immediate supervisor? [Yes]

Establishing Witness Authority

- Where were you on the morning of December 14, 2004?
- How far were you from Mr. Smith when the fight began?
- How is your vision? Do you wear glasses? Were you wearing them on the morning in question?
- Have you ever had any problems with the Mr. Smith before? How would you describe your relationship with him prior to the incident?

Helping the Witness Succeed

- You say you don't remember the agenda for the meeting. Did you make any notes that morning?
- You don't hear very well, do you? Have you taken steps to address that problem?
- The complainant, in his affidavit, says that he was pushed. Is that a correct statement of what happened?
- Let's see if I can help you remember when that happened; was it around the time of a holiday?

Tricks of the Direct Exam Trade

- Bring out harmful matters on direct.
- Keep the transcript clear.
  - "She stabbed me right here."
- Look at the witness during the answer.
- Watch your pacing.
- Control your witness.

Handling Real Evidence

- Real evidence is something tangible.
  - Organizational chart
  - Photograph of the workplace
  - The scissors
- Most learning is based on sight, not sound.
- As real evidence has no independent significance, it must be introduced into the record through a witness.

Exhibit Entry Protocol Example

1. Hand the exhibit to opposing counsel.
   - Gives a chance for an objection.
2. Approach the witness (asking permission is optional).
3. Identify the exhibit for the record.
   - "I am handing you a photo of a government office, marked as Agency Exhibit 2. Can you identify what this is a photo of?" [Yes, that's my office.]
4. To the judge:
   - "I move for the admission of Agency Exhibit 2."

And When You Think You Are Done

- Take a minute to look back over your notes.
  - Did you ask all your planned questions?
  - Did you get an answer to all of your questions?
  - Did you move all your exhibits into evidence?
- Consult with your second-chair.
- Plan on no re-direct.
- Notify the judge that you are finished.
  - "No more questions."
  - "Pass the witness."

Preparing Yourself to Testify

CROSS EXAMINATION

Why Cross Examination

- Cross examination can bring out:
  - Inconsistencies in testimony
  - Bring out omissions in testimony
  - Establish lack of or poor opportunity to observe
  - Bias
  - Relationship to party
  - Payment
  - Fear of reprisal
  - Scripted testimony

Why Not Cross Examination

- Cross examination may not be a good idea when you have a:
  - Truthful witness who can't be shaken
  - Untruthful witness who can't be shaken
  - Witness who does no harm, or
  - Exceptionally sympathetic witness

Preparing for Cross Examination

- Remember all that discovery? Now is where it comes in handy. For each witness:
  - Review all prior statements made by the witness, sworn and unsworn;
  - Review all documents that the witness authored or received;
  - Review the deposition transcript for that witness and prepare a deposition digest that will go into your hearing notebook.

Preparing for Cross Examination

- Select only significant points of discrepancy in prior statements, testimony and documents.
- Attacking a witness on insignificant points make it look like you have nothing significant to attack the witness with. Example:
  - Is it really significant that the supervisor said in an affidavit that her meeting with the appellant lasted 2-3 minutes and in her deposition said the lasted no more than 5 minutes?

Preparation for Cross Examination

- Make sure to cross reference cross examination notes/questions with where in the record prior statements are located, deposition testimony and appropriate documents.
- Don't let a witness off the hook by giving him/her a break while you search for evidence.

Preparation for Cross Examination

- Pay close attention to the testimony of the witness at the hearing for deviations from prior statements or testimony.
- If additional cross examination points come up, take a few moments before beginning cross examination to locate what you need to impeach the witness.

Cross Examination Techniques

- The general rule is use leading questions, *i.e.*, questions that contain that answer and require only a yes or no answer, such as:
  - Isn't it true that . . .?
  - Isn't it a fact that . . .?
  - Isn't it correct that . . .?
  - Do you agree that . . .?

Cross Examination Techniques

- This is your examination, control it. Do not:
  - Let the witness answer a yes or no question with a narrative;
  - Let the witness answer yes or no and then launch into an explanation of his or her answer;
  - Let the witness answer any questions with a gesture or unintelligible noise, *e.g.*, nodding the head, shrugging the shoulders, “uh-huh”;
  - Let the witness question you.

Cross Examination Techniques

- Cross examination need not proceed chronologically, which is exactly how the witness has been prepared.
- Do not use cross examination to have the witness repeat his or her story. All you're accomplishing is to permit the witness to add something he or she forgot, or to permit the AJ to pick up on something he or she missed the first time around.

Cross Examination Techniques

- If you have something good consider starting with it.
  - It immediately plants in the AJ's mind the notion that things may not be what they appeared on direct examination;
  - It immediately puts the witness on the defensive which may lead to further mistakes on the part of the witness.

Cross Examination Techniques

- In the end:
  - Keep it as short and simple as possible;
  - Do not ask questions that allow the witness to repeat and thereby reinforce what they've already said on direct examination;
  - Do not argue with the witness;
  - Make the points you can make and then do what comes naturally to no lawyer -- sit down and shut up.

Direct Examination as Cross

- FRE 611(c):
  - Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Direct Examination as Cross

- Leading a witness on direct is permissible when the witness is the opposing party, aligned with the opposing party or hostile.
  - Question of seeking permission to lead.
- When "cross examining" the adverse or hostile witness leading questions should not be used.
  - Conduct the examination as a direct examination.

Check Out a Sample of Direct/Cross

- There is nothing magical about this audio recording, but it is typical of a standard direct and cross of a primary witness:
  - https://www.youtube.com/watch?v=Nlq2xa-R-mA

Thanks for attending
EEOC Law Week:

Basic EEO Nuts & Bolts

Good luck out there.

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