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Trials and Tribulations of Witness Examinations

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Questioning Witnesses – Start Early

Pre Trial Considerations

Client
Interview

Mediation/
Conciliation

Depositions



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THEME AND THEORY OF CASE

- *THEORY* – STARTING POINT, SIMPLE, LOGICAL, PROVABLE ACCOUNT OF FACTS LEADING TO DESIRED OUTCOME
- *THEME* – PERSUASIVE STATEMENT TO GRAB JUDGE’S ATTENTION
 - *THEORY* – FORMED AT FIRST CLIENT MEETING
 - *THEME* – DEVELOPED ONCE ALL INFO IS ASSESSED



DEPOSITION ABC's

Pa.R.C.P. 4007.1

When and why?

Tips for prep

Party v. non-party

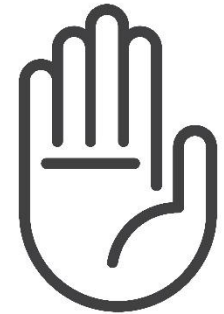
Cost considerations



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DEPOSITION OBJECTIONS

- Privilege
- Form and foundation
- Relevance
- Hearsay
- Coaching objections



Tips for Using Deposition at Trial



- Impeachment
- Trial depositions
- Unavailable witness



Elements for Direct Examination



ASSESSING EXHIBITS

- THEORY/THEME
- FOUNDATION ISSUES
 - OBJECTIONS
- ENHANCE CREDIBILITY v. DUPLICATIVE





WHAT TO ASK

- OUTLINE v. FREESTYLE (winging it)
- OUTLINE STRUCTURE AND STYLE
- QUESTION STYLE – NOT A VOCABULARY TEST



BAD WITNESS OR BAD EXAMINER

- DIRECT IS NOT A NARRATIVE
- DIRECT IS WELL PLANNED AND WELL PACED STORY
- EACH SET OF QUESTIONS HAS BEGINNING AND END



HOW TO ADDRESS YOUR WITNESS

- FIRST NAME
- Mr./Ms. LAST NAME
- PLAINTIFF/DEFENDANT
- MOTHER/FATHER
- WIFE/HUSBAND
- FORMER SPOUSE



The Facts – Good, Bad and Ugly

- ADDRESSING BAD FACTS
- HOW, WHEN AND WHY
- ADDRESSING UGLY FACTS – MOTION IN LIMINE



THE W's - OPEN ENDED QUESTIONS

Who What When Where Why ...and
How



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LEADING QUESTIONS ON DIRECT? YES

- WITNESS – HOSTILE, OPPOSING PARTY, OPPOSING PARTY AFFILIATE
 - PRELIMINARY/UNDISPUTED MATTERS
 - LAYING FOUNDATION FOR EXHIBIT



WITNESS PREPARATION



- PREPARE v. REHEARSE
- APPEARANCE MATTERS!
- PREPARING CLIENT v. THIRD PARTY



EXHIBITS – LAYING FOUNDATION

- REFRESH RECOLLECTION RULE 612
- REASONABLE RELIANCE ON EXPERT REPORT RULE 703
- PAST RECOLLECTION RECORDED RULE 803.1(3)
- PRIOR INCONSISTENT STATEMENT 803.1(1)
- BUSINESS RECORD RULE 803(6)
- AUTHORIZATION RULES 901, 902
- SUMMARIES RULE 1006



Cross Examination – The Rule

Pa.R.C.P. 611 Mode and Order of Interrogation and presentation

Scope of Cross-Examination. Cross-examination of a **witness other than a party** in a civil case should be **limited to the subject matter of the direct examination and matters affecting credibility**, however, the court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination. A **party witness** in a civil case may be cross-examined by an adverse party on **any matter relevant** to any issue in the case, including credibility, unless the court, in the interests of justice, limits the cross-examination with respect to matters not testified to on direct examination.



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CROSS EXAMINATION GOALS

- SCORE AN MANY USEFUL POINTS
- PREVENT WITNESS FROM SCORING ANY MORE POINTS AGAINST YOUR
CASE
- ESTABLISH FACTS NEEDED THAT ONLY THIS WITNESS CAN PROVIDE TO
SUPPORT YOUR CASE
- CHALLENGE OBSERVATIONS OR CONCLUSIONS OF AN ADVERSE
WITNESS



IMPEACHMENT

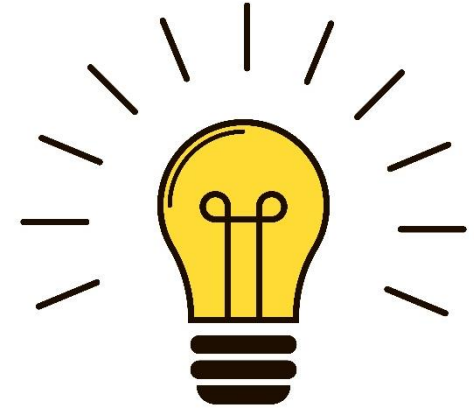


- Pa.R.C.P. 607
- Witness credibility may be attacked by any party, including the party calling the witness
- Witness credibility may be impeached by any relevant evidence

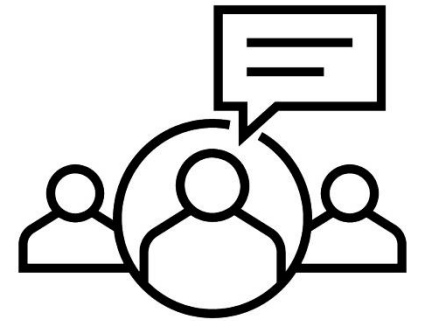


TIPS FOR EFFECTIVE CROSS

- ELICIT FAVORABLE FACTS
- IMPEACH CREDIBILITY
- QUESTION IN SMALL SEGMENTS
- BUILD TO CONCLUSION
- DO NOT GET CAUGHT UP ARGUING WITH WITNESS
- KNOW WHEN TO QUIT (sit down and shut up rule)



EXPERTS



If scientific, technical or other specialized knowledge beyond that possessed by a layperson will ***assist the trier of act*** to understand the evidence or to determine a fact in issue, a witness qualified as an ***expert*** by knowledge, skill, experience, training or education ***may testify in the form of an opinion*** or otherwise.



DO YOU NEED AN EXPERT? – THE RULE

Pa.R.E. 702

A witness who is **qualified** as an expert by knowledge, skill, experience, training, or education **may testify in the form of an opinion** or otherwise **if**:

- (a) the expert's scientific, technical, or other **specialized knowledge** is beyond that possessed by the average layperson;
- (b) the expert's scientific, technical, or other specialized knowledge will **help the trier of fact** to understand the evidence or to determine a fact in issue; **and**
- (c) the expert's **methodology is generally accepted** in the relevant field.



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BASIS FOR EXPERT'S OPINION

Pa.R.E. 703

An expert may base an opinion on **facts or data in the case that the expert has been made aware of or personally observed**. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they **need not be admissible for the opinion to be admitted**.



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OPINION ON ULTIMATE ISSUE – ABSOLUTELY!

Pa.R.E. 704

An opinion is **not objectionable** just because
it embraces an ultimate issue.



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QUALIFYING THE EXPERT

- Voir dire (French – to see to speak; to speak the truth)
- Waive or stipulate?
- Challenging qualification of proposed expert



Voir Dire – Questions/Topics for Cross

- Lack of education
- Deficient training
- Lack of skill implementing objective testing
- Lack of adequate information
- Improper facts, test procedures, or legal principles



QUESTIONING THE EXPERT – REDUCING THE SNOOZE FACTOR

- Questioning chronologically – what were you hired to assess, what did you next...
- Questioning thematically – start with conclusion and follow theme
- Avoiding technical jargon



Expert Witnesses – Issues to Consider

- REPORTS (must have and must produce in advance?)
- STAYING IN COURTROOM DURING TESTIMONY OF A PARTY OR OTHER EXPERT'S TESTIMONY
- HYPOTHETICAL QUESTIONS
- LEARN THE FIELD BUT KNOW YOUR LIMITATIONS
- PREP WITH YOUR EXPERT OR HIRE CONSULTING EXPERT
- **ATTACK AREAS OF SUBJECTIVE JUDGMENT**



OBJECTIONS TO ADMISSION OF THE EXPERT'S REPORT



- CUMULATIVE
- INCLUDES HEARSAY
- LACK OF FOUNDATION



Testimony By Electronic Means

Pa.R.C.P. 1930.3

With the approval of the court upon good cause shown, a party or witness may be deposed or testify by telephone, audiovisual or other electronic means at a designated location in all domestic relations matters.



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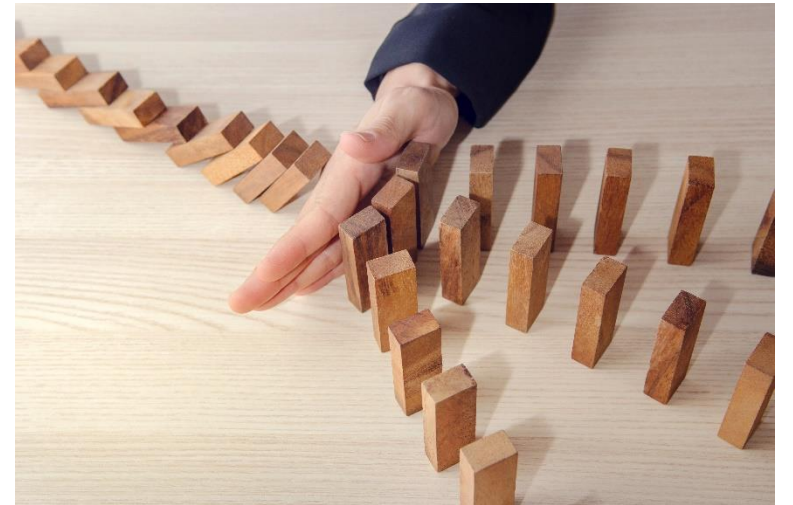
The Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; **nor shall be compelled in any criminal case to be a witness against himself**, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.



KEEPING YOUR CLIENT OUT OF TROUBLE

- ADVANCE PLANNING – criminal charges pending
 - PFA
 - CUSTODY
- ADVANCE PLANNING – failure to report or under reporting income
 - SUPPORT/DIVORCE



THE WITNESS SAID WHAT???

- INVOKING FIFTH AMENDMENT DURING TRIAL
- GROUNDS FOR OBJECTION?
- WHAT TO SAY
 - I'm taking the Fifth
 - On counsel's advice, I invoke my right under the Fifth Amendment not to answer, on the grounds I may incriminate myself.
- CAN IT BE USED STRATEGICALLY?



AND NOW, SOME LEVITY

Actual excerpts from courtroom testimony...

Attribution: Charles M. Sevilla has compiled some of the funniest exchanges from justice halls between defendants and plaintiffs, lawyers and witnesses, juries and judges, and released a book of court records called *Disorder in the Court*. (<https://www.boredpanda.com/funny-court-reports-disorder-in-court/>)



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There are no stupid questions... well maybe some

- ATTORNEY: She had three children, right?
- WITNESS: Yes.
- ATTORNEY: How many were boys?
- WITNESS: None.
- ATTORNEY: Were there any girls?
- WITNESS: Your Honor, I think I need a different attorney. Can I get a new attorney?



... and more

- ATTORNEY: How was your first marriage terminated?
- WITNESS: By death..
- ATTORNEY: And by whose death was it terminated?
- WITNESS: Take a guess.



... and more

- ATTORNEY: The youngest son, the 20-year-old, how old is he?
- WITNESS: He's 20, much like your IQ.



... and more

- ATTORNEY: What was the first thing your husband said to you that morning?
- WITNESS: He said, 'Where am I, Cathy?'
- ATTORNEY: And why did that upset you?
- WITNESS: My name is Susan!



... and more

- LAWYER: Are you married?
- WITNESS: No, I'm divorced.
- LAWYER: And what did your husband do before you divorced him?
- WITNESS: A lot of things I didn't know about.



... and more

- ATTORNEY: Is your appearance here this morning pursuant to a deposition notice which I sent to your attorney?
- WITNESS: No, this is how I dress when I go to work.



... and more

- LAWYER: What is your marital status?
- WITNESS: Fair.



... and just one more

- **LAWYER:** Did you tell your lawyer that your husband had offered you indignities?
- **WITNESS:** He didn't offer me nothing. He just said I could have the furniture.



DEPARTING THOUGHTS

"If I had eight hours to chop down a tree, I'd spend six sharpening my axe."

— Abraham Lincoln



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Special thanks to Ken Horoho for several of the slides in this Power Point!



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