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Cross-Examination Without a Comfort Blanket

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"We may have three principal objects in the study of truth: one to discover it when it is sought; another to demonstrate it when it is possessed; and a third, to discriminate it from the false when it is examined."[2]

The adage "never ask a question on cross-examination to which you don't know the answer" sometimes reminds me of my old baseball coach's admonition: "Don't give him anything good to hit, but don't walk him." The ideal is, by definition, a worthy object. But one also needs to know how to handle circumstances when the ideal is unattainable.

In cross-examination, the "ideal" contemplates circumstances allowing examination of a witness solely based on questions previously asked and answered by a witness in deposition. In such cases, the witness either will testify as he or she did in deposition, or provide an inconsistent answer. Should a witness deviate from prior deposition testimony, counsel may clutch the comfort blanket afforded by the ability to read the contrary deposition testimony into the record.

But the comfort blanket is not always available. In this article, I discuss those (often invigorating) occasions when counsel may need to ask questions never posed in deposition. The skill is a critical one in reinsurance arbitration, where third parties often will testify but once, and where the economies of an arbitration, or strategic considerations, may weigh against deposing a party witness even when the witness has been listed to appear at the hearing. While this discussion includes circumstances in which counsel may *elect* to reserve a line of questioning for the hearing, this article offers no excuse for neglecting to acquire necessary information during the disclosure phase. For a pilot, "flying blind" signifies a skill, not a goal.

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The skill of cross-examining a witness "blind" - *i.e.*, employing questions not previously answered in deposition - is an important one, particularly in arbitration. In arbitration, there are at least five instances, discussed below, in which this skill is valuable.

Instances When Prior Testimony May Be Unobtainable, or Unwanted Third-Party Subpoenas

The most common instance in which counsel may need to cross-examine without a comfort blanket involves third-party witnesses subpoenaed to appear in the proceeding. Recent decisions have held that under the Federal Arbitration Act, a third-party witness may not be compelled to give a deposition.[3] However, third-party witnesses may be subpoenaed to testify before the arbitration panel. Some decisions describe such an examination as part of the "hearing" itself, though the FAA simply refers to the arbitrators' power to call a witness "... to attend before them or any of them ..."[4] But regardless of whether such a proceeding occurs during the main hearing, or in deposition-style examination before a single arbitrator, it is probable that the examination will not be repeated. Counsel often has but one chance to question a third-party witness who is appearing pursuant to a subpoena. Accordingly, unless there has been an opportunity to interview the witness in advance, counsel necessarily will be asking questions to which the witness's answers are unknown.

Arbitral Economy or Rulings Limiting Depositions

Criticisms of increased discovery in latter day arbitration sometimes overlook a critical factor: the massive increase in the amounts in dispute. Few participants would complain about multiple depositions in an arbitration of a $50 million dispute. Many arbitrators

consider a sliding scale of efficiency and disclosure, in which the amount at stake may properly justify increased discovery.[5]

In the small case, excessive discovery more easily can destroy the value of the process. Neither side wins in a proceeding in which $250,000 is awarded while the victor expends $450,000 in fees and expenses. Thus, in the small case, the panel may limit the number of depositions, though not necessarily in lock-step with the number of hearing witnesses.

Likewise, a party may decide to arbitrate "on the cheap." This approach may even be disconcerting to an opponent who comes to realize the other party is in an advantageous financial position from minimizing, on a relative scale, its financial investment in the proceeding. A dramatically unbalanced expense burden can increase the relative settlement pressure for the party who is paying more to arbitrate if it concludes there is no linear correlation between expenditures and odds of success.

Thus, whether at the direction of the panel or a party, the interest of economy may limit depositions.

The "Surprise" Hearing Witness

Although it is common practice for parties to exchange preliminary lists of hearing witnesses, surprises of one sort or another do occur. For example, parties occasionally submit heavily populated lists from which opposing counsel must distinguish the witnesses likely to actually appear from those witnesses a party has listed merely "in an abundance of caution." In the small or even mid-sized arbitration, a party might forego deposition of a seemingly peripheral witness, who nevertheless may appear at the hearing armed with direct or (more often) rebuttal testimony. Or, an opponent's position or evidence during the hearing might open the door to their own employee being called to testify even though not listed (and not deposed). The party seeking such an appearance might be granted this right without (necessarily) an accompanying opportunity to depose that witness. The fluid nature of some arbitrations, therefore, can create a risk of "surprise" different than encountered in litigation.

Horse trading may also limit depositions. Years ago a lawyer complained to me that the CEO of his client had informed him: "If I am deposed, you have seen your last case from us." The CEO was not deposed. Neither, however, were one or more executives of the opponent who previously had been slated for deposition.

Late Emerging Issues

A corollary to the "surprise witness" is a more common occurrence: the "surprise *issue*." Particularly in the complex case, it may be only after the last document has been produced and the last deposition taken, that all the issues come to light. I recall an arbitration many years ago in which only late in the disclosure process did it emerge that the cedent had sought to place a prior iteration of the risk in the London Market a year before it placed it with this reinsurer.

At the hearing, the cedent's witnesses admitted that essentially the same risk, though styled slightly differently, had been submitted to, and declined by, a Lloyd's syndicate. The reinsurer's underwriter then testified he had, per his regular practice, inquired regarding prior declinations and had been informed there had been none. He stood up to cross-examination, and thus the materiality of the nondisclosure was established. Thus, in that proceeding, testimony adduced for the first time at the hearing proved critical.

Forbearance in Aid of Securing Candor

The first four instances discussed above may be categorized as exigencies. They concern situations primarily arising from situations beyond counsel's control, though - as in the case of the "surprise witness" - the party's election, perhaps for reasons of economy, to limit depositions can play a role.

The last situation in which "blind questioning" may arise is purely discretionary. There are situations in which counsel believes that an opponent's representative is sufficiently calculating that the element of surprise is the best means of obtaining a candid and straightforward answer. "Forewarned is forearmed" (and rehearsed), and a well-prepared witness who has had a rehearsal, by way of deposition, can be all the more difficult at the Hearing.[6]

Accordingly, counsel may prefer to develop a line of questioning that not only was not deployed during deposition, but likely will not have been envisioned by opposing counsel. In a complex case, in particular, there may be documents that, when looked at collectively, establish a point that neither opposing counsel nor the witness likely appreciates. If so, the witness may not have been prepared for the line of questioning asked at the hearing.

For example, various documents from different sources might, when presented seriatim, demonstrate the witness had a pattern of paying little mind to loss notices for amounts less than $1,000,000. If the witness is led through these documents in deposition, he may concede (let us assume, correctly) that he did not seem to pay attention to small loss notices. However, by the time of the hearing, having been schooled in advance by the deposition experience, he may "clarify" that for each of these notices there was some distinction - say, for example, seemingly remote liability, or retrocessional protection, or (the all-purpose) his being away on holiday - that explains why he ignored those notices when he absolutely would have not have ignored a loss advice had he received it for *this claim*. If counsel does not trust this witness to be frank, the better strategy for eliciting the truth may be to reserve the line of questioning for the hearing.

Regrettably, some witnesses lie or dissemble under oath. As opposing counsel, there is nothing wrong with employing surprise in aid of obtaining the truth. And bringing the truth out live in front of the Panel makes a stronger impression than reading deposition testimony to the witness and asking the witness whether the deposition testimony was correctly recorded.

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Techniques for "Blind" Cross-Examination

When the comfort blanket of deposition testimony is absent, increased preparation in connection with the hearing is essential. Asking a new line of questioning at the hearing requires a very different approach than "ideal" cross-examination. A number of practice points exist that may increase the likelihood of success.

Inform the Panel

First, if blind questioning is the result of exigencies, such as documents produced by a third-party after a party witness was deposed, inform the panel of this. In a neutral tone, simply comment: "I didn't have these documents when I took Ms. Jones' deposition, so I am going to ask some new questions today." In arbitration, no lay jury being present, counsel should be permitted reasonable latitude during examination to informally address the panel concerning the direction of the proceedings. Thus, if a deposition was foregone for reasons of economy, counsel might observe: "It seems that in a case of this magnitude five depositions were enough, so we did not take Mr. Smith's deposition. But here he is, so you and I will be hearing his answers to my questions for the first time."

Concomitantly, the arbitrators should allow appropriate latitude to conduct some of the "discovery" during the hearing. Allowing this leeway during hearings can mitigate against a perceived need to depose every possible witness prior to the hearing. The potential benefit: streamlined discovery, albeit in exchange for a somewhat lengthier hearing. After all, there was a time when the hearing itself often was *the* process for adducing key facts.

The arbitral environment differs from a jury trial. There, each hour in the jury box may be regarded by a juror as an imposition, as the juror has been compelled to serve for fifteen dollars a day. For this reason, trial cross-examination must be short, precisely targeted, and conservative. Professional arbitrators, by contrast, are not as susceptible as lay jurors to mere impressions. At the conclusion of the hearing, they usually will have ample time to read the transcript. Thus, it will do little good to have left the reinsurer's underwriter trembling after a ten minute examination confined to "picking the low hanging fruit" if, for example, the record fails to show the underwriter knew of facts your cedent client is accused of having concealed.

Questions from the Panel

Questioning from the panel is welcome, valuable, and a well-established prerogative of an arbitrator. The examination during the hearing of a witness who has not been deposed, however, may warrant careful discretion on the part of arbitrators when interposing their own questions. There is a risk that the question interjected may be one the attorney intended to deploy later, only after the witness had been ringed in and committed to the desired answer, or that the question could cause the witness (correctly or incorrectly) to assume that a particular answer or fact might be material.

To illustrate, where the issue was whether "underwriting guidelines" were regarded as mandatory:

Q. Are there risks in excess of $10 million you believe could be written profitably assuming adequate premium is charged?

A. Yes.

Q. Did you believe such risks generally would be profitable?

A. Yes.

Q. All other things being equal, they would generate more profit than a $1 million risks?

A. Assuming the risk of loss is not proportionately higher, yes.

Q. Were there one or more occasions on which you had the opportunity to write a risk larger than $10 million but did not do so?

A. Yes.

Q. Do the Underwriting Guidelines contain a provision setting a limit on writing risks in excess of $10 million?

A. Yes.

Q. In ten years of using these and the predecessor Guidelines, did you ever write a risk in excess of $10 million?

A. No.

Q. So ...

[Interjection]: What did you feel was the purpose of these Guidelines?

A. Oh, they were simply there for guidance.

"Stepping on" a line of cross-examination has the potential to impede a party's ability to elicit important facts, or, to develop facts in an intelligible sequence. In court, in extreme circumstances, it has been deemed prejudicial or unfair to a party.[7] Thus, when cross-examinations are not unduly lengthy, many arbitrators reserve their questioning until the attorney has completed the examination.

However, as discussed above, examination of a witness who has not previously been examined may be relatively prolonged. Panel members may worry that having to ask a question in the fourth hour concerning testimony given in the first thirty minutes may - aside from the risk of simply forgetting why one wanted to ask the question - raise the problem of having to bring the witness's mindset back to the context concerning which he had been testifying hours ago. In addition, counsel's questioning may simply neglect to elicit a critical foundational fact - such as the witnesses' relevant experience or authority - without which the witnesses' substantive testimony may be of no evident value. Indeed, there are many instances in which arbitrators may need to interpose questioning.

In those circumstances, there are a few precautions that can insulate against any undue risk of treading on a valuable line of cross-examination that may be on the verge of administering the *coup de grace*. Counsel may be asked if he or she is near to honing in on a point. A few questions later might be an ideal time for interjections by the panel, while the iron is still hot. And for particularly critical lines of questioning, counsel might take the initiative to apprise the Panel in advance that a particularly important line of questioning may seem at first somewhat mystifying, but that counsel intends to tie things up before finishing, bringing out the relevant foundational facts before concluding, if not necessarily in the order one might develop them when employing a purely narrative approach.

Counsel Should Employ Documents Intelligently to Elicit the Truth

While, as I have observed, the maxim "never ask a question to which you do not know the answer" is over-used, counsel should, at a minimum, have an answer in mind. And that answer should be directly or inferentially supported by other evidence.

The other evidence may include testimony of others, but will principally consist of the documents. Employing documents effectively in cross-examination serves multiple purposes, including: (1) securing testimony consistent with the documentary evidence, (2) keeping the witness honest, and (3) assuring the panel that the questioning is based upon evidence, and not designed simply to "fish" or harass.

Ineffective use of documents is a common occurrence. Directing an adverse witness to read a document - particularly one written by another - is seldom the most effective use of a document. It is a tactic sometimes justified in front of a lay jury, in which counsel perceives the need, through repetition, to hammer home a key point throughout the trial. By contrast, an arbitration panel, having been furnished with pre-hearing briefs, will have a far better grasp than a jury of a party's themes entering the hearing. Critical documents can be emphasized in summation. And the arbitrator appointed by a party fulfills a proper role in ensuring that during deliberations the other panel members do not overlook important evidence. Accordingly, except for occasions when witnesses make statements that contradict a writing, so that having it read during cross-examination demonstrates the witness's lack of credibility, there is seldom cause for having documents merely read by an adverse witness.

The effective use of documents should be based on the same analytical approach one employs in developing cross-examination generally. While others' practices may differ, mine typically begins with two questions. First, if X were actually true, as I expect the witness will claim, what would the witness have done that would have been consistent with X? Second, if X is untrue, as I believe it is, what might the witness have done that would have been inconsistent with X?

To illustrate, suppose I am concerned an adverse witness will testify, incorrectly, that the cedent classified pregnancy as a "disability" risk. In that case, I would focus on documents concerning how the cedent treated pregnancy claims by policyholders. Were they covered as disability, or classified as "medical" risks? If my hypothesis is that pregnancy had customarily been treated as medical business, I would seek documents indicating such

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claims had been ceded under a medical stop loss treaty. Cross-examination built upon such a documentary record is on solid footing, even if the ultimate question - How did the company classify pregnancy risks? - had never before been answered by this particular witness.

When documents establishing an evidentiary point are lacking, documents can still be used to further end of candor. A witness might be questioned on a preliminary topic on which she may be inclined to dissemble. "Ms. Jones, at these round-table meetings, management recognized that the seventeen percent ceding allowance afforded a profit even when the reinsurer would experience a loss. Correct?" Assume the witness denies this, but then is confronted with documents showing she was present at two meetings where this was acknowledged. When the questioning then moves to the central topic, the witness may worry that her inclination to make a blanket denial will similarly be contradicted by the record. She does not want to lose all credibility, and may therefore work harder to give an accurate, rather than an argumentative, answer.

Is it proper for counsel to bluff; that is, to physically pretend to hold an impeachment document when there is no such record? Opinions are mixed. In my view, the guidepost must be a search for the truth.[8] Thus, it is shabby practice to buffalo a nervous witness by waving a document that is really only the hotel bill. On the other hand, counsel always should demonstrate total command of the record early in an examination, so the witness knows he will be exposed if he deviates from reality. I remember one such examination where, after the documents "corrected" a witness twice, he answered a later question with: "Do you have a document there that says so?" I gave him the only appropriate response: "I think you should answer as if I had a document proving the truth."

Finish Strong

Breaking one rule - the rule against asking questions to which you do not know the answer - can be sound practice. However, breaking multiple rules at the same time is simply foolish. Thus, if one is going to ask new questions at the hearing, do not make these your concluding questions. Asking new questions does carry risk. Unfavorable testimony at the conclusion of an examination tends to resonate more than bad testimony sandwiched between line of questioning that undercuts the witness' credibility. Reserve to the end at least a few questions for which you do know the answer.

If the witness provides a bad answer that, while incorrect, cannot easily be disproved by the evidence, you may need to resist the temptation to swiftly change the subject. Doing so will only temporarily avoid highlighting the answer. Opposing counsel likely will bring it out again on redirect and, of course, during summation.

Rather than skip forward rapidly to some new topic, experienced counsel hold in reserve a line of questioning going to the reliability of the assertion. Why wasn't the action described by the witness documented? Does the witness remember other similar instances and, if not, why is the witness's recollection so strong with regard to this instance? I once asked a witness why she remembered her underwriting intent from twelve years ago so clearly when she had difficulty recalling more recent decisions. This was somewhat risky, as a possible answer could have been along the lines of "I remember it because I had a big argument with my colleague and it all happened on my birthday;" i.e., the kind of self-corroborating details that validate a recollection. Instead, however, she answered: "I remember this issue, because it is important." "Important for what?" Again a somewhat risky follow-up. The answer might have been: "Important, because back in 1992 I'd had a similar problem on the XYZ Program." Instead, the answer was: "Important for this case." That was the signal to conclude on that subject. The witness had now suggested that not only was her recollection the result of straining to remember (probably during preparation with counsel), but also that the recollection may have been colored by her interest in seeing her employer prevail.

The risk of a harmful (corroborative) answer certainly exists, but it is a tolerable one. After all, the witness had begun by giving an unqualified answer which the panel might have presumed was based on a well-founded recollection. Further testimony corroborating her memory may be undesired, but does not inflict a fresh wound. This is often a risk worth taking when weighed against the

potential that the witness's declaration is merely a rehearsed response, and not a firmly held memory.

Conclusion

Arbitration presents more opportunities for cross-examination without a comfort blanket than litigation. Third-party testimony "before the panel," numerical and time limitations on depositions, and greater latitude before experienced panels, each may put counsel on the spot. Either ask a question for which one does not know the answer; or play it safe.

For attorneys who litigate as well as arbitrate, the opportunity to examine a witness fresh (and live) can be an invigorating exercise of truly thinking on one's feet. The experience is a throwback to nineteenth century practice, in which intuiting human nature often substituted for use of prior recorded testimony as a basis for impeachment.

The ability of counsel to cross-examine without a prior deposition does not justify a proceeding that visits surprise, unfairly, upon either party. The positions of the parties, and their evidence, are appropriately made known in pre-hearing briefing. If a party witness gives seemingly dispositive testimony that has not been alluded to in pre-hearing briefing, the panel may wonder about possible gamesmanship and may have a few questions of its own for the witness, counsel, or both. The object always must be to distill out the truth in the most efficient manner. This requires counsel who are able to cross-examine based on varying degrees of discovery, and arbitrators who acknowledge the additional latitude during the hearing that is appropriate in such cases.▼

1 The views expressed herein do not necessarily reflect those of the author's clients.

2 Blaise Pascal, Minor Works p. 1 (Harv. Classics 1909).

3 *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 408-10 (3d Cir. 2004).

4 9 U.S.C. §7 (West 2007).

5 The ARIAS•US Practical Guide to Reinsurance Arbitration Procedure, Chapter IV, Comment E provides: "The Panel has considerable discretion to limit the amount and type of discovery available to the parties in the arbitration. The Panel's objective should be to give each party a fair and reasonable opportunity to develop and present its case without imposing undue burden, expense or delay on the other party(ies). No particular pattern suits all reinsurance arbitrations. In resolving disputes, the Panel should exercise its discretion and strike the appropriate balance for the given case between enabling the parties to obtain relevant discovery necessary to their respective cases, and protecting the streamlined, cost-effective intent of the arbitration process."

6 As Justice Jackson famously observed: "I think every lawyer knows that one of the great questions in this case is credibility, and that if we have, in cross-examination, to submit every document before we can refer to it in cross-examination after we hear their testimony, the possibilities of useful cross-examination are destroyed. [W]e have had the experience of calling document after document to their attention, always to be met with some explanation, carefully arranged ..." Excerpt No. 2 at the Testimony of Hermann Goering (Mar. 19, 1946), posted at www.law.umkc.edu/faculty/projects/ftrials/nuremberg. (The author does not equate any of his opponents with Justice Jackson's adversary).

7 *See, e.g., Harding v. Noble Taxi Corp.*, 182 A.D. 2d 365, 370 (1ST Dept. 1991) ("[T]he trial court's persistent interjection into the questioning and testimony of the plaintiff's expert hampered her ability to establish her case.").

8 *See* Phillip H. Corboy, Cross-Examination: walking the Line Between Proper Prejudice and Unethical Conduct, 10 Am.J. Trial Advoc. 15, 13 (1986)("Truth, as an absolute, is an incidental function of the adversary process. ....[A] lawyer may effectively employ trial skills and tactics that make a witness appear unreliable, although that countenance stems more from the artifice of counsel's skillful questions than any discomfiting revelations by the witness. ... Out of the process of destruction on cross-examination, the truth, as spoken, is whittled. ... From this dialectic, a terrible beauty is born; it is called justice.").

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