

At Cross-Purposes

*Using Cross-Examination to Defend against
the Policyholder's Attacks at Trial*

Asim K. Desai

Rina Carmel

Carlson Calladine & Peterson LLP

Wells Fargo Tower

333 South Grand Avenue, Suite 3500

Los Angeles, California 90071

(213) 613-1191

(213) 617-1191 [fax]

www.ccplaw.com

adesai@ccplaw.com

rcarmel@ccplaw.com

ASIM K. DESAI is the managing partner of Carlson, Calladine & Peterson LLP's Los Angeles, California, office, where he specializes in representing property and casualty insurers in bad faith litigation, as well as commercial business disputes. Asim's experience includes both prosecuting and defending high-exposure, complex cases involving bad faith, professional liability, contractual disputes including fraud, product liability, and catastrophic injury. Asim is a frequent speaker on insurance law and litigation topics. Asim's most recent trial victory, involving claims of breach of contract, breach of the implied covenant of good faith and fair dealing and fraud in connection with a first party property claim, resulted in a jury verdict in favor of the insurer.

RINA CARMEL is a senior associate with Carlson, Calladine & Peterson LLP in Los Angeles, California. She specializes in all aspects of complex coverage litigation, including defense of bad faith suits, contribution and declaratory relief actions; commercial and intellectual property litigation; and appeals. Rina obtained a favorable appellate opinion on behalf of her client in *Century Surety Co. v. United Pacific Insurance Co.*, 109 Cal. App. 4th 1246 (2003), *review denied*, No. S117884 (Cal. Sept. 17, 2003). Rina is a frequent speaker and has written several articles on topics in insurance law, including bad faith, duty to investigate, independent counsel, late notice, additional insurance, advertising injury, coverage for intellectual property and techno-tort claims, and coverage for pandemics. She is active in the American Bar Association's Insurance Coverage Litigation Committee and currently serves as a web site managing editor for the committee.

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I. Introduction

The one who first states a case seems right, until the other comes and cross-examines.

—Proverbs 18:17

Suits against insurers now constitute approximately 20 percent of all suits filed. Insurers have, on average, 1696 cases pending—or five times as many lawsuits as the next-highest sectors, energy (with 364 suits), retail (333), and financial services (300). Insurance Journal, *Litigation Trends Continue to Mount Worldwide; Insurers Face Five Times the Average Number of Lawsuits*, www.insurancejournal.com/news/national/2006/10/11/73220.htm (Oct. 11, 2006). Seventeen percent of insurers reported having at least 50 cases with \$20 million or more at stake. *Id.* The number of class action suits filed against insurers surged from 1993 to 2005, stemmed only in part by the passage of the federal Class Action Fairness Act of 2005. Insurance Journal, *Study: Class Actions Against Insurers Surged in 1990s; Many Resolved Behind Closed Doors*, www.insurancejournal.com/news/national/2007/04/10/78621.htm?print=1 (Apr. 10, 2007); 28 U.S.C. §§1332(d), 1453, 1711–15; *see* Fed. R. Civ. P. 23. These alarming statistics, coupled with an increasingly aggressive plaintiffs' bar, mean that insurers must mount an effective defense.

Mounting an effective defense will, in almost every case that goes to trial, involve cross-examination of the plaintiff-insured, as well as the insured's experts. A defendant's right of cross-examination is fundamental to American jurisprudence. Indeed, the United States Supreme Court has held that “[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.” *Goldberg v. Kelly*, 397 U.S. 254, 269–70 (1970). The Federal Rules of Evidence, as well as most state equivalents, codify the defendant's right to cross-examination. *See, e.g.*, Fed. R. Evid. 607 (“The credibility of a witness may be attacked by any party...”); Fed. R. Evid. 611 (contemplating that court's control of examination of witnesses includes cross-examination); Cal. Evid. Code §711 (“At the trial of an action, a witness can be heard only in the presence and subject to the examination of all the parties to the action, if they choose to attend and examine.”); 735 Ill. Comp. Stat. 5/2-1103(b) (“If the evidence is presented by oral examination, an adverse party *shall* have the right to cross-examination.”) [emphasis added]; Ga. Code Ann. §24-9-64 (“The right of a thorough and sifting cross-examination shall belong to every party as to the witnesses called against him...”).

Defendant-insurers are wise to anticipate that the insured will cross-examine the insurer's witnesses—or even call the insurer's witnesses on direct examination as hostile or adverse witnesses. *See, e.g.*, Fed. R. Evid. 611(c) (“When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.”); Alaska R. Evid. 611(c) (“On direct examination, leading questions should not be allowed except: . . . (3) when the witness is hostile, an adverse party, or identified with an adverse party.”). Therefore, an effective defense will likely include rehabilitating the insurer's witnesses following cross-examination by counsel for the insured.

This article summarizes the law applicable to cross-examination and rehabilitation of witnesses, offers practical tips for effective cross-examination and rehabilitation, and provides examples of successful cross-examination and rehabilitation. Technology has become an integral part of most litigation, and this article reviews useful technology. In addition, since effective examination at trial results from careful planning throughout the life of the case, this article includes essential discovery and pretrial steps.

II. Sometimes the Best Defense Is a Good Offense: General Principles for Effective Cross-Examination of the Insured and Its Experts

If I can cross him any way, I bless myself every way.

—William Shakespeare

Much Ado About Nothing, act I, sc. 3.

Often, the insurer's cross-examination of the insured and its experts can be the deciding factor in the case. An effective cross-examination can elicit testimony favorable to the insurer, demonstrating that the insurer acted in a proper and timely fashion, as well as establishing coverage defenses, such as the insured's failure to cooperate or provide timely notice. An effective cross-examination can attack the insured's credibility—persuading jurors that the insured's case is flawed.

Pertinent rules regarding cross-examination. The jurisdiction, court, and judge may each have rules governing cross-examination. Knowing these rules is fundamental to effective cross-examination and controlling the witness. In addition, judges will not hesitate to rebuke counsel for violations of the rules—even in front of the jury—so it is important to become familiar with applicable procedure.

Rules for cross-examination are typically found in the jurisdiction's rules of evidence. The Federal Rules of Evidence are available on-line at http://www.law.cornell.edu/rules/fre/index.html#article_vi. State rules are available *via* links at http://expertpages.com/news/state_rules_of_evidence.htm or <http://www.findlaw.com/casecode/>. Many states' rules track the Federal Rules of Evidence. The states' rules are not necessarily identical to the Federal Rules of Evidence, so it is important to read the rules and comments to the rules carefully.

Local rules are often available on the court's web site or by calling the court clerk.

The judge's individual procedures, if any, may be available through the court's web site, or the judge may have a handout regarding her trial procedure. Individual procedures may govern where counsel stands during cross-examination, whether counsel may walk around during cross-examination, whether counsel may approach the witness to show him an exhibit, or whether the bailiff acts as intermediary.

Timing of cross-examination. Cross-examination typically follows direct examination. *See, e.g.*, Cal. Evid. Code §772(a) ("The examination of a witness shall proceed in the following phases: direct examination, cross-examination, redirect examination, recross-examination, and continuing thereafter by redirect and recross-examination."). In federal court and most states, the judge retains authority to control the order of examination. *See, e.g.*, Fed. R. Evid. 611(a) ("The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence..."); Mont. Code Ann. §26-10-611(a) (same); Cal. Evid. Code §772(b) ("Unless for good cause the court otherwise directs, each phase of the examination of a witness must be concluded before the succeeding phase begins.").

Examples of exceptions to the direct, cross, redirect sequence include

- *Busy doctors.* For busy witnesses, such as doctors, the court may permit a party to postpone cross-examination until later in the trial. To avoid postponing cross-examination, opposing counsel may opt to videotape the doctor's deposition in lieu of an appearance at trial. *See, e.g.*, Cal. Evid. Code §§2025.340 (procedure for videotaping deposition), 2025.620 (use of deposition as evidence).
- *Several complex topics.* Where a witness testifies on several complex topics, the court may permit cross-examination to proceed after direct examination on each topic concludes, so to avoid confusing the jury.

- *Establishing foundation to avoid prejudice.* The court may allow opposing counsel to interrupt direct examination to “*voir dire*,” or cross-examine, the witness on foundational facts. Cal. Evid. Code §§402–405. Doing so prevents the witness from testifying regarding unfounded facts that may be prejudicial, thereby reducing the risk of a mistrial.

Scope of cross-examination. In federal court and most states, the scope of “[c]ross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness...” Fed. R. Evid. 611(b); Ohio R. Evid. 611(b) (“Cross-examination shall be permitted on all relevant matters and matters affecting credibility.”). With respect to the subject matter of the examination, the trial court retains discretion to decide what constitutes the “scope of direct examination.” *Garcia v. Hoffman*, 212 Cal. App. 2d 530, 536 (1963); Cal. Evid. Code §§761, 773(a), 785. Rule 611(b) makes clear that opposing counsel may inquire into the witness’s credibility, without regard to the scope of direct examination.

On cross, “[t]he court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.” Fed. R. Evid. 611(b); 225 Pa. Cons. Stat. §611(b) (“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.”). These rules ensure that the defendant has the opportunity to elicit relevant testimony that the plaintiff might seek to keep from the jury. For example, if plaintiffs’ counsel avoids questioning the insured on whether the insured timely provided the insurer with information needed for the coverage investigation, in an effort to prevent the insurer from impeaching this testimony on cross-examination, the insurer can ask the court to invoke the quoted rules to allow the insurer to raise these issues with the witness. If the court declines to allow such examination, the insurer may call the insured as a hostile or adverse witness. *See, e.g.*, Fed. R. Evid. 611(c) (implicitly permitting party to call hostile and adverse witnesses); 225 Pa. Cons. Stat. §611(c) (same).

Form of questions. As with most aspects of trial, the court retains discretion to control the mode of interrogation of opposing witnesses. *See, e.g.*, Fed. R. Evid. 611(a); Cal. Evid. Code §765(a).

- *Leading questions are permissible* on cross-examination, and in examining hostile and adverse witnesses, in every jurisdiction. *See, e.g.*, Fed. R. Evid. 611(c); N.J. R. Evid. 611(c); Wisc. Stat. Ann. ch. 906.11(3). Questions must relate, however, to matters already in evidence, or that are reasonably anticipated to be in evidence. *Marcus v. Palm Harbor Hosp., Inc.*, 253 Cal. App. 2d 1008, 1015 (1967).
- *Argumentative questions are improper.* Opposing counsel may ask, “Isn’t it true that you did not allow Defendant Insurer to inspect the damage to your home until [date]?” On the other hand, an argumentative question such as “Weren’t you committing fraud by refusing to allow Defendant Insurer to inspect the damage to your home until [date]?” is subject to objection.
- *Conclusionary questions are improper.* For example, “Did you understand that failing to advise Defendant Insurer of your claim until after repairs were completed constitutes late notice?” is conclusionary, because it assumes that (1) the insured failed to advise of the claim, (2) that repairs were completed, and (3) that the same constitutes late notice. Another strategy for eliciting the same information is to create a time line with cross-examination, asking whether repairs were completed, the date repairs were completed, whether the insured advised the insurer of the claim, and the date the insured first advised of the claim. (If the insured tries to testify to an earlier date of tender, be prepared with deposition testimony or the tender letter to impeach him.)

- *Cumulative, “asked and answered” questions are improper*, subject to the limitation that the defendant must be allowed to fully explore the topic on cross-examination. See *People v. Hernandez*, 18 Cal. App. 3d 651, 658–659 (1971); *People v. Riel*, 22 Cal. 4th 1153, 1197 (2000). For example, the questions, “Did your spouse *write* the letter advising Defendant Insurer of your claim?” and “Did your spouse *type* the letter advising Defendant Insurer of your claim?” are not necessarily cumulative, because the second question regarding typing allows for the possibility that someone else actually composed the tender letter.
- *Compound questions are improper*, especially where they raise both admissible and inadmissible matters. See, e.g., *Wiese v. Rainville*, 173 Cal. App. 2d 496, 506–507 (1959). Not only might the jury misunderstand the compound question, but the witness might answer the wrong part of the question. The words “and” and “or” usually signal a compound question. For instance, asking the insured, “Did you advise the Agent *and* Defendant Insurer of your claim?” is compound, and is especially confusing if one of the issues in the case is whether the agent advised the insurer of the claim. Similarly, “Did you delay in mailing this letter *or* do you always delay in mailing letters?” is compound, because it asks two—or maybe three—questions in one.
- *Misstating the evidence is improper*. Asking “You heard the contractor testify that your house was not really damaged, didn’t you?” is improper, if this was not the contractor’s testimony.
- *Harassing questions are improper*. Questions of marginal relevance that are intended to humiliate or embarrass the witness are subject to objection. For example, asking whether the insured refused to shop at a store because of the owner’s ethnicity, where the insured’s shopping habits are not at issue, is harassing. On the other hand, if the insured refused to cooperate with the claims representative because of the claims representative’s ethnicity, such questions should be allowed on cross-examination.

Counsel’s demeanor can also be objectionable as harassing. Asking questions before the witness has completed his answer may be harassing. Standing too close to the witness may be harassing.

Counsel’s style and demeanor. Cross-examining attorneys should strive to develop a style that makes them comfortable, while at the same time keeping control over the witness. The following tips are part of a variety of effective styles.

- *Asking narrow questions* prevents the witness from answering anything other than the question asked. For example, “Where were you on November 1?” will allow the witness to give a discursive answer or even avoid answering. On the other hand, “Did you attend the meeting with Claims Representative on November 1?” requires a “yes” or “no” answer.
- It is crucial to *listen to the witness’s answers*, and employ the answers as appropriate, in planning future questions. For instance, if a witness answers “yes” to the question, “Have you ever had a felony conviction?” the attorney will want to follow up with questions about the conviction, instead of proceeding to the next question, “Did you graduate high school?”
- *Treating the witness with respect and courtesy* is crucial, because jurors will notice, and tend to give courteous attorneys more credibility than disrespectful attorneys. This holds true even with dishonest witnesses. If the witness lies on the stand, opposing counsel must impeach the witness with questions, deposition testimony, and documents. Impeachment will be much more persuasive to the jury than making disrespectful or sarcastic gestures, rolling your eyes, or yelling at the witness.

Quit while you're ahead. Knowing when *not* to ask a question can be just as important—if not more important—than knowing when *to* ask a question.

- *Never ask the witness “why?” or questions for which you do not have proof of the answer.* Instead, *stop* after cross-examination establishes that the insured gives the answer the defendant wants. For example, once the witness admits to giving late notice of the claim, the question “Why did you wait until December 2, 2006, to advise Defendant Insurer of your claim?” will allow the witness to explain away bad testimony or evoke the jury’s sympathy. An answer such as, “My relative was dying of cancer and I was with her in the hospital” can defeat an otherwise successful cross-examination.
- *When cross-examination elicits a helpful answer on a topic, stop questioning on that topic and move on to the next area.* Further questions might allow the witness to explain away bad testimony. For instance, after establishing that the witness gave late notice of the claim, move on to the insured’s completion of repairs before tender.
- *The reason for moving on is that further questions may elicit harmful testimony.* For example, if opposing counsel asks, “Did you understand that the policy has a provision stating ‘If a claim is made or “suit” is brought against any insured, you must . . . [n]otify us as soon as practicable?’” the witness might respond, “I didn’t think it applied to me because during that period of time, Defendant Insurer had threatened to cancel my policy for nonpayment of premiums even though I had paid my premiums and had the canceled checks to prove it.”

A. Additional Rules for Experts

Cross-examination of the insured’s expert is perhaps the riskiest part of trial. Not only is the expert likely to be much more knowledgeable about her field than the attorney, but the expert may have more experience at trial than the attorney. Thus, the first step in preparing for cross-examination of the insured’s expert is to become as thoroughly versed as possible in the expert’s field. Close consultation with your own experts and reading pertinent literature in the field are essential to mastering the field.

Scope of cross-examination of experts. Expert witnesses may be cross-examined to the same extent as lay witnesses. *See, e.g.,* Cal. Evid. Code §721(a). In addition, experts may be cross-examined on their qualifications, the subject matter of their testimony, the matters on which the expert opinion is based, and the reasons for the opinion. *See, e.g.,* Cal. Evid. Code §§721(a)(1), (2), (3); S.D. Codified Laws §19-15-15 (expert “shall be subject to cross-examination by any party on his qualifications and the subject of his testimony”).

Hypothetical questions. Many jurisdictions have done away with the traditional requirement that experts can answer hypothetical questions only. Counsel may cross-examine an expert by asking hypothetical questions as well as questions directed to the facts at issue. *See, e.g.,* N.Y. C.P.L.R. §4515 (“Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form . . .”). Indeed, cross-examining the expert on the facts at issue may prove highly effective as an attack on the expert’s credibility, especially since the expert may be unfamiliar with the specific facts at issue.

Questions regarding scholarly literature. Jurisdictions differ on procedure for cross-examining an expert regarding scholarly literature in the field, specifically as to whether the scholarly literature must itself be admissible in evidence. The Federal Rules of Evidence, Mississippi, and Utah, for instance, do not require that the scholarly literature be admissible as a prerequisite to admitting the expert’s opinion. *See* Fed. R. Evid. 703 (adding that otherwise inadmissible facts or data shall not be disclosed to jury unless “their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.”); Miss. R.

Evid. 703 (“The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.”); Miss. R. Evid. 703 cmt. (“Since these sources provide the doctor with information that he utilizes in making life-and-death decisions, his validation of them ought to be sufficient for trial, especially since he can be cross-examined.”); Utah R. Evid. 703. On the other hand, in California, an expert may not be cross-examined regarding “the content or tenor of any scientific, technical, or professional text, treatise, journal, or similar publication” unless (1) the expert “referred to, considered, or relied upon such publication in arriving at or forming his or her opinion,” (2) the publication has been admitted into evidence, or (3) “[t]he publication has been established as a reliable authority”).

Maintain a calm demeanor. The expert may assume that her superior knowledge in the field entitles her to speak in an arrogant tone of voice and condescend to opposing counsel. The expert may even assume that haughty behavior will assist the insured’s case. An effective way to handle such behavior is to remain calm and continue to treat the expert with respect and courtesy; the jury will notice the difference in attitude and is likely to discredit whoever behaves more arrogantly. Keep in mind that even though the expert knows more about her field, you know more about your case and your cross-examination. An expert who underestimates opposing counsel, and who is unable to perceive the true purposes of your cross-examination, is most likely to give helpful answers on cross-examination.

III. Returning the Insured’s Cross-Court Shots: Rehabilitating the Insurer’s Witnesses

Many counsel for the insured choose to call the insurer’s witnesses as part of plaintiff’s case in chief. Some insureds even call the insurer’s witnesses as the first witnesses in the case. Defense counsel must anticipate the possibility that the insurer’s witnesses will be called as adverse witnesses, or at the very least face cross-examination by counsel for the insured, and prepare their witnesses accordingly. In addition, defense counsel must be prepared to rehabilitate the witness, if appropriate, following questioning by the insured.

From a procedural standpoint, if the insured calls the insurer’s witnesses to testify, they are adverse or hostile witnesses, and technically, counsel for the insured conducts a direct examination of the insurer’s witnesses, while counsel for the insurer conducts a cross-examination. *See, e.g.,* Fed. R. Evid. 611(c). In contrast, if the insurer calls its own witnesses to testify, counsel for the insurer conducts the direct examination, while counsel for the insured conducts the cross-examination. *Cf.,* Cal. Evid. Code 772(a). Practically speaking, however, the questioning is likely to proceed according to the alignment of counsel and the witnesses. For purposes of convenience, this section assumes that counsel for the insured has conducted a cross-examination of the insurer’s witnesses, and that counsel for the insurer intends to conduct a redirect examination to rehabilitate the witness.

Following cross-examination, counsel for the insurer may conduct a redirect examination. *See, e.g.,* Cal. Evid. Code §§762, 772(a). Redirect examination is typically limited to the scope of cross-examination, but in some states, the judge has discretion to permit questioning on matters outside the scope of cross-examination, essentially permitting the reopening of direct examination. *See, e.g.,* Cal. Evid. Code §772(c). Redirect is used to accomplish the following objectives:

Rehabilitation of witness. Where counsel for the insured impeaches the witness’s credibility on cross-examination, counsel for the insurer may ask questions on redirect to restore the witness’s credibility.

For example, if counsel for the insured introduced prior inconsistent statements, on redirect, the direct examiner can introduce prior consistent statements “to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.” Fed. R. Evid. 613(b), 801(d)(1); Fla. Stat. §§90.614(2), 90.801(2); Cal. Evid. Code §§791, 1236.

Similarly, redirect allows the witness to explain inconsistencies where no prior consistent statement is available. If the witness testifies at deposition and on cross-examination at trial to two different dates for receipt of the insured’s tender, on redirect, counsel should allow the witness to clarify his testimony. For example:

Q. Were there any circumstances that prevented you from giving your best testimony at deposition?

A. Yes, I stated at deposition that my flight was delayed and that as a result I did not get enough sleep the night before the deposition. I must have been tired when I gave that response, but I also offered to verify the date in my files and Ms. Opposing Counsel did not ask me to do so.

Correcting mistakes. If the witness made a mistake on cross-examination, on redirect, counsel for the insurer can attempt to correct the mistake. This must be done without asking leading questions, however, as leading questions are typically impermissible in direct examinations. *See, e.g.,* Fed. R. Evid. 611(c); N.J. R. Evid. 611(c); Wis. Stat. Ann. Ch. 906.11(3). One strategy is for counsel for the insured to ask, “Do you recall that a few minutes ago, Ms. Opposing Counsel asked you the date you first received Insured’s letter? Do you recall that you testified it was October 13, 2006? Is that testimony correct?” If the witness realizes that the testimony was incorrect, he can correct the error. If the witness does not realize that he made a mistake, counsel for the insurer can refresh the witness’s recollection by showing the witness documentary evidence. *See, e.g.,* Fed. R. Evid. 612; Wash. R. Evid 612.

Correcting misleading implications. Opposing counsel’s cross-examination may have forced the insurer’s witness to testify in a manner that creates a misleading implication. On redirect, the direct examiner can ask questions to clarify the testimony. For instance, opposing counsel may use cross-examination to imply that insurer routinely appoints counsel with the lowest hourly rate to defend insureds, to the detriment of the insureds. On redirect, counsel for the insurer can use open-ended questions to correct any misimpressions. For example:

Q. Do you recall that a few minutes ago, Ms. Opposing Counsel asked you whether the insurer had a procedure in place for selecting counsel to defend insureds in an underlying action?

A. Yes, I explained that we consider a number of factors, such where the underlying action is venued, the allegations in the underlying action, the lawyer’s area of expertise, and the hourly rates charged by the lawyer.

Q. Did you mean to testify that any of these factors is more important than the other factors?

A. Certainly, the lawyer’s location is important, because we want someone who will be familiar with opposing counsel and the judges. The lawyer must have expertise in defending the allegations against the insured, and we do not compromise on that, because it’s not in the best interest of the insured or us. We would never appoint defense counsel simply on the basis of hourly rates, because defense counsel must first meet the criteria of location and expertise.

IV. Crossing “t”s and Dotting “i”s: Tying Case Themes into an Effective Cross-Examination

A skillful cross-examination will tie the overarching themes of the case into the cross-examination. The overarching themes of the case are the two or three major points the insurer most wants the jurors to

remember as they deliberate. These points should be simple and intuitive. For example, an insurer's overarching theme at trial might break down as follows: (1) Mr. Insured had a duty to timely advise the insurer of the claim; (2) Mr. Insured repaired his house before he ever told the insurer about the claim, so (3) the insurer has no way of knowing whether the damage really happened and it's not fair to expect the insurer to pay for repairs.

The topics for cross-examination should mirror these key points. Counsel for the insurer should cross-examine the insured on each of these points (as well as other relevant topics). The insured's spouse can be cross-examined on point 2, the timing of repairs and notice. The insured's claim-handling expert should be cross-examined on points 1 and 3. If the insured's expert has little or no knowledge of the facts associated with point 2, counsel for the insurer can attack the expert's credibility.

Because opening statements and closing arguments will focus on the overarching theme, questioning the insured on the major points will help reinforce the overarching theme in the minds of the jury.

V. Getting Your Point Across: Effective Use Of Trial Technology

Technology is great when it works, but when it doesn't.

—California Superior Court judge, awaiting an image of an exhibit via overhead projector.

Studies confirm that people learn best when information is presented both orally and visually. Add to that the fact that Americans are constantly exposed to multimedia information, in their homes, schools, workplaces, restaurants, stores, airports, and even now in elevators. It is clear that the use of technology at trial can assist insurers in conveying their points to the jury.

Outside the courtroom, jurors are influenced in their workplaces, their homes, and virtually everywhere else, by an almost continuous stream of multimedia information. Using advanced technology in the courtroom allows trial lawyers to reach jurors in these same kinds of ways. In addition, numerous research studies and articles have emphasized that jurors learn information more easily—and more importantly, retain information more accurately and for longer periods—when exposed to a combination of oral and visual presentations.

Kathryn Burkett-Dickson, *The Use of Technology at Trial: Tools, Rules and Techniques*, American Bar Association Labor and Employment Section EEO Committee Midwinter Meeting (March 24-27, 2004), available at www.bna.com/bnabooks/ababna/eoo/2004/eoo132.pdf.

Ultimately, however, nothing will substitute for plain, old-fashioned preparation and thorough knowledge of the case. Trial technology is most useful as a supplement to the insurer's defense; it cannot replace the defense itself.

The following steps will assist in determining whether trial technology will be effective.

Is the technology permitted in court? The first step in evaluating trial technology is determining whether the judge will allow the technology in the courtroom; there is no point in spending time and money on technology that will certainly be inadmissible. Virtually all courts will allow overhead projectors, video or DVD players, and large-screen monitors. On the other hand, some judges may prohibit (or at least require a hearing to determine whether to admit) more exotic forms of technology, such as allowing a witness to testify *via* Internet connection.

Is the expense worthwhile? Ensuring that the trial technology will effectively convey the insurer's points is crucial. If trial technology does not advance the defense, it is a waste of the client's money and the attorney's effort. Jurors are unlikely to be fooled by glitzy,

expensive technology. On the other hand, a low-tech display of a highlighted deposition transcript on a large-screen monitor, when used in conjunction with impeachment of trial testimony, is easy to understand, conveys information in a memorable way, and is therefore effective.

Who supplies the equipment? Some courts provide basic equipment, such as overhead projectors, video or DVD players and large-screen monitors. Other courts require counsel to bring their own equipment. It is imperative to check with the court, well before trial, to determine who is responsible for supplying equipment. If you are responsible for supplying the equipment, check whether you will need to make special arrangements with court security in order to bring the equipment into the courthouse.

Does the technology work? Test the equipment before use, and be sure that someone on the defense team knows how to work the technology. This will ensure a seamless presentation. Counsel for the insurer may even score points with the jury by assisting plaintiffs' counsel, if he has trouble working the technology at trial.

Have a no-tech backup available, just in case. Trial technology is effective only if it works. If an exhibit is available only in electronic form, and the technology does not work, you risk having your evidence excluded—unless a paper copy is readily available. The judge and jury will rapidly lose patience with technology that does not work. Counsel without a back-up exhibit may appear unprepared. To avoid losing credibility, bring paper copies of exhibits along with the e-copies.

A survey of trial technologies follows. Some technologies are tried and true, and likely to be a useful supplement to the insurer's case. Some technologies are emerging as society becomes more computer-dependent. Understanding the range of options will enable counsel for insurers to pick the most effective technology for trial.

- *Projectors and large-scale monitors:* Most courts will allow counsel to use overhead projectors and large-scale monitors to show exhibits to the judge, the witness, and the jury. A few courts have such equipment; the United States District Court for the Central District of California, for example, has six-foot plasma monitors in easy view of the witness and jury. Other courts allow counsel to bring their own equipment, provided arrangements are made in advance, for security purposes. This low-tech option is both relatively inexpensive and extremely effective, because it allows counsel to highlight key portions of exhibits and deposition transcripts. Highlighting in color is useful because it will draw the jurors' eyes to the highlighted material.

Using this low-tech option is an effective way to underline defense counsel's impeachment of the insured. If, for example, the insured falsely testifies that he first advised the insurer of the claim on the date of the event, April 2, 2005, counsel has several options.

First, counsel can show the witness and jury a copy of the insured's December 1, 2006, letter, perhaps with the date already highlighted in color. Following authentication of the letter, counsel can ask: "You wrote this letter; didn't you? What is the date of this letter? Isn't it true that this is the first letter you wrote to Defendant Insurer concerning your claim? Isn't it true that you did not telephone Defendant Insurer concerning your claim before December 1, 2006?" The visual impact of the letter is likely to reinforce the insurer's cross-examination in the minds of the jury.

Second, counsel can show the witness and jury a copy of the insured's deposition transcript. Counsel can ask: "Do you recall your deposition in this case? Do you recall that you swore to tell the truth in your depo-

sition? Do you recall that I asked you, when did you first advise Defendant Insurer of your claim? Do you recall testifying that you first advised Defendant Insurer of your claim in a letter dated December 1, 2006?” Again, the visual impact of the testimony is likely to reinforce the impeachment of the insured for the jury. No further questions should be necessary; the jury can see and hear for itself that the witness’s trial testimony contradicts the deposition testimony.

- *Videotaping depositions.* The plaintiffs’ bar is increasingly taking videotaped depositions of the insurer’s witnesses, and seeking to use videotaped deposition testimony in lieu of live trial testimony. Therefore, counsel for the insurer must prepare witnesses for deposition as if they were preparing for trial. Witnesses should wear conservative clothes, ideally a suit, and maintain a calm demeanor and tone of voice. Practicing with mock questions will show the witnesses what to expect during questioning.

Counsel for insurers should likewise consider videotaping the deposition of the insured and other key plaintiff’s witnesses. Doing so will prevent plaintiffs from evading the question, maintaining an inappropriate demeanor, and—most important—changing their testimony at trial.

- *Electronic Data Discovery (“EDD”):* EDD is poised to jump to the head of the list of trial technologies, in light of the recent amendments to Federal Rules of Civil Procedure, Rule 26 to require disclosure of electronic information. In these early days of the new rules, EDD exists in several forms: search engines, archiving tools, document management solutions, and litigation support systems. Alan Radding, *The Forecast for EDD*, <http://www.law.com/jsp/legaltechnology/pubArticleLTN.jsp?id=1131640456522> (November 16, 2005). Some vendors offer licensed EDD software, while others sell EDD as a service. *Id.*

“Consider early and often how you can most effectively present the electronically stored information at depositions, hearings and trial. If, for example, you want a key witness to walk through a live spreadsheet at trial, you better not have produced the file only in paper form.” George Socha, *Law Technology News, Break Out the EDD Road Map*, <http://www.law.com/jsp/legaltechnology/pubArticleLTN.jsp?id=1136541917878> (January 9, 2006). Coverage litigation frequently involves claims for business interruption, loss of use of funds, or other allegations of economic loss. Such claims are frequently presented in the form of Excel or other computer-generated spreadsheets, which appear bulky and inaccessible when printed out. A printout may alienate the jury—but walking the insured’s expert through a “live” spreadsheet, and allowing the jury to follow along *via* overhead projector and large-scale monitor, may prove a simple and elegant means of cross-examining the expert.

- *Real-time transcription:* Real time transcription is a computer-assisted process that allows the court and counsel to simultaneously view the court reporter’s transcription of the proceedings as they occur. Livenote, Inc. is currently the dominant provider of this service. www.livenote.com/realtime.asp explains the service and technical options.

For purposes of cross-examination, real-time transcription allows opposing counsel to summarize a prior question, or a witness’s testimony, using appropriate tonal inflection. (While the reporter can also read back questions and testimony, the reporter will do so in a monotone, which is likely to bore the jury. Moreover, the use of monotone could alter the meaning of the witness’s testimony.) The benefits of using appropriate inflection are significant, but counsel should be careful not to use tonal inflection that would draw objections of being argumentative or harassing the witness. Counsel should also remain careful to listen to the witness’s answers, and not be seduced by the transcription scrolling across the screen.

VI. Examples from the Trenches

The following examples are taken from a jury trial in a bad faith action brought against an commercial general liability insurer in state court in California. Some facts have been changed for purposes of this article. The named insured entered into a joint venture with several individuals to market widgets, and the joint venture was sued in an underlying action for trademark infringement. The insurer agreed to defend the underlying action pursuant to a reservation of rights, and the underlying action settled. At trial, the insurer asserted as coverage defenses that (1) the joint venturers did not qualify as insureds under the policy, and (2) the insured made material misrepresentations in the insurance application.

Spoiler warning: The insurer won at trial!

A. Cross-Examining the Plaintiff

Questions and Answers

Q. I'd like you to turn, if you would, Mr. Insured, to Exhibit 1 in the binder before you.

A. Yes.

Q. And the first page on it says, "Special meeting of the principals of Insured and Joint Venturer X." Is that correct?

A. Correct.

Q. And it's dated January 3, 2001, 10:00 a.m., at the address of Insured in California.

A. Correct.

Q. And it notes that present at the meeting were you, Mr. Y and Mr. Z, correct?

A. Correct.

Q. And it also states—well, first of all, is that your signature on the signature line for Mr. Insured?

A. Yes.

Q. Do you recognize the signature of your partner, Mr. Y?

A. Yes.

Q. Do you recognize the signature of your partner, Mr. Z?

A. Yes.

Q. And you don't know who drafted this agreement?

A. I do not remember.

Q. Okay. Is this, to the best of your knowledge, a true and correct copy of the original signed by you and your two partners on January 3, 2001, or do you have some reason to believe it's been altered?

A. Your question is—

Comments

These questions are short, simple and narrow. By requiring the witness to answer "yes," opposing counsel keeps control over the witness.

The witness cannot remember, and is not being evasive. The attorney moves on, but will return later.

The witness is confused by the compound question.

Questions and Answers

Q. Let me re-ask the question. Is this, to the best of your knowledge, a true and correct copy of the original signed by you and your two partners on January 3, 2001?

A. I believe so.

Q. Has someone altered this document?

A. No one altered this. I don't remember anyone altering the document.

Counsel: Move for admission, Your Honor.

Court: Hearing no objection, Exhibit 1 is admitted.

Counsel: Please project Exhibit 1.

Q. Okay. Now did you read the first page of Exhibit 1 before you signed it, sir?

A. Yes.

Q. And your purpose in signing this was to terminate the employment of Employee and remove him from all offices, and positions, and titles in the corporation?

A. Correct.

Q. And the corporation you were referring to was Joint Venture, correct?

A. Correct.

Q. Okay. Now another purpose of the first page of Exhibit 1 was to, and I quote, "remove Employee from the Board of Directors due to his actions of embezzlement and breach of fiduciary duty," correct?

A. Correct.

Q. And Employee was "denied all authorization to act on behalf of the corporation or to sign on behalf of any and all bank accounts," correct?

A. Correct.

Q. And Employee was denied access to the corporation's California facilities, correct?

A. Correct.

Comments

By simply re-asking the question, rather than arguing with the witness, opposing counsel keeps the jury's focus on the fact that the document is a true and correct copy of the original (which is the main point opposing counsel wants to make). In addition, opposing counsel succeeds in authenticating the document for admission.

Use of technology allows the witness and jury to see the exhibit, and counsel to highlight key portions.

Again, these questions are short, simple and narrow. By requiring the witness to answer "yes," opposing counsel keeps control over the witness.

In asking about the witness's purpose in signing the document, opposing counsel must have the relevant pages of the deposition transcript ready to impeach the witness, should he change his testimony and say he had a different purpose.

Opposing counsel exploits technology by pointing to the quoted portions on the overhead projector, so that the jury can clearly see the key point: employee embezzled and is being dismissed. Highlighting these portions in color allows the jury to focus on them.

Questions and Answers

Q. And everything in the first page of Exhibit 1 refers to the Joint Venture, including reference to it as a corporation, is that right?

A. Correct.

Q. And your testimony today to the jury is that you don't know who wrote this up.

A. I don't remember who wrote this up.

Q. Okay. Please proceed to the second page of Exhibit 1.

Comments

By confirming that Joint Venture is a corporation, opposing counsel has reinforced a key coverage defense, that Joint Venture is not a named insured. In closing argument, opposing counsel can point to the policy's "who is an insured" provisions (which limit coverage to the corporation named in the declarations), remind the jury that the witness testified that Joint Venture is a corporation, and show that Joint Venture is not listed as an insured in the policy declarations.

This question effectively attacks the witness's credibility. Having seen that Exhibit 1 dismisses Employee for embezzlement, the jury will find it difficult to believe a witness who cannot remember the details of dismissing someone for embezzlement. The witness is pinned down because he has already testified that he cannot remember; if he now testifies that he has suddenly remembered the author, the jury will be unlikely to give the witness credibility.

Having successfully attacked the witness's credibility, opposing counsel stops this line of questioning and moves on to the next topic.

B. Cross-Examining the Insured's Expert

At trial, the insured called a claims handling expert to testify. Counsel for the insurer conducted the following cross-examination.

Questions and Answers

Q. Ms. Expert, let's talk a little bit about your professional background and qualifications. Aside from being a lawyer, you're not a licensed insurance adjuster, are you?

A. No.

Q. You've never been a licensed insurance adjuster, have you?

A. I have not.

Q. Do you hold any other licenses, other than the license to practice law, with respect to insurance underwriting, insurance claim handling, anything like that?

A. Not—no, I don't.

Q. Have you ever been an actual employee of an insurance company?

A. No, other—than as I described earlier.

Q. So, with respect to your experience in the insurance industry, you've never actually been in the precise situation that Ms. Claims Representative or Mr. Claims Representative have been in with respect to actually receiving claims?

A. That's correct.

Q. Handling claims?

A. Correct.

Q. And your experience with the insurance industry has been as a lawyer licensed to practice law representing insurance clients, correct?

A. Yes.

Q. Is it correct that neither you or your law firm hold yourself out as intellectual property lawyers?

A. Well, I could speak for me. I'm not. As far as the firm is concerned, I—there may be intellectual property people there but—

Q. And you're not a trademark litigator, are you?

A. No, I'm not.

Comments

Counsel for the insurer begins by attacking the expert's credibility by showing that she has no actual claims handling experience.

Counsel for the insurer continues to attack the expert's credibility, by showing that she has no experience in the subject matter of the underlying action.

Questions and Answers

Q. In the last nine years, your law firm has represented many policyholders in lawsuits against insurance companies for coverage and bad faith, correct?

A. I know the firm has. I don't know how many there are.

Q. Well, I don't want you to be bashful, Ms. Expert. Isn't it true that your law firm is considered to be one of the preeminent plaintiff law firms against insurance companies?

A. I would like to think that.

Q. Sure. And—

A. Can I quote you on that?

Q. You may. You may. Isn't it true, Ms. Expert, that your firm is the last nine years has filed hundreds of lawsuits against insurance companies?

A. Yes, we have.

Q. Is it correct that you, on behalf of your law firm, signed a written retainer agreement for your engagement in this case on August 7, 2006?

A. I believe that's right.

Q. And around that date, after you signed the engagement agreement, Ms. Opposing Counsel provided some documents for you to look at so that you could formulate your opinions. Correct?

A. Correct.

Q. And thereafter, Ms. Opposing Counsel's office provided you with about five boxes of documents in total, right?

A. I think that's—I don't recall what the total was.

Q. The work that you did with respect to reviewing documents in this case came after August 7, when you signed the written retainer agreement with Ms. Opposing Counsel, correct?

A. That's correct.

Comments

Counsel for the insurer shows the expert's bias, because she earns a living from a law firm that is in the business of suing insurers.

Counsel for the insurer attacks the expert's credibility by showing that she agreed to serve as an expert before even knowing what this case is about. Not only did the expert not review documents before agreeing to testify, she does not know how many boxes of documents she was asked to review. The jury should understand that this expert is nothing more than a hired gun.

Questions and Answers

- Q. And isn't it true, Ms. Expert, that you agreed with Ms. Opposing Counsel's associate to testify as an expert witness in this case for the plaintiff before you had read a single piece of paper?
- A. I agreed initially to look at the papers. I knew what the issues were from the conversations I had and—and there was a designation of experts due at a certain time, I don't know the date.
- Q. Would it refresh your recollection, Ms. Expert, if I told you that the plaintiffs' lawyers in this case designated you as their expert witness on August 2, five days before you signed a retainer agreement with Ms. Opposing Counsel?
- A. It would not refresh my recollection, no.
- Q. Ms. Expert, please look at Exhibit 2, which is entitled Plaintiffs' Expert Witness Disclosure Statement; Declaration of Opposing Counsel. [Questioning elicits the purpose of an expert disclosure.] Please tell me the date on which Exhibit 2 was signed.
- A. August 2, 2006.

C. Rehabilitating the Insurer's Witnesses

At trial, counsel for the insurer called an underwriting supervisor to testify regarding standards for issuing policies to joint ventures and what investigation needed to be done, in order to determine what exclusions needed to be written in policies issued to joint ventures. On cross-examination, the insured elicited an admission that the insured's application had not been signed, implying that the underwriter acted improperly by approving an unsigned application--and, more seriously, implying that the insured was not bound to make truthful representations in an unsigned application. On redirect, counsel for the insured elicited testimony to correct the insured's misimplication.

Questions and Answers

- Q. In your experience in working for Insurer here in California, is it a typical custom and practice for applicants, brokers submit commercial general liability applications unsigned?
- A. Yes.
- Q. And do you have an understanding as to why that is?
- A. Yes. Because—kind of like I've stated earlier, a broker represents the insured. So it's our understanding from the underwriting world that the broker is submitting an application on behalf of the insured. And again, it is industry standard that it is not signed.

Comments

The expert refuses to admit that she was designated as an expert before the insured retained her. Counsel for the insurer is prepared with the documentary evidence needed to impeach and refresh the witness's recollection, forcing the expert to concede that she was designated as an expert before the insured retained her.

Counsel for the insured has effectively attacked the expert's credibility, especially because the expert testified that telling her the date of the designation would not refresh her recollection.

Comments

Counsel for the insurer establishes that insurance applications are typically not signed, and that a signature does not impact how the underwriter evaluates the application. By doing so, counsel for the insurer defuses the misimplications that the underwriter improperly approved an unsigned application, and that the insured had no obligation to make truthful representations.

Questions and Answers

Comments

Q. All right. And so when you were asked whether or not you knew who actually put the information on Exhibit 3, the application, from your perspective as managing director of six underwriters here in California, it doesn't make any difference to you in performing your job, is that right?

The prepared witness works with her counsel to ensure that the question and answer will be clear for the jury.

Counsel: Objection, leading.

Court: Sustained.

Q. Does it make a difference to you in performing your job who filled out an application for a commercial general liability policy?

A. When you say "who," meaning the broker or the insured?

Q. The broker or the insured or a specific individual at the brokerage house.

A. No.

VII. Conclusion

The escalating aggressiveness of the plaintiffs' bar, coupled with increasingly sophisticated trial technology, mean that insurers must work harder and smarter than ever to mount an effective defense. Counsel who cultivate their own style and who understand which technology works best for which case will have a headstart in skillfully cross-examining the insured and its experts.