The following materials are primarily sourced from:

NATIONAL COLLEGE OF DISTRICT ATTORNEYS  **APPROACH POINT CROSS-EXAMINATION**

Methods and techniques to prepare for an Approach Point Examination. How to develop fact points to use in this type of cross- examination.

**I. Types of Cross-Examinations:**

A. Concession based - cross-examination focusing on gaining admissions from the witness that help establish the points you seek to prove.

1. *Ex: "You are admitting to this jury that you were in the house on that night correct?"*

2. *Ex. “you acknowledge you were in a dating relationship, living together, correct?”*

B. Proactive -cross-examination to strengthen the prosecution case or weaken the defense case without impeaching the witness who is testifying.

1. *Ex: "So, even if your times are accurate you admit that the defendant was still absent from your presence for at least two hours that night?"*

C. Reactive -traditional, impeachment cross examination, designed to demonstrate that the witness is either mistaken or lying.

1. *Ex: "Isn't it true you testified differently at the preliminary hearing?"*

D. Approach Point - cross-examination based upon a series of short, concise facts which permit the prosecutor to "approach" the ultimate argument as more fully set forth below.

**II. Approach Point cross-examination**

A Definitions:

1. "Ultimate Argument" - the main idea(s) you want to convey to the jury about the witness you are cross-examining expressed in generic terms. May be more than one main idea. *Ex: The witness is biased or lying, or not qualified to give an opinion, or not knowledgeable about the .facts, or shouldn’t be believed because of priors or etc...).* The ultimate argument should have negative(-) human values that make the jury want to disregard the defense witness.

2. "Heading" - the case specific reason why the Ultimate Argument is true. May be more than one Heading for a Ultimate Argument. *Ex: If your Ultimate Argument is that the witness is biased then your Heading would be why he is biased. "He is the defendant's neighbor" or "He is the defendant's co-worker" might be Headings if the Ultimate Argument that you are trying to get across to the jury is that the witness is biased.*

3. "Fact Point"- a short phrase that sets forth a fact that you want to bring out in questioning of a witness. *Ex. If your Ultimate Argument is that the witness is biased and your Heading is "He is the defendant's neighbor" then possible fact points may be: "5 years neighbors" I "carpool" I "kids play together" I etc...*

4. "Theme"- the catch-word or phrase used to suggest the Ultimate Argument to the jury. *Ex. If your Ultimate Argument is that the witness is biased and your Heading is "He is the defendant's neighbor" then a possible Theme may be* *"He and the defendant are good friends".*

B. Developing Fact Points:

1. Video replay- ask yourself "If this fact is true then what else must also be true?" *Ex: The witness is the defendant's neighbor*. If this fact is true what else must also be true? They live close together. Their families probably know each other. Their children probably play together. Etc..... These facts then make up your fact points and ultimately your question to the witness.

2. Concessions - In almost every case there are things that are not being

 c·ontested. Using your elements (PIK) to develop these questions can help focus the jury. *Ex: (In a self-defense shooting case) “You admit that you shot the victim?”, “You admit that your actions were intentional?”. (In a sex crime case) “You admit you were over 18 years of age on the date in question”?*

3. . Comparison/Contrast: Ask yourself – “If this witness was a perfect, unbiased witness then what would I expect" and make a list of what you would expect. Then make a list of what you actually have in the case. Your fact points will focus on the difference. (We have all had this used against us when a police officer testifies who left something out of his report*-"You have been trained to write reports? You try to put down everything that you feel is important in the report?”Etc…*

**Reminders for Cross-Examination**

1. Prepare

a. Use the Approach Point form

b. Work toward your closing argument. c. Save argument for argument.

2. Avoid objections

a. Avoid argument--ask for facts b. Have a good faith factual basis c. Do not harass unnecessarily

3. Have a purpose but don't telegraph it. Remember your case theory.

4. Don't chase the defense theory unnecessarily.

a. Avoid strict chronology of the defense theory.

b. Determine the role of this witness to the defense theory.

5. Don't chase "rabbit trails" which lead nowhere.

6. Ask questions in short fact points whenever possible.

7. Be careful about "over controlling" the witness.

a. Witness conduct can be better than answers. b. Note troublesome conduct for argument.

c. Think of a characterization for troublesome witnesses

d. Don't go to the court for help until the jury sees the witness conduct. e. Switch to accusatory formats when control is a problem.

8. **Listen** to the answer.

a. Is it an answer to the question? Was it the *truth;*

the *whole* truth; and *nothing but* the truth?

b. Did it provide better material than you had already?

c. Incorporate good points into the next question.

9. Prepare an impeachment predicate section for your trial notebook.

10. Avoid multi-fact or multi-element questions. The answers may mean nothing. a. Be careful of "fact-lusions"-concepts which appear to be

facts, but are really conclusions: *angry, upset, concerned,* etc. b. Adjectives, adverbs and some nouns can expand concepts

c. Words such as "since" and "because" in questions can give

a witness room to run. ("And you did that *because...")*

11. Secure concessions early and often. What must this witness concede which will advance your case theory or, to the contrary, make the witness less credible?

12. Keep your demeanor consistent with what the jury would find reasonable for this point in the trial. Don't change demeanor just because it is cross examination.

13. Lock witnesses down before introducing inconsistencies.

14. Use transitions to help the jury follow you.

15. Avoid nit-picking cross-examination.

16. Avoid interrupting or overriding the witness' answers.

17. Avoid negatively worded questions.

18. Have a plan for when to quit, but keep listening for a better one than your plan.

National District Attorneys Association
National Prosecution Standards
Third Edition

• **NDAA 6-6.1 Fair Examination**

A prosecutor should conduct the examination of all witnesses fairly and with due regard for their reasonable privacy.

• **NDAA 6-6.2 Improper Questioning**

A prosecutor should not ask a question that implies the existence of a factual predicate
that the prosecutor either knows to be untrue or has no reasonable objective basis for
believing is true.

• **NDAA 6-6.3 Purpose of Cross-Examination**

A prosecutor should use cross-examination as a good faith quest for the ascertainment of
the truth.

• **NDAA 6-6.4 Impeachment and Credibility**

A prosecutor should not misuse the power of cross-examination or impeachment to
ridicule, discredit, undermine, or hold a fact witness up to contempt, if the prosecutor
knows the witness is testifying truthfully.

Possible Objections

* No good faith basis for question or underlying factual predicate;

Counsel must have a good faith basis for believing underlying predicate is true

* Assumes facts not in evidence

Question must not assume as true facts not in evidence

* Argumentative Question

Argues with witness

Requests witness to agree with case theory

Harasses witness

Elicits no new information

* Beyond the Scope of Direct

Should be limited to subject matter of direct or go to credibility

* Compound question; multiple elements

Results in ambiguous answer

* Misleading, confusing Question; Mischaracterizes Evidence

Questions should be clear and free from confusion or mistake

* Repetitious Question; "Asked and Answered"

Unnecessarily repeats facts or evidence

* Incorrect, Improper Impeachment

Wrong impeachment

Not materially inconsistent

Irrelevant information

* Danger of Unfair Prejudice

Question, while addressing relevant information, ventures into area where information has danger of unfairly prejudicing jury.

* Improperly Calls for a Conclusion; Speculation; Guess

Witness cannot answer factually

* Answer is Unresponsive

Witness is volunteering unnecessary additional information

Witness answered question different from one asked

 **Witness Control**

• Use leading questions beginning with:

"Do you/did you"; "Can you/could you"; "Will you/would you"; "Have you/had you"; "Are you/is it"; "Was it/were they"

• Make the witness agree with a short, simple thought

• Be patient. Make progress in short steps

• Select the proper form and tone of the question

• Work from specifics to generalities. Start with a single fact and add additional single facts in building block fashion.

• "Yanking the leash"

Repeat the question

Ask the witness to repeat your question

Ask the witness if the question was heard; if so, ask the witness what the question was

Provide the answer yourself

• Q: Did you see the car? A: Ramble, ramble, ramble.

• Q: Did you hear my question? A: Ramble, ramble, ramble.

 • Q: Then your answer is “yes"

 Enter into an agreement with the witness

• Q: I'm going to ask you some questions which can be answered yes or no. If you cannot answer my question yes or no, please let me know and I will rephrase the question for you.

Challenge the witness on the rambling.

• Q: Did you see the car? A: Ramble, ramble, ramble.

• Q: There is something which prevents you from answering yes or no?

A: Not really.

• Q: Then are you ready to answer my question yes or no? Allow them to run in a small area and challenge them on it.

• Q: Did you see the car? Ramble, ramble, ramble

• Q: Is there anything else you want to tell us about that? A: Ramble, ramble.

• Q: Anything else? A: Ramble, ramble.

• Q: Anything else? A: Ramble.

Q: Anything else? A: No.

• Q: Now let me ask you again, did you see the car?

APPROACH POINT CROSS-EXAMINATION WORKSHEET PAGE OF

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|  | ARGUMENT TO JURY( State here the argument you will make to the jury) | HEADING (The argument should be organized intosub headings. Put the subheading for these questions here)THEME FOR THESE QUESTIONS(Think of a "theme" for this particular line of questionswhich you can use in closing argument to remind the jury about the conclusions made about these facts) |  |
|  | FACT POINTS SOURCE/EXHIBIT(List the short facts here which help you (List here the source of the make the desired argument above. You do fact point or the particular not have to write out questions. Each fact exhibit which will help you can be made into a question by the addition with this set of fact points) of a "tag line" such as "didn't you", "wasn'tit", "isn't it a fact", etc.Think of a good transition fact which can be used to set up these facts. You maywant to depart from these facts if thewitness gives you a better fact direction) |  |

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