



SUFFOLK ACADEMY OF LAW
The Educational Arm of the Suffolk County Bar Association
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BILLY LEVINE TRIAL TECHNIQUE SERIES #3
“DIRECT & CROSS EXAMINATIONS”

FACULTY

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Hon. R. Bruce Cozzens
Hon. James P. Flanagan
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Hon. Peter H. Mayer

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January 29, 2019
Suffolk County Bar Association, New York



The Billy Levine Trial Techniques Series #3
Direct & Cross Examinations

AGENDA

5:45 - 6:00 Hon. Paul J. Baisley

6:00 - 6:15 Hon. R. Bruce Cozzens

6:15 - 6:30 Hon. Peter R. Meyer

6:30 - 6:40 Break

6:40 - 7:25 Marvin Salenger, Esq.

7:25 - 7:35 Break

7:35 - 8:20 William G. Spratt, Esq.

8:20 - 8:30 Questions & Answers

Direct and Cross-Examination of Witnesses

DIRECT EXAMINATION OF THE PLAINTIFF

In a motor vehicle case, for example, the scene of the accident must clearly be set before the jury. Usually, the use of demonstrative evidence (diagrams, photos) is extremely helpful in this regard. As a plaintiff, you have an opportunity to explain your version of events twice. First, have the witness describe in detail what took place during the accident. Then, after introducing the pictures or diagrams, have the witness describe the accident again, using the demonstrative evidence. As stated earlier, repetition is important.

If your witness is likeable, make him/her the star of the show. Stand back, ask non-leading questions and encourage the witness to make eye contact with the jury and tell the story. More often, however, your witness will not have public speaking experience or be dynamic enough to tell an effective story. In that case, stand near the jury so the witness will seemingly make eye contact with them, and ask short, direct questions for the witness to answer. Lead the witness as much as your adversary will allow.

Preparation is obviously the key to a good direct examination. But rather than simply rehearsing the questions and answers, review the theory of the case with the witness. Try to convey the big picture to the witness and focus on the important aspects of the accident that will decide the case. This will also prepare the witness for cross examination. Remember to point out potential inconsistencies with the deposition testimony and instruct the witness on how to handle impeachment by prior testimony (e.g.: "if that's what the transcript says, I must have said it"). Also, review all photos and diagrams in evidence with the witness; make sure all markings made regarding points of impact, etc. are consistent with prior testimony.

Practical Suggestions – Direct Examination

- If you cannot articulate a reason for the question being asked, either on direct or cross then don't ask the question.
- Meet with the client well before the trial, not the night before trial.
- Preparation has to be very thorough. Explain direct examination, cross examination, terminology, demonstrative evidence, etc.

CROSS EXAMINATION OF THE DEFENDANT

Every aspect of a trial is crucial, but it can be fairly said that cross-examination of the defendant is often the most crucial aspect of a motor vehicle case. Counsel's failure to effectively challenge an opponent's witnesses will most certainly be noted by the jury and, in most instances, cannot help but have a detrimental effect on your client's case. Conversely, effective cross-examination engenders positive jury support for your client's cause. The fantasy of every trial lawyer is the occasion when the lay witness is so devastated by the probing, incisive questions that he pulls out his handkerchief, wipes his sweaty brow and cries out, "Enough, enough. I'm sorry, it's all my fault." In reality, this doesn't happen.

How is an effective cross-examination conducted of the lay witness? First, understand

there is no mystery to an effective cross-examination. Like any other aspect of a successful trial, successful cross-examination of the lay witness is the product of thorough preliminary work and informed, intelligent choices at trial. Second, successful cross-examination does require counsel to possess one crucial talent: the ability to *listen* - both to your opponent's direct and to the answers you elicit on cross.

The usual cross-examination sequence is simply stated: obtain favorable admissions (where available), and then follow-up with a discrediting cross and impeachment. Further, before giving practical tips, it is important to understand that there is more than one way to cross-examine the witness: the witness can be attacked, the story can be attacked, or both the story and the person can be attacked. A witness can be attacked by demonstrating bias or lack of direct knowledge. For example, a police officer who did not witness the accident and came upon the scene *after* the vehicles were moved has no direct knowledge of the point of impact. In any event, technique in cross-examination is essentially something that can be learned, but not necessarily taught. You really have to go out and try cases, case after case, and examine witness after witness in order to learn your own technique and what works best for you. However, to the extent that we may offer you a guide to conventional strategy and effective courtroom conduct we offer the following:

PREPARATION

Be prepared. Before trial even starts you should have a good idea of at least three things:

- (1) how your adversary will likely defend the case;
- (2) who will be the likely witnesses; and
- (3) the theme for your case.

Given this, you should know in advance what you generally expect to achieve when cross-examining such witnesses. For example, you may know from deposition testimony that the witness on the police report is the defendant's uncle (or co-worker or friend); you may know that the investigating police officer did not arrive at the accident site until 15 minutes after the accident; you may know the vehicle damage shown in the pictures does not match the defendant's deposition testimony describing the points of impact; you may know the defendant's MV-104 statement is inconsistent with his deposition testimony regarding his speed and where he was looking at the point of impact; or you may know that the witness bus driver has been employed by the defendant Transit Authority for 25 years. In short, you may know all these things only if you thoroughly prepare and *do your homework*.

REACT

Often, attacking a witness' story, and how you attack a witness' story requires not just homework but also elements of psychology and a feeling of who the witness is. Put another way, what impression does the witness project? Is he cocky? A wise guy? Does the jury like him? Does he come across as timid or vague? Tailor your approach accordingly. Stay in tune to all aspects of the case and always imagine how the jury perceives the witnesses and evidence.

Make a determination as to how harmful a witness has been. If a witness has been especially harmful, would it be a good idea to have a recess before beginning cross? Your

request for a brief recess could be phrased in the form of needing a moment to review the police officer's memo book and reports for example. A word of caution: not all witnesses require a recess before beginning cross. Often times, the most devastating witness should be attacked immediately. Further, if the witness you expected to be devastating was not, then question quickly and get him/her out of the courtroom before your adversary realizes the errors and omissions. The point is this: *Do not conduct a lengthy cross-examination if it is not going to help you.*

DEMEANOR

When a witness has said something that angers you (e.g.: a lie or exaggeration) do not get up immediately with a flush in your cheeks and decide you're going to rip him apart. By the same token, if things are going well, don't strut in front of the jury with a smirk on your face, or wink to the gallery, or whisper to your adversary that the case is over. At all times, be gracious and professional while the witness is still on the stand, unless of course you are one of those rare lawyers who has the personality to get away with "showboating." Conversely, if the answers are devastating, do not compound adversity by sagging in body or in mind. If an answer is beneficial to your cause, do not ask the same question again in a different form, for the next answer may surprise you. Trust the jury, they try to do a good job and they hear the answers.

CONTROL THE WITNESS

Use short, close-ended questions on cross. Avoid the "why?" questions, although sometimes they are appropriate. If the witness is not answering the question directly, there are certain techniques you can utilize. For example, clarify the rules for the witness prior to the start of testimony with, "Mr. Jones, I'm going to be asking you a series of questions concerning what you told Mrs. Lynch. Please listen to my questions and if you can, please answer yes or no. If you cannot answer that way, please let Her Honor know and I'll rephrase the question." Another way of dealing with a rambling witness, rather than moving to strike the answer as unresponsive, a motion which the judge may deny, is to ask the witness directly, "Now, Mr. Jones, can you answer my question please?"

KEEP THE JURY INTERESTED

It is generally thought to be error to jump from topic to topic in cross-examination. It would be of greater benefit to the jury if one subject is exhausted before moving onto another topic. If there is difficulty in developing a smooth style in cross-examination it would be helpful to have prepared a written outline of the proposed cross-examination, *but do not read the questions to the jury.* Additionally, a good working knowledge of the proposed jury instructions is invaluable.

AVOID "LAWYERISE"

As in any part of the trial, the question propounded on cross-examination should be in lay language. It is not appropriate to ask, "Did you look at the cars subsequent to the impact?" it is infinitely more effective to ask, "Did you look at the cars after they hit?" Language, if it is to be

used effectively, must be familiar and readily comprehensible to the listener and the jury.

Tips for Testimony

Try to Avoid:

- Open-ended questions;
- "Why?" questions;
- Talking "down" to the witness;
- Trick questions (e.g. the proverbial "when did you stop beating your wife"; remember the jury is smarter than you think);
- Arguing with the witness;
- Bolstering the witness' previous, harmful testimony;
- The obvious question (which your opponent has hoped you would ask and thus make the case for him);
- The unnecessary question; and
- Allowing the witness to cross-examine you.

Try to Accomplish:

- * Insuring that the desired answers are comprehensible to the jury (in order to avoid 'talking down" to the jury, express your own confusion at the witness' answer);
- * Requiring the witness to distinguish between fact, assumption and opinion in his testimony;
- * Controlling the pace of the cross-examination; and hitting all the points you have chosen to hit.

General Cross Examination Strategic Principles

- Have predetermined goals;
- Elicit favorable information before attacking the witness;
- Try to end on a high note;
- Keep the witness off-balance;
- Control the examination;
- Avoid the unnecessary question;
- Quit while you are ahead.

Strategy is a product of your goals, which are derived from your pretrial preparation and your theory of the case. Once you have determined what you wish to establish through cross of the defendant's witness, the case's circumstances and facts will necessarily work to guide your choices and thus shape strategy.

Remember, there is no tried and true method of cross-examination. The method of interrogation is left to your discretion. You must consider the risks and weigh the risks against the possible benefits. Your decisions should be based upon the specific issues involved in your case and these issues will dictate the approach you will take during the course of the trial.

Biography of Marvin Salenger, Esq.

Simply put, Marvin Salenger is one of the most highly regarded personal injury litigators in New York. Most recently he was named “2018 Lawyer of the Year for Personal Injury Litigation – Plaintiffs” in the New York Metropolitan Area” by Best Lawyers(r). In 2012, his was the cover photo of the New York Metro Super Lawyers magazine insert in the New York Times Sunday Magazine, and Marvin has been ranked among the top 100 on the Super Lawyer list for the New York Metro region in what is likely the country’s most highly competitive arena.

As one admiring competitor wrote in support of Marvin for the New York Super Lawyer list, “He has extremely polished courtroom skills and has any jury eating out of the palm of his hand. Marvin is a very dangerous adversary.”

Fierce in his convictions, imposing in stature, Marvin is compassionate, generous, patient and accessible to his clients. A big personality who prefers to share the credit of his many accomplishments with his team at Salenger, Sack, Kimmel & Bavaro, Marvin Salenger is passionate about fighting for the underdog, in part because he’s been there.

Money was always scarce in the Salenger household during Marvin’s childhood in Brownsville, Brooklyn. His chronically ill mother struggled to raise her three children single handedly, and their tenuous situation worsened when 9-year old Marvin was struck by rheumatic fever. Severely ill and unable to walk, Marvin was confined to his family’s apartment and schooled at home for two and a half years.

The challenges of his early years left Marvin determined to help others like his family—good people living on the edge. Working by day and attending school at night, Marvin earned a teaching degree. He accepted a Social Studies position in Brownsville at one of the most troubled junior high schools in New York City, even though he had also been offered a more prestigious position in Bayside. “I wanted to change the world,” explains Marvin.

Realizing that he could effect change in the courtroom, Marvin earned his JD by night at Brooklyn Law. A true “lawyer for the poor,” Marvin found his first clients by frequenting the courthouses, picking up work no one else wanted. Then, as now, Marvin worked on contingency, only getting paid when his clients were awarded through a favorable settlement or verdict.

“What’s fascinating about the type of work we do is, just think of someone who’s poor, or disabled, or worse—and how are they going to be compensated for their injuries? Doctors and hospitals have access to the best lawyers money can buy. How is this poor person with limited resources going to get compensated?”

Marvin recently secured a \$10 million verdict for the family of a mother of two whose physician failed to diagnose her breast cancer. The woman ultimately died from the disease. “Tragedies like this change peoples’ lives, and the goal of a settlement or verdict is to help keep a family intact after a tremendous loss and give them a chance for a new life.”

In another recent case a union carpenter from the Bronx plunged 40 feet down an uncovered stairwell when a plank supporting his scaffold snapped. As a result of the accident, the worker is now paraplegic. The case resulted in a \$13 million settlement.

“Working with a client who has suffered a life changing and catastrophic injury, we look to bring some joy, continuity and even a sense of normalcy back into their lives. A favorable settlement or verdict can certainly do that, but our actions, and the small ways in which we can help, are just as valuable.”

William G. Spratt

Education:

D/O/B – Bronx, N.Y.	1/21/52
All Hallows High School	1965 - 1969
Iona College – BA in Economics	1969 - 1973
Summa cum Laude	
Recipient of the Economics Department Award	
Recipient of the Generosa Pope Award for Excellence	
St. John's University School of Law	1973 – 1977 JD

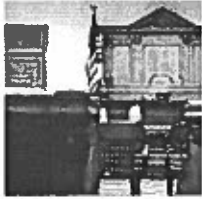
Employment:

Bronx District Attorney Office: Case Aide Homicide Division	1974 - 1977
Bronx District Attorney Office: Assistant District Attorney – Major Offense Bureau	1977 - 1982
Bower and Gardner – Associate	1982 – 1985
Partner	1986 - 1994
Shaub, Ahmuty, Citrin and Spratt – Partner	1994 – Present

Lectures/Honors:

- Have started and/or tried to verdict more than 200 criminal/civil cases
- Have lectured on trial techniques including case preparation, jury selection, opening statements, direct and cross examination and summation before Suffolk County Bar Association, Nassau County Bar Association, N.Y. State Trial Lawyers and Practicing Law Institute
- Chosen to Super Lawyers since 2008
- President Nassau/Suffolk Trial Attorneys 2015-2016
- Chosen Best Lawyers 2018 Lawyer of the Year - Personal Injury Litigation – Defendants (Long Island)
- Selected 2014 and 2017 Best Lawyers Lawyer of the Year – Medical Malpractice - Defense (New York City)
- Selected 2013 Top Ten Legal Eagles Medical Malpractice Long Island Pulse Magazine

Hon. Paul J. Baisley, Jr.



Supreme Court, Suffolk County
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Judicial Offices

Justice, Supreme Court, Elected, 1998 to 2011; Re-elected, 2012 to 2025

Acting Judge, County Court, Appointed by Hon. Guy James Mangano, Presiding Justice, Appellate Division, Second Department, 1996 to 1997

Judge, District Court, Elected, 3rd District, Suffolk County, 1996 to 1997

Judge, District Court, Suffolk County, Appointed by Hon. Robert Gaffney, Suffolk County Executive, 1995 to 1996

Other Professional Experience

Private practice, 1987 to 1994

Office of the Suffolk County Attorney, Bureau Chief, 1984 to 1987

Office of the Suffolk County District Attorney, assistant, 1983 to 1984

Admission to the Bar

NYS, Appellate Division, Second Department, 1982

U.S. Court of Appeals, Second Circuit, 1984

U.S. District Court, Eastern District of New York, 1984

U.S. District Court, Southern District of New York, 1984

Education

J.D., New York Law School, 1979

B.A., Dickinson College, 1976

Professional & Civic Activities

Member, New York State Bar Association

Member, Suffolk County Bar Association

Biography of Justice R. Bruce Cozzens

Justice Cozzens was elected to the Supreme Court, 10th Judicial District (Nassau and Suffolk Counties) in 1997. He currently is the Presiding Justice in the Trial Assignment Part of the Supreme Court, Nassau County. Justice Cozzens also maintains a full Differentiated Case Management calendar as well as trying both jury and non-jury civil cases. Each morning, Justice Cozzens addresses the new prospective jurors. He explains the jury selection process and thanks them for their service to the community. Prior to taking the bench, he was an attorney in private practice and a founding partner of a Long Island civil litigation firm. Justice Cozzens also is an Adjunct Professor at the Hofstra University School of Law where he teaches a practical skills course. He holds a B.A. Degree from the University of Virginia and a J.D. from Pace University School of Law. He is a member of the Nassau County Bar Association, the Nassau County Women's Bar Association, and the Lawyer-Pilot's Bar Association. He is married to the former Mary Ann Meyer of Roslyn, New York.

William G. Spratt

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