



Conducting cross-examinations

The art of cross-examination is both a science and an art. Ask first, “what is to be gained?” before stepping up to begin your cross.

BY PAUL STRITMATTER

“Be mild with the mild; shrewd with the crafty; confiding with the honest; merciful to the young, the frail or the fearful; rough to the ruffian; and a thunderbolt to the liar.”

– Francis L. Wellman

Our culture believes that the truth is best found if trial testimony is subject to a searching inquiry by the opposing counsel. Cross-examination techniques exist to ferret out facts that may have been omitted, confused, or overstated. The necessity of testing by cross-examination the “truth” of direct examination is an essential portion of the trial. It is beyond any doubt the greatest legal engine ever invented for the discovery of truth. The fundamental importance of cross-examination was recognized by our Founding Fathers when they incorporated it into the confrontation clause of the Sixth Amendment of the United States Constitution.

Good cross-examination is the work of an experienced trial lawyer skilled in the methods of witness examination. There are facts to be introduced, points to be made, theories to be supported and opponent theories to be undermined.

Cross-examination is a science. It has firmly established rules, guidelines, identifiable techniques and definable methods, all acting to increase the cross-

examiner’s ability to prevail. But it is also an art, and experience more than anything, helps develop the artistic components of cross-examination.

The purpose and goals of cross-examination

Cross-examination is one of the safeguards of the law to accuracy and truthfulness. It is a matter of right. (*Alford v. United States* (1930) 282 U.S. 687 [75 L. Ed. 624].) Cross-examination is the highest and most indispensable test known to the law for the discovery of truth. (81 Am.Jur.2d Witnesses, §510.)

The purpose of any aspect of a trial is to persuade. Persuasion of the trier of the facts is the only ultimate goal of cross-examination. If cross-examination is not attaining that goal, it is a waste. Too often lawyers set a goal of destroying the witness and end up with an ineffectual cross-examination, or a cross-examination that is disastrous.

Wigmore said that the goal of cross-examination should be to “soften the impact of a witness by confrontation.”

Persuading the fact finder by softening the impact of the witness may take many forms, including:

- Forcing the witness to admit certain facts or agree with certain basic principles;
- Destroying all or a portion of the testimony of a witness;

- Discrediting the witness personally;
- Separating falsehood from truth;
- Separating hearsay from actual knowledge;
- Separating opinion from fact;
- Eliciting contradictions, modifications or retractions of material testimony;
- Discrediting the witness because of bias, prejudice or perjury;
- Destroying or weakening the jury’s favorable impression of a witness;
- Establishing that the witness is lying on one or more material points;
- Showing that the testimony is improbable or that the witness has a lack of knowledge, lack of opportunity to know or lack of opportunity to observe;
- To impeach a witness by showing that he or she has given a contrary statement at another time.

To cross-examine or not to cross-examine?

The general rule should always be, “If there is nothing to gain, do not cross-examine.” Cross-examination is more often overused than underused. Too often, lawyers forget the rule and get themselves in trouble.

While the witness is under direct examination, you must be analyzing and evaluating the testimony and its impact upon the jury. When your opponent says “Your witness,” your mind must work fast and answer the following questions:



- Do I really need to ask this witness any questions, or can I save it for another witness?
- Has this witness hurt me? If yes, where exactly?
- Can this witness really help me? Where?
- Can I really reverse or weaken the harm caused by this or some other witness by questioning this witness?
- Is this witness basically honest?
- Is this witness knowledgeable?
- Is this witness vulnerable? Where exactly?

If the witness hasn't hurt you, why gamble on asking anything? Why try to convert the witness into a "more helpful" witness? The witness has already been "helpful" by not hurting you. Besides, your "most helpful" witnesses should have been those called by you in your case in chief, not those called by your opponent.

Where are the land mines? Here, one false step brings self-destruction. Has your opponent set you up for ambush or booby trap? Has your opponent purposely done a sketchy direct examination hoping you will barge in and get killed on the cross? If you say, "No questions," your adversary usually can't reopen the direct to ask more questions to bring out what he or she has failed to cover on the initial direct (unless, of course, the court gave permission to "reopen").

What makes you confident you can do anything about reducing the harm with this particular witness? What makes you think you can persuade the witness to "change" observations, recollections, opinions, or give "confessions"?

Do you expect to do it by "sheer logic"?

Do you have a writing actually in your possession, or available to you before this witness leaves the witness stand, to force favorable answers (admissions, confessions, contradictions, deposition testimony) or are you just shooting in the dark and "hoping to turn the witness around" by luck or logic?

If you do not have an impeaching writing (deposition, signed statement, letter or other writing), and if you ask questions, and the witness disagrees with what you want the witness to say, how are you going to rebut the adverse testimony?

Preparing for the cross-examination

Prepare your own witnesses for cross-examination. Explain the form and substance of the cross-examination and what the other lawyer wants to accomplish and why. Explain that the lawyer doesn't necessarily want to kill you or make you look stupid, but that the lawyer will seek admissions to support his or her theory of the case.

- Tell the witness what points you expect opposing counsel to cover. Explain what you do and how you prepare for cross-examination.
- Explain that the jury will see him or her as one of them – with sympathy and understanding. Talk to your witness about the fact that juries enjoy a witness who holds his or her ground.
- Explain that the witness should not get defensive.
- Use role-playing and practice a cross-examination. Be threatening and aggressive to show the worst of all possible worlds. Use videotapes for review. Take the witness to the actual courtroom to learn to get comfortable with the surroundings.
- Teach body language and how to sit in the chair. Talk about how to speak to the jury.
- De-personalize the opposing lawyer's attacks by emphasizing that the questions are attacking the issues, not the person.
- Discuss counter-techniques. Explain that the witness should not be influenced by leading questions. Discuss examples of asking for questions to be repeated to break the rhythm and asking "Which part of that question do you want me to answer first" to complex questions. Teach the witness how to qualify answers and explain, not just follow the leader.

- Teach the witness to listen thoroughly and critically to the questions and not volunteer answers.
- Start each critique with compliments and emphasize what the witness did right so as not to discourage or frighten the witness.

The lawyer's preparation of the cross-examination

It is, of course, fundamental that you must have done a complete investigation of the case, the facts and the law in order to prepare properly for cross-examination. This should include interrogatories, depositions, and requests for production of relevant documents.

Rule – Generally you should not be cross-examining during a discovery deposition. This is the time to collect facts and information, not to educate the opposition as to how you intend to cross-examine their witnesses.

When preparing your cross, you should always:

- Index and outline depositions so that they can be properly used during trial.
- Determine objectives for your cross-examination of each witness.
- Prepare questions in advance. Prepare a thorough outline of the objectives and areas to be covered. List the points you are sure you can make and separately list those you may not be able to make.
- Determine and list the strongest points to start with and end with. Always try to start and end strong.

Technique of cross-examination

How you begin your cross-examination often sets the tone and the jury's attitude toward how you and your examination will be perceived.

Lift the jury's energy for the cross-examination. Move into position energetically, with enthusiasm and purpose. Take your space and secure the focus of attention on you. Use delay to heighten the drama.

Arrange your notes and place them properly. Arrange exhibits you will refer



to unless surprise is important. Set up visual aids.

Stand or sit? Use a podium with wheels. Use the power of the podium but break away for emphasis.

Other techniques you should use to conduct a successful cross:

- Make eye contact with the witness. Take control.
- Make a transition from the direct examination. Let the other lawyer's voice and images die down.
- Start subtly. Let nothing in your body language, your voice or your energy level betray that this will be an attack unless you have a bombshell to drop. Just begin by suggesting you'd like to discuss a couple of points.
- Don't give the jury reason to doubt your sincerity throughout the whole trial by affecting exaggerated warmth at this point. Be courteous and considerate. Don't patronize.
- Start with benign, clear and short questions.
- If you have decided not to cross-examine, explain to the jury. "There is no need for a cross-examination now." Body language should also be used to indicate

that the testimony of the witness was of no consequence to your case.

- Don't feel hostile to the witness. It will show. Feel secure enough in the idea that your points are so clear that you don't need to be angry.
- Maintain eye contact with the witness. Stare the witness down. It keeps the witness focused and concerned. It makes you seem on solid ground if you wait for the witness to flinch. It will energize you.
- Be careful of the witness's space. Don't intrude because it heightens the look of aggression and belligerence.
- Don't be nasty or engage in name-calling. It is perceived as unprofessional and the jury will discredit you.
- When opposing counsel objects, don't look at the objector. You give the objection too much importance and credence. Look only at the jury or judge.
- Hold a series of questions for just before a break. End examination before a break on a high note.

Conclusion

The limited space prevents me from discussing all aspects of cross examination, but you can access my complete arti-

cle, along with a case example along with five expert cross-examinations on our firm's Web site at <http://www.skwwc.com/skwc-booklet.pdf>. By incorporating these principles into your cross-examinations, you will successfully persuade the jury to find in favor of the plaintiff.

The complete version of this article can be found on the firm's website at <http://www.skwwc.com>.

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