

NEED TO KNOW TIPS ABOUT EFFECTIVE CROSS EXAMINATIONS

15 TIPS TO MAKE YOUR CROSS BETTER

THE RIGHT TO CROSS-EXAMINATION IS THE VERY BASIS OF OUR ADVERSARY SYSTEM. WITH THE CROSS:

- YOU use leading questions to test the veracity of what the witness says!
- YOU get to testify!
- YOU control the tempo and cadence of the questioning!
- YOU choose the direction of the testimony!
- YOU are the focus of attention!
- YOU have fun (most of the time!)

THE BIGGEST SECRET OF AN EFFECTIVE CROSS-EXAMINATION IS – THERE IS NO SECRET

- An effective cross uses common sense and regular old human nature to get to the heart of the matter.
- "*Cross-examination is simply storytelling in yet another form. Cross-examination is the method by which we tell our story to the jury through the adverse witness and, in the process, test the validity of the witness's story against our own.*" [Spence, Gerry *Win Your Case*, at 169]

15 THINGS YOU NEED TO KNOW TO HAVE A BETTER CROSS-EXAMINATION

1) **KNOW YOURSELF AND YOUR STYLE – AND STICK TO THEM**

- Phony will get you crushed.
- A judge or jury will see a phony a mile away – and punish your client for it.
- If you are yourself you will never come across as someone that's pretending
- Trials are stressful and the true you will invariably come out.

2) **KNOW THAT YOU ARE IN CHARGE DURING THE CROSS**

- The cross-examination is your show – you are in charge -- NOT THE WITNESS and yes -- NOT THE JUDGE (sort of!)
- Know you are in control and stay there.
- Use body language, gestures, silence, or questioning tone to enforce control.
- If you lose control, retreat to an area where you can regain control or end the cross – its only going to get worse.

3) KNOW THE RULES OF EVIDENCE

- They are the most important set of rules for your cross.
- They are the field boundaries that define where you can and can't go.
- Some judges and lawyers might not know all the rules of evidence – nobody in this room of course.

4) KNOW YOUR CASE AND FACTS BETTER THAN THE OTHER LAWYER AND THE WITNESSES

- The roots of a good cross depend on the trial preparation in the pleadings and discovery phase of the case.
- Visit accident scenes. Talk to witnesses before depositions. Read reports and medical records.
- Take a “Trial Ready” deposition. Ask crisp questions. Describe exhibits in detail when referring to them during the deposition.
- Know what documentary and demonstrative evidence is likely to be used at trial and know what needs to be redacted or highlighted (if the judge allows you to.)

5) KNOW YOUR AUDIENCE

- If it is a bench trial – find out about your judge. If you practice in front of them – learn what they like and dislike. If not – ask other lawyers. Check Lawyers Weekly.
- Get to know what their “You are annoying me” cue is. When you see it – stop doing whatever you are doing.
- Know that you will usually get more latitude in questioning witnesses and should get to the point faster than with a jury.

5) **KNOW YOUR AUDIENCE**

- If it is a jury trial remember to fashion your cross to the sensibilities of modern jurors.
- Remember that most jurors do not listen to anything anymore – they watch and look at things now.
- TV, Internet, Tablets, Smart Phones and Buzz feed have changed the way people get information and limited their attention span.
- Cross exams should be tailored to this new reality – otherwise you can lose the attention of the jury.

5) **KNOW YOUR AUDIENCE**

- Make eye contact with your jury members – but just not too much – it creeps them out.
- Try and make positive eye contact for a few seconds with each juror and then rotate.
- Watch them for signs of distraction or boredom. Speed things up if you see it.
- Remember that you know your case inside and out – but the jurors are just learning about it. Try not to assume they know it as well as you.

6) KNOW WHEN NOT TO CROSS

- If a witness didn't hurt you – don't cross.
- If you can't control a witness – don't cross.
- If you can't discredit a duplicative witness – don't cross.

7) **KNOW WHERE YOU WANT TO GO BEFORE THE CROSS STARTS**

- After the other side finishes direct -- remember to take a second and gather your thoughts.
- Stick to your plan.
- Resist the urge to savage the witness over the totally false testimony they just gave. Keep that for the end.
- Jumping around will only make your cross look and feel disjointed.
- Remember Tip 6. If you don't have to cross them, don't.

8) **KNOW HOW TO STRUCTURE YOUR CROSS**

- Tell your client's story during a cross. Whether it is by damaging the witnesses' credibility or simply telling your version of the facts.
- Tell a story in small quick blocks – remember the commercial structure on TV. Most are receptive for a much shorter time than you think.
- Establish your points fact by fact – but always allow jurors to come to the obvious conclusion on their own.
- Incorporate visual aids and chalks into your cross.

9) **KNOW TO START AND END ON HIGH POINTS**

- Hit the high points at the beginning and end of your cross.
- Put the stuff you think is weaker in the middle when jurors may not be as in tune with what is going on.
- **MINIMIZE REPETITION!**
- Don't expect a Perry Mason Moment.

10) KNOW THAT YOU SOUND LIKE A BROKEN RECORD IF:

- EVERY QUESTION begins with “Isn’t it True” or ends with “Correct?”
- Use questions in the same way you normally would.

THIS

- "Your name is Wile E. Coyote, isn't it?"
- "On March 23rd of last year, you placed an order with the Acme Co, right?"
- "Isn't it true that three days later, a package arrived, didn't it?"
- "And isn't it true that it was a box from the Acme Company?"
- "And you would agree that you opened the box, correct?"
- "And you would agree that you looked inside, correct?"
- "Isn't it true that it contained a jet rocket?"
- "And isn't it true it also contained roller skates?"
- "You removed the jet rocket, correct?"
- "You strapped the jet rocket to your back, didn't you?"
- "You strapped the roller skates to your feet, correct?"
- "Then you saw the Road Runner right?"
- "Isn't it true you then pointed yourself towards the Road Runner."
- "You lit the rocket...didn't you. Tell this jury that you lit that rocket!"

VS THIS

- “Your name is Wile E. Coyote, isn’t it?”
- “On March 23rd of last year, you placed an order with the Acme Co, right?”
- “Three days later, a package arrived, didn’t it?”
- “A box from the Acme Company.”
- “You opened the box.”
- “You looked inside.”
- “It contained a jet rocket.”
- “And roller skates.”
- “You removed the jet rocket.”
- “You strapped the jet rocket to your back.”
- “You strapped the roller skates to your feet.”
- “You saw the Road Runner.”
- “You pointed yourself towards the Road Runner.”
- “You lit the rocket...”

11) KNOW YOU HAVE TO LISTEN TO WHAT THE WITNESS SAYS AND ADJUST IF NEEDED

- Listening to what the witness actually says is essential.
- Sometimes they will follow your lead to slaughter other times they will fight.
- Remember the jury, if you haven't put them to sleep, are listening to everything.

12) KNOW THAT ALL IMPEACHMENT POINTS ARE NOT CREATED EQUALLY

- Impeachment evidence RULES – but only if its material and relevant.
- If a witness says the car was green in a deposition but says it was olive on the stand – don't base your cross on this thin reed.
- If, on the other hand, a witness says there was nothing on the floor at the deposition then gets on the stand and says there was grape juice everywhere – you have something to work with.

13) KNOW WHEN THE WITNESS IS SMARTER THAN YOU

- It is hard to believe that can possibly be true, but there are witnesses that are way smarter than you.
- If you meet one – be careful and recognize they can hurt you.
- Expert witnesses can often be in this category.
- Unless you are also an expert – never try an match wits with an expert in their field of expertise. They will usually trounce you.
- It is better to hit them on the periphery of their knowledge or their bias.

14) KNOW WHEN YOU ARE GOING TOO FAR

- It is possible to do TOO good a job at crossing a witness
- Make sure destroying the credibility of the witness is worth the cost.
- Ask yourself – do I really need to destroy the well meaning granny that thought the light was red or can I gently and respectfully show the jury there was no way for her to see the light from her position?
- Is it possible to make the point while also being polite? If so – then be polite.

- A LAWYER CAN LOSE HIS CREDIBILITY BY BEING TOO NIFTY WITH THE BLADE." [GERRY SPENCE, *O.J., THE LAST WORD* 211-212 (NEW YORK: ST. MARTIN'S PRESS, 1997)]

15) KNOW WHEN TO SHUT UP AND SIT DOWN

- If you are getting nowhere with a witness – stop.
- MINIMIZE REPETITION– Say it and stop.
- If you see the “You are annoying me” cue from the judge or jury – stop.
- And last – but not least – if you have made your point – stop and say “No further questions Your Honor.”

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