

Tips for Effective Cross-Examination

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- **Organize.** Do not necessarily follow the order of opposing counsel's direct examination of the witness. Use principals of primacy and recency. What the jury hears first and last are most memorable.

- **Utilize the Two Types of Cross-Examination, as Appropriate.** There are two types of cross-examination, constructive and destructive.

With constructive cross-examination, the lawyer seeks to get helpful testimony from the witness. Such testimony can corroborate the testimony of one of your witnesses or impeach another witness, either or both of which may be helpful to your case. The format, "Mr. Jones, can we agree that...?" is often useful in framing constructive questions. Frequently, constructive cross-examination is initially used with the other party's expert witnesses. For example, getting the witness to agree with you that your expert is, in fact, an expert or that his methodology is accepted and reliable in the field can be valuable.

With destructive cross-examination, your goal is to destroy, or at least seriously hurt, the witness' credibility or limit the effect of her testimony. This is the type of cross-examination we typically think of and, more importantly, that jurors have come to expect from watching television and movies. Destructive cross-examination is "gotcha" time.

Generally speaking, if you need constructive testimony from a witness, it is better to get it first before moving into destructive cross-examination. After having her credibility challenged, the witness will be more likely to fight you on the points about which you seek her agreement.

- **Destructive Cross-Examination of Critical Adverse Witnesses.** Your goal is to establish your immediate control over the witness in his mind and in the minds of the jurors. Again, jurors have come to expect this and if you fail to come out swinging, they'll assume you can't impeach this critical witness. In addition to starting strong, you should finish strong holding certain "zingers" until the end of the cross. Remember, utilize principals of primacy and recency. The first and last things jurors hear stick with them.

Establish and maintain your control over the witness by following the traditional rules of cross-examination: Ask only leading questions, ask only questions which can be answered with a "yes" or "no" (if possible in a situation where either answer hurts the witness) and never ask a question unless, first, it is absolutely necessary and, second, you already know the answer. Don't ask that one question too many.

Ask questions in which you dare the witness to disagree with you. Assuming you've deposed the witness, lay the deposition on counsel table or the lectern where the witness can see it. This visual technique reinforces your challenge to the witness to disagree with you and tacitly tells the witness you expect certain answers from her and that she will pay dearly for varying from those answers.

- **Framing your Questions.** Your questions should be tight and limited to one fact per question. The more complicated a question or the more loaded it is with facts, the more easily the witness can quibble with it or deny it. The witness may fairly deny the question based the fact that a sub-part or minor fact, for example, is technically incorrect. Don't give the witness that

opportunity—leave out the extraneous stuff.

In framing your questions, and in keeping with the notion that you should dare the witness to disagree with you, don't use the "Isn't it true that...?" format. Instead, you, the lawyer, should testify. For example, don't say "Isn't it true that the light was red?", "Isn't it true that you were going 95 miles per hour?", etc. Rather, say, "The light was red.", "You were going 95 miles per hour.", and so forth.

While opposing counsel might object on the grounds that, technically, you are not asking a question, the question is implied from your tone of voice. In any event, if the objection is sustained, you can revert to using the "isn't it true that" format to cure the objection. In the process, you've succeeded in making opposing counsel look foolish for objecting to a question so easily corrected and the jury has now has gotten to hear the same question twice.

In summary, make your "statement", get your "yes" or "no" answer and move on. Sometimes the best cross-examination, even of a critical witness who just completed a lengthy direct examination, consists of only a question or two. For example, consider a case in which the other side has an expert, but you don't for whatever reason (and your not having one doesn't hurt you). Following the expert's presumably lengthy and technical testimony where opposing counsel didn't "draw the sting" by asking the expert about her fees, consider this cross:

Q: Dr. Jones, you're getting paid \$450 per hour to testify here today?

A: Yes.

Q: I won't take another minute of your time.

A colleague of mine claims to have done this and, while the story is perhaps apocryphal, it does illustrate the value of brevity.

- **The Evasive Witness.** The witness is evasive, won't directly answer your question with a "yes" or "no" or claims not to know what the meaning of "is" is. Never interrupt the witness, just go back and repeat your question. Never rephrase it. Repeat it verbatim. If the evasiveness persists, continue to repeat the question exactly slowing down and pausing between words, if necessary. Eventually, the witness will look obstructionist or ridiculous to the jury. You have succeeded already in your cross even if the witness still hasn't answered your question. Demand a "yes" or "no" answer if that's what you're seeking, but never invoke the judge unless all else fails. You will look like a tattletale running to the teacher. Establish and maintain your control, but don't be rude, ugly or hostile to the witness. For example, if the witness dodges or gives a rambling answer to a simple, direct question, let him finish and then start over saying, "I'm sorry, sir, I must not have been clear. My question actually was..." Hostility is not necessary and the jurors likely will resent it.

- **Remember the Point of Cross-Examination.** Cross-examination is not a time for the lawyer to grandstand or win a battle of wits with the witness. Cross-examination is, like all other parts of the trial (opening, direct examinations and closing), a means by which you argue your case. If nothing else, remember that and you'll have conducted a successful cross-examination.