

Lecture: Cross Examination
ACTL Trial Academy Bootcamp
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I still remember the gasp from a cross examining attorney when, after establishing some strong admissions from a critical witness, he asked a “why” question, eliciting a response referring to a damning conclusion from an otherwise inadmissible report. He pleadingly objected to the judge who responded with “You asked the question.” I’ve watched a lawyer squirm as his expert demonstrated under effective cross that he did not know some essential facts. I do not have time in this 15 minute lecture to regale you with stories of winning and losing cross examinations, but the point is that cross examination can win or lose your client’s case. Following proper techniques in preparing and conducting cross examination is critical. The following guidelines, based on the teachings of experts and my own experience, are the most important.

I. Thorough preparation is critical.

Although beyond the scope of my presentation, let me make a brief comment about preparing a witness for cross examination. I, like you, have a standard lecture which I give my witnesses before being cross examined in a deposition and trial, which includes directions to tell the truth, listen to and understand the question, don't speculate or volunteer, don't let them put words in your mouth, etc. One of the mistakes we sometimes make, however, is not having the witness articulate in his or her own words their own answers to anticipated questions. It is also important for the witness to understand and articulate what is important about what they have to say. It is the witness who has to testify, and they should not be burdened by trying to parrot what you told them.

In preparing my own trial cross examination, I found that it would often take hours to prepare for a few minutes of cross examination. My cross at trial was always from a prepared script, following principles I will discuss next. My written script had references to prior testimony and documents for ease of reference. If I was going to use exhibits, they were already organized for uninterrupted use.

Occasionally, there is some surprise helpful or harmful testimony given on direct which requires you to adjust your cross, but that is unusual. Generally, you know well ahead of time what you're going to ask, how you are going to ask, and in what order you are going to ask. Prior preparation is critical.

II. You Must Have Important Purposes for Your Cross Examination.

Never ask questions to just ask questions. Generally, there are two overall purposes for cross examination: enhance your case by obtaining facts and agreement in support of your case and diminish unfavorable testimony. Do not bother with questions that do not advance your purposes. If you can't advance your goals, consider asking no questions. Sometimes a witness is highly credible, testifies only about matters you cannot dispute, and has nothing to say that enhances your case. Crossing such witnesses may well reinforce the damage.

III. Ask Only Leading Questions.

Your questions should be designed to produce only a "yes" answer, or at least make a witness look bad if he or she does not answer yes or provide an answer that is obvious to the jury. This is your chance to tell your side of the witness's story in your own way. Never ask an open-ended question, such as why, how, explain, or what is your opinion.

IV. Ask Short and Clear Questions.

Your leading question should be a short, declaratory statement with a question mark. Avoid stock introductions or tag endings, such as "Isn't it true." Do not ask compound questions. Phrase questions to avoid objections and witness equivocation.

An important rule suggested by experts is that each question should only ask about one new fact. The initial question discusses one fact. Each succeeding question contains one additional new fact, adding to the body of facts established by previous questions.

V. Control the Witness.

Short and clear leading questions are the most important techniques for controlling the witness on cross. Don't abandon your question. If the witness doesn't really answer or otherwise avoids the question, ask the same question again. Ask a third time if necessary. Sometimes you can say something like "perhaps I wasn't clear, let me phrase my question this way.". You can also follow up an equivocal answer with "that means yes?" or "that means no?" In the very least, you should either get the answer you seek or have the jury believe that the witness is being evasive, uncooperative, or dishonest.

I have found that a witness is less likely to argue with you if you demonstrate a command of the facts, or use documents and deposition transcripts. Although you should not lose your temper or appear that you are being unfair to the witness, do not abandon control.

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VI. Organize Your Cross Examination in a Logical Progression to Achieve Your Goals; Starting and Ending with a Punch.

Rather than organizing your cross examination to follow the direct examination or chronology, organize it logically to achieve your goals. Each section of your cross examination should have a specific goal. In organizing the different parts of your cross examination, be sure to start and finish with your strongest points. That is what the jury is most likely to remember. Usually, you will start with cross designed to undermine the testimony of the witness, but if the witness has things to say that helps your case, start there

Make your points and sit down. Shorter cross examinations are frequently more effective than long drawn out crosses. Remember to begin and end with a bang.

VII. Guidelines for Cross Examining Experts.

- A. Make the expert your witness
 - Establish agreement with facts and opinions helpful to your case.

- B. Undermine credibility.
 - Professional witness who makes a good living by providing opinions.
 - Demonstrate bias; lack of objectivity.
 - Question qualifications.
 - Impeach with prior inconsistent statements and opinions.

- C. Undermine factual basis for opinions.
 - Demonstrate inadequate investigation.
 - Establish different and/or additional facts.

- D. Undermine opinions.
 - Establish different facts and how they affect the opinions.
 - Impeach with learned treatises.

VIII. Do No Harm.

You do not want your cross examination to end with your case worse off than when you began. You also do not want your cross examination to result with the jury thinking less of you than the witness. Some suggestions to avoid such results:

- A. Follow the guidelines I have discussed.
- B. Listen to answers to direct and cross.
- C. Don't ask a question to which you don't know the answer.
- D. Don't ask one question too many.
- E. Be respectful.
- F. Do not quarrel with the witness.
- G. Do not conduct a dishonest cross examination.

Conclusion - Further Study.

This lecture has been necessarily brief and general. I encourage you to study some of the many helpful sources on cross examination. In preparing this lecture, I have borrowed liberally from Irving Younger (known for his ten commandments of cross examination), Larry Pozner's and Roger Dodd's book, "Cross Examination: Science and Techniques" (advances three rules), and James McElhaney (written extensively on trial techniques).