

# Rules for Successful Cross-Examination

By Steven Susser

Preparation for cross-examination is incomplete unless a trial attorney has defined reasonable goals, developed points of emphasis, and honed his or her technique.

## Define reasonable goals

Cross-examination of an adverse witness has two goals: the first and most important is eliciting information that helps your case; the second is chipping away at credibility, which should be used sparingly. Design each question to lead you toward one of these two goals.

Asking difficult questions the witness must answer is a way to help you meet your goals. This type of concession can be obtained by being prepared with evidence the witness can't deny—either in the form of a document, discovery response, or deposition answer. For example, if the question is whether the witness improperly rejected your client's parts by claiming the parts were defective, you could force a favorable answer if you had an e-mail or deposition response in which the witness conveyed that the parts were acceptable. Posing a question that tracks a favorable deposition response and asking if it's correct will work. If the witness tries to avoid answering the question, impeach the witness with his or her deposition testimony.

A second way to get a concession is to ask a question that the jurors expect to be answered in a way that is favorable to you. For example:

Q: "Your quality control people check parts at the rate of one per minute, correct?"

A: "Yes."

Q: "And they check the same kind of part time and again, often for hours at a time?"

A: "Yes."

Q: "And checking so many parts under that kind of pressure and after tedious hours, it is certainly possible that they could make a mistake, right?"

This example works because most jurors will anticipate that if a person is checking a large number of parts in a repetitive manner, occasional mistakes may occur through inattention or fatigue. Either the witness agrees with you that mistakes can happen, or he or she looks biased and not credible.

Avoid the "Hail Mary" question ("You defrauded your partner, didn't you?") unless you have an earlier damaging admission. Don't ask a question you know the witness will deny simply so the jury can hear it ("You are an arrogant and insensitive boss, aren't you?"). Asking softball questions to get the witness to agree with you won't accomplish much ("Can we agree that your relationship with the defendant broke down?").

The two goals—getting useful admissions and denting credibility—can be at cross purposes. When an adverse witness's testimony helps your position, you don't want to discredit the witness's credibility. On the other hand, if the witness has nothing useful to say for your case, your best play might be highlighting his or her bias. When a witness makes statements during direct examination that help the other side and hurt yours, on cross you will usually be able to elicit at least one point that helps your side and hurts the other. The more you're able to extract helpful points, the less you want to discredit the witness. Using potentially discrediting



## fast facts

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appearance, body language, etc. You'll do more for your position by provoking a few helpful admissions than you will by fighting the witness on each point. Juries listen with particular attention to a point that is against that witness's interest. Getting a cross-examinee to make one statement favorable to your client is worth a multitude of answers that simply address direct testimony.

Another reason for brevity is that the jury is particularly attuned to cross answers. It expects a song and dance on direct, but fireworks on cross. Don't disappoint; that is, give the jury a punchy, but short, cross. This makes use of the heightened focus that you get and avoids boring or distracting your audience with a lengthy, perhaps rambling, cross-examination.

information is a matter of judgment, but as a rule, I prefer to "turn" the witness rather than hurt his or her credibility.

I recently handled the cross of a distinguished senior executive for the plaintiff in a patent case. I could tell he was in marketing. He spoke smoothly and came across as the picture of honesty. It would have been shortsighted for me to try to paint him as a liar unless I had something foolproof and exceedingly strong. I didn't, but I came armed with deposition testimony in which this witness—deposed early in the case—unwittingly gave several answers that helped my defense. I used those damaging statements to hijack the witness's credibility despite his appearances to the contrary.

### Develop points of emphasis

Most cross-examinations are too long. With a cross, you want to go in, satisfy your reasonable goals, and get out. Countering each point the witness scored on direct is tempting, but resist the urge. Instead, select a few key points that you want to communicate to the jury and then ask a set of questions designed to elicit those points.

The reason for brevity is that your listener will evaluate the witness on his entire presentation—words,

## Hone your technique

Here are some tips for making your cross more effective:

- **Relax.** If you're tense and scripted, your cross may fall apart if the witness gives answers you don't expect—and he or she likely will. Have reasonable and limited goals in mind and supporting evidence, if you have it. Prepare an outline designed to attain those goals, and don't panic when the direction of the examination strays from your best-laid scheme. Then, let the words come out as they will without trying to force them.
- **Use your voice.** By the time you start your cross, the jury has been listening to lawyers say strange and largely uninteresting things for a while. Use your voice to signal a point that you want the jurors to catch. You can do this by pausing for longer than usual before asking an important question, or by slowing your speech and raising your voice slightly. You can even alert the jury that something important is coming with words like these: "Now, Mr. Smith, I would like you to listen carefully to the next question." As long as you use them sparingly, these verbal cues signal the jury that something significant is coming.
- **Don't hoard.** If you have good material, use it within your first five minutes. Don't save it for some imagined grand finale. If you're lucky, you'll get 15 minutes of cross at the end of the day (maybe even a Friday) to end on a high note. Don't waste that opportunity. Those minutes of testimony before a break can be critical. A judge once forced my witness to take the stand for cross on a Friday afternoon with 20 minutes of testimony left. I was nervous that my witness was going to be sucker-punched two or three times. Instead, opposing counsel asked innocuous questions that gave my witness the chance to make some helpful points. The jury's last impression of the witness before the weekend break was just what I wanted it to be.
- **Use visuals.** If you have a good document that impeaches the witness, have a highlighted version ready to introduce into evidence. If you have deposition testimony and the judge will let you display it, take advantage. The combination of a strong question supported by a clear document can be more effective than either in isolation. I particularly like Apple's TrialPad because you are in control with no graphics operator standing between you and the jury. Like extra questions, too



many visuals spoil the effect of the good ones. Use them sparingly.

- **Don't be mean.** It may be tempting to make a cutting remark, roll your eyes, or lay on the sarcasm. Don't. You rarely can be sure how the jury perceives a witness, and you don't want to be seen as being hurtful to someone the jury likes. Even if the witness seems patently unsympathetic, no one likes a bully. Basically, you want to speak to the cross witness in the same manner you spoke to your own witness on direct.

## Conclusion

An effective cross-examination can be a formidable weapon. But, in reality, it tends to be less theatrical and less effective than it is often portrayed in the movies. A strong direct will beat a strong cross any day of the week. If you don't overreach, you can often leave a witness who was strong on direct in a compromised position after cross. That may be the best you can hope for in most instances.

Only a small percentage of cases involve trials. Depositions are more frequent. Many of the suggestions in this article work equally well in the context of taking depositions. Try some and see how they work for you. ■



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