

Basic Principles of Cross-Examination

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Cross-examination has been called the greatest legal engine ever invented for the discovery of the truth.¹ This article discusses the purposes of, and provides guidelines to be used on, cross-examination.

Purposes of Cross-Examination

The first decision to make is whether you should cross-examine a witness. In order to make that decision, you must know what you want to accomplish by the cross-examination. Professors Steven Lubet and Thomas Mauet, in their manuals on trial practice, suggest a number of factors that should be considered in making that decision.² They are summarized as follows:

1. Did the witness hurt your case by the testimony given on direct examination? If so, can cross-examination be used to minimize or repair the damage?
2. Can the cross-examination help your case?
3. Can the cross-examination hurt your adversary's case?
4. Do you need the witness to establish an evidentiary foundation to admit a document or other exhibit in evidence?

5. Can you discredit the testimony given on direct examination? In other words, can you demonstrate inconsistencies in the testimony given on direct examination? Can you demonstrate that the testimony given on direct examination conflicts with the testimony of other witnesses?

6. Can you discredit the witness? For example, can you show that the witness is biased? Prejudiced in favor of your adversary and/or against your client? Has a motive to lie? Is personally, financially, or otherwise interested in the outcome of the litigation? Was not in a position to see or hear the event that he/she testified about on direct examination?

7. Can the cross-examination be used to enhance or destroy the credibility of other witnesses?

8. Is the witness so important that you should undertake some sort of cross-examination to fulfill the expectations of the jury?

Unless the answer to one or more of these questions is "yes," you would be well-advised not to cross-examine the witness. Indeed, the jury may be impressed if you choose not to cross-ex-

amine a witness. The jury may even understand that you have no questions for the witness because the testimony given on direct examination was not important.

Guidelines for the Cross-Examination

Once you decide to cross-examine a witness, be forewarned that you will almost always be venturing into dangerous territory. The reason is that the witness is usually adverse or hostile to your client's position. Therefore, you must control the witness on cross-examination. This can be accomplished by following certain guidelines during the cross-examination.

A number of years ago, the late Irving Younger developed his "Ten Commandments of Cross-Examination:"

1. Be brief.
2. Short questions, plain words.
3. Ask only leading questions.
4. Never ask a question to which you do not already know the answer.
5. Listen to the answer.
6. Do not quarrel with the witness.
7. Do not permit the witness to explain.

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8. Do not ask the witness to repeat the testimony he gave on direct examination.

9. Avoid one question too many.

10. Save the explanation for summation.³

Today, some prominent trial lawyers disagree with many of Younger's Ten Commandments. For example, in his book *Examining Witnesses*, Michael E. Tigar writes that "good sense and good tactics" will result in every one of Younger's rules being violated at one time or another.⁴ Likewise, in his book *The Trial Lawyer*, David Berg writes that he believes that Younger's rules were intended for beginning trial lawyers.⁵ Berg suggests that many of the rules need to be broken to develop a powerful cross-examination.⁶

Other prominent trial lawyers have developed their own rules. In their book *Cross-Examination: Science and Techniques 2d*, Larry S. Pozner and Roger J. Dodd advocate three rules for cross-examination. Use leading questions only, elicit one new fact per question, and break down the cross-examination so that each section has a specific goal.⁷

However, all authorities on trial practice agree that a trial lawyer needs to control a witness on cross-examination. For example, Tigar astutely notes that the witness has already hurt you on direct examination and, if given the opportunity, will probably hurt you again on cross-examination. Therefore, a witness needs to be controlled on cross-examination so he/she will not hurt you again.⁸

The following guidelines can be used to control a witness on cross-examination:⁹

1. Do not ask a question unless you are reasonably certain that you already know the answer. Cross-examination is not the time to discover new facts. It is not the time to be curious. Remember, curiosity killed the cat. It may likewise kill your case.

2. Treat the witness fairly. You should not be hostile, especially if you want to gain concessions from the witness, including that he/she may have been mistaken in his/her testimony on direct examination.

3. Use leading questions. A leading question suggests the answer, which is usually "yes" or "no."

4. Unless you have incredible intestinal fortitude, never ask open-ended questions, such as those that ask "how" or "why" or that allow the witness to explain anything on cross-examination. These types of questions can lead to disaster.

5. Listen to the answers. Do not mechanically ask one question after another without listening to the witness' answers. The answers may contain favorable testimony. If so, you may have accomplished your task and you should consider ending your cross-examination. On the other hand, if you do not listen to the answers you may not hear damaging testimony that should be addressed.

6. Do not allow the witness to repeat (and therefore reinforce in the minds of the jury) the testimony given on direct examination. There is no reason to ask a question that allows the witness to repeat his testimony. The odds are very small that the witness will testify differently on cross-examination. You know the testimony given on direct

examination, the witness knows the testimony, the jury knows the testimony. So just dive into your cross-examination.

7. Keep your questions short and in plain English. Your goal is to obtain one fact with each question. Ideally, each question should be posed as a declaratory statement of a single fact calling for affirmation by the witness. This will make the cross-examination much more manageable for you, prevent objections from your adversary (for example, that you are asking compound questions), and allow the jury to easily follow and understand your cross-examination.

8. Ask the important questions at the beginning and end of your cross-examination. People, including jurors, remember best what they hear first and last. Conclude your cross-examination on a high note—your strongest point.

9. Your cross-examination should be brief. Remember, you are trying to "score points" to be used in your closing argument. In a lengthy cross-examination, your strongest points will be lost and the less significant points will be forgotten by the jury.

10. Control the witness. The best way to control the witness is to ask simple and clear questions. By doing so, you will not give the witness an opportunity to give harmful testimony. If your question calls for a "yes" or "no" answer and the witness provides additional testimony that is harmful to your case, you should ask the court to strike the testimony as being unresponsive to your question. Although you cannot "unring a bell," the jury even-

tually will understand that the witness' conduct is improper. If the witness answers a question other than the one you asked, ask it again, and yet again if necessary.

11. Do not ask one question too many. Remember the purpose of cross-examination—you are trying to obtain favorable testimony so it can be used in your closing argument. You need not ask the ultimate question that will drive your point home to the jury. Instead, your cross-examination should only suggest the point to the jury. Your closing argument will drive the point home.

The use of these guidelines will allow you to control the cross-examination. By being in control, you will be in a better position to obtain the testimony to fulfill the purposes of your cross-examination.

Conclusion

You must have a purpose to cross-examine a witness, and you must always control a witness on cross-examination. With a purpose and with control of a witness, you will be in a position to conduct an effective cross-examination.

1 5 Wigmore, *Evidence* (Chadborn Rev. 1974) §1367 at 32.

2 See Steven Lubet, *Modern Trial Advocacy: Analysis and Practice 3d* (NITA 2004) at 87-88 [hereinafter "Lubet"]; Thomas A. Mauet, *Fundamentals of Trial Techniques 2d* (1988) §6.2 at 211-213 [hereinafter "Mauet"].

3 Professor Younger's Ten Commandments of Cross-Examination are reprinted in Michael E. Tigar, *Examining Witnesses 2d* (ABA 2003) at 203 [hereinafter "Tigar"], and David Berg, *The Trial Lawyer* (ABA 2003) at 175 n.3 [hereinafter "Berg"].

4 Tigar at 203.

5 Berg at 175 n.3.

6 See *id.*, Chapter 6.

7 See Larry S. Pozner and Roger J. Dodd, *Cross-Examination: Science and Techniques 2d* (LexisNexis 2004), Chapter 8.

8 Tigar at 201.

9 The guidelines are derived from texts by Professor Mauet and retired New Jersey Superior Court Judge Leonard Arnold. See Mauet, §6.4 at 214-222; Leonard N. Arnold, 32 *New Jersey Practice: Criminal Practice and Procedure* §22.1 at 660 (Thomson West 2005).