

Practical “Rules” for Cross-Examination

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The first rule of cross-examination is that there are no absolute rules of cross-examination. There are merely guidelines and suggestions. Every cross-examination is different, and has to be approached with flexibility. But cross-examination is certainly not the time to shoot from the hip. You must be prepared, confident and have clear goals. The difference between an average and a great cross-examination can be as little as one simple question. The learned skill is to get in and get to the important issues and then get out without being hurt in the process. Perhaps Mick Jagger said it best: “You can’t always get what you want, but if you try sometime, you just might find, you get what you need.”

1. STOP

The late Professor Irving Younger had four simple “rules” for cross-examination:

- When you are winning, STOP;
- When you do not know what to do, STOP;
- When you have made your point, STOP; and
- Before you get hurt, STOP.

This may seem like a strange first rule, but cross-examination is a dangerous time of the trial for you. More things can go wrong than go right. Keep in mind the principle physicians follow, *primum non nocere* (“First, do no harm.”).

You should set your goals, and plan your cross. Then sit down. It should be long enough, and no longer.

There is nothing worse than not stopping in time. For an example, see *Appendix A*.

2. PREPARE

- a. A good cross-examination starts long *before* you get to court.
 - Cross examination is 90% preparation.
 - There are no short cuts, you must know and understand the facts cold.
 - You must know and understand the substantive issues, i.e. the medicine, science, etc.
 - You must know and understand the applicable law.
 - Don't let your client pay for your lack of preparation.
- b. Investigate to prepare.
 - i. Know the witness
 - (1) Learn all you can.
 - (2) Know her written and other statements inside and out.
 - (3) Has she testified before? Has she written or lectured on the relevant issues?
 - (4) Search the web (Facebook, Twitter, YouTube, blogs).
 - (5) Any collateral issues?
 - (a) Arrests.
 - (b) Bankruptcies.
 - (c) Judgments.
 - (d) Prior lawsuits.

- (6) Are there “hot button” issues for the witness?
- ii. Know your opponent.
 - (1) How carefully has she prepared the witness?
 - (2) What type of objections will she make?
 - (3) What type of redirect can you expect?
- iii. Know the law.
 - (1) Understand the evidentiary principles and the proper scope of impeachment.
 - (2) Consider getting an advance ruling if there is a particularly significant issue.
- iv. Know the Judge.
 - (1) How far will the judge let you go?
 - (2) When does the judge like to break? Plan your examination accordingly.
 - (3) Does the judge allow you to approach the witness, or do you have to ask permission?

Simply put, preparation and hard work are two of the few common denominators in any effective cross-examination. You can only succeed if you put forth maximum effort beforehand. Do the investigation, do the research, and prepare thoroughly. Then practice. Your hard work will pay dividends when it counts – in front of the jury.

3. REMEMBER YOUR AUDIENCE

You are there to persuade the jury – not the witness, the client, your opponent or the judge (unless it is a nonjury trial). So target your cross to the jury.

- a. Even the greatest concession from a witness will be lost if the jury does not understand the testimony, and why it is important. So make sure that you use language that every juror will understand.
 - Adjust your approach based upon the specific jury in each and every case. If you have jurors with different levels of education, make sure they can all follow. If one of the jurors has particular expertise (i.e., an engineer, someone with military experience) consider exploiting that in your choice of language and themes.
- b. It goes without saying that you want the jury on your side. To be on your side the jurors have to not only believe you, they have to like you. No one makes enemies on a jury faster than an arrogant attorney who talks down to the jurors or to a witness (particularly one they like). But to believe you, the jury has to understand the evidence. Just be careful not to belittle the jury (this begins in jury selection) in your attempt to simplify the evidence. Take stock in your jury, take what you learned through jury selection, and adjust your approach – and your attitude – accordingly.

4. SET YOUR GOALS

Before standing up to do a cross-examination, you must know what you want to accomplish. Your preparation may suggest your goals, but you can't decide for sure until you hear the direct examination.

Remember you do not have to cross. If the witness hasn't hurt your case, doesn't have any favorable testimony to offer or is immune to any attempt to discredit her, your best strategy may be to say, "Your Honor, no questions."

If you do decide to cross, consider what you want to accomplish. Do you think the witness can help your case? In other words, do you think that through your cross you can get testimony that helps prove your case? Then you want to do a "positive cross." Alternatively, do you think you need to use your cross to discredit the witness or your opponent's case? Then you want to do a "negative cross."

a. Positive Cross

- Confirm favorable facts.
- Develop new facts that bolster your case.
 - Watch for "scope" objections.
 - You can make the witness your own, but will then have to ask non-leading questions.

b. Negative Cross

- Demonstrate error or confusion.
 - Witness might be wrong.
 - Witness might not have had best view, or might have been influenced by other factors (police suggestion, intimidation by other side).
- Demonstrate bias.
 - Relationship to party.
 - Interest in outcome.
 - Pecuniary interest.
 - Any reason witness might be lying, or embellishing testimony.

- Impeach the witness.
 - Bad acts.
 - Prior statements.
 - Learned treatises.

It is hard to do both a positive cross and a negative cross with the same witness. If you must try, do positive cross first. Once you have started a negative cross, the witness is unlikely to cooperate in your positive cross.

5. ORGANIZE

You must plan your cross, and craft it in a way that accomplishes your goals. Writing it out word for word is difficult, because you will need to adapt to unexpected testimony on direct, objections and rulings, and the answers the witness gives you on cross. The better approach is to create an outline, which can be supplemented based on the testimony on direct.

List the answers you want to solicit. Ask the necessary questions to get there. List appropriate page numbers of a deposition or other exhibit that may be necessary for impeachment.

Break your outline down by subject matter. Have one main point per section. Many lawyers find it effective to announce the subject matter so the jury understands the organization of the cross. For example, you might say, "Ms. Witness, I would now like to ask you about the events that occurred immediately after the accident." Announcing the topic like this helps the jury understand where you are going. This is sometimes referred to as the "Chapter Technique" since you are announcing chapter headings.

It is important to create a road map for your cross-examination. And while it is certainly ok to write out some of your questions, try to avoid scripting your entire cross. That will likely result in you becoming tied to your notes instead of listening, adapting, and going with the flow. It is better to have a detailed outline of the points you want to make and the

subject areas you must cover. You are in full control – get the witness there.

For an example of an outline, see *Appendix B*. Include in your outline a reminder to look at any notes you have about the direct testimony.

6. CONTROL

A good cross-examiner is “in control.” “Of what?” you ask. Everything. The entire cross is a performance for the jury, and you want to control everything about the performance.

- a. Control the witness.
 - i. To control the witness, control the questions and the subject matter.
 - (1) Limit the boundaries of the possible answer.
 - (2) Break the question down into basic components.
 - (3) Control the tone.
 - (4) Control the pace.
 - (5) Controlling the answers.
 - (6) Of course the best control comes with “yes” and “no” answers.
 - (7) A good technique to control the cross is to phrase questions so as to elicit a simple “yes” for an answer. A witness who says “yes” repeatedly is sometimes said to be on the “Yes Train.”
 - ii. Do not provide the opportunity for the witness to wiggle out of the point that you just made.

- iii. Be prepared to force a witness to answer your question. You can have a question read back. You can insist on a yes or no answer (if properly phrased). Avoid asking the judge to help, unless really necessary.
- b. Control yourself.
- i. Maintain eye contact.
 - ii. Use dynamic voice and tone.
 - iii. Be aware of your body language.
 - iv. Don't be afraid of using exhibits.
 - (1) Exhibits and demonstrative evidence make a cross-examination more interesting.
 - (2) More interesting means jurors pay more attention.
 - (3) Enumerate key concessions on a chart or projector.
 - v. Control your temper, unless you choose not to.
- c. Control yourself.
- i. Know the rules of evidence, and how to phrase your questions to avoid objections and interruptions. Keep your opponent seated.

7. ELICIT ONE FACT PER QUESTION

The easiest and best way to control a witness is to ask short, simple questions that establish only one fact. Phrased in a way that they call for a “yes” or “no,” such questions allow you to control the examination.

- Easy for jury to follow.
- Creates clean record.
- Sets the rhythm.
- Get the witness on the “Yes Train.”

Not only does it create a cleaner record, keeping the testimony simple will allow you to use a building block approach and fashion a more effective summation. If the question is short and simple, it pressures the witness to keep her answers short. If the witness persists in lengthy replies to short questions, she appears non-cooperative. For a good example, see *Appendix C*.

8. BE FLEXIBLE

No matter how carefully you prepare, set your goals and try to control what happens, something unexpected can always happen. The witness may be evasive or refuse to cooperate. The witness may say something you weren't expecting. The judge may strike important portions of the testimony. When these things happen, you must be flexible and adapt. Don't let the jury see you sweat. Jurors watch body language.

To be a great trial lawyer you must have the ability to think quickly on your feet. This is never truer than in the world of cross-examination. You have to adapt, improvise and overcome.

This goes back to only having an outline of your cross as opposed to a question by question play book. You must remain flexible and adjust your cross-examination in part based upon the direct you just witnessed.

Maybe the last thing the witness says is where you decide to begin, maybe you stick to your original plan. You must listen very carefully and make any necessary adjustments on the fly. No one said it was easy.

A terrific example of a trial lawyer staying focused on the goal while being flexible and listening to the witness and reacting to the answers can be found in *Appendix D*.

9. USE YOUR OWN STYLE

The most important thing to remember when it comes to style is to be yourself. Do not try to imitate someone else's cross. You may have been impressed by a bulldog of a trial lawyer you've seen in court, but if your personality is more easy-going, you won't be able to become another person. You will fail and the jury will notice. Adjust your personal style to the case and to the jury, but never go outside of your own comfort zone.

10. MASTER THE BASICS

Like any skill, cross examination requires that you master certain basic techniques, so you can call on them whenever you need. Two of the most important basic techniques are using a statement to refresh a witnesses' recollection, and impeaching a witness with a prior inconsistent answer.

- a. Refresh Recollection of a Witness. "I Don't Recall!"
 - i. Witness **MUST** say: "I don't recall" or "I don't remember" or some variation. Otherwise, the judge won't allow you to refresh their recollection.
 - ii. Tell witness you will show them something to see if it helps refresh their recollection.
 - You can show them anything to refresh their recollection.

- It can be a police report, a medical report, a book excerpt, a photograph, a map, etc.
- Does not have to be that witness' prior statement or report.

iii. What to do:

- (1) Mark document or item for identification. (This is done by asking the Court to have the document marked for identification. It is then given to the reporter who marks it. If you know you may be using the document, or if it is a document you may want to put into evidence at some point, you can have it "pre-marked for identification" which means you ask the Court Reporter before the trial starts or the day it starts to pre-mark your items/exhibits.)
- (2) Show the document to the witness. "I am showing you what we have marked for identification as Exhibit ____."
- (3) Instruct the witness to look at the document and read it to themselves. Because the document is only marked for identification and is not in evidence, neither you nor the witness can read it out loud to the jury. Most judges will let you describe it in general terms, i.e. "This is a police report dated September 20, 2012." (Depending on what the document is, you may want to direct the witness to a particular place on the document for their review. If it is a book, or several pages, you may want to direct them to the appropriate page.)
- (4) Once the witness has finished reviewing the document, ask, "Does that refresh your recollection as to . . ."

(5) Repeat your initial question.

For an example, see *Appendix E*.

b. Impeaching with a prior statement. The “TEMPO” Technique.

You can use this technique when the witness says something inconsistent with her prior statement.

- i. Trap the witness. Get witness to commit to current version. Leave no escape route.
- ii. Emphasize importance of prior statement. Authenticate and validate it.
- iii. Mark the statement (make sure opponent has it).
- iv. Pound witness with it. Read it yourself or have witness read it.
 - (1) If you read it, you can emphasize it the way you want, and don't give witness chance to explain. Ask witness “Did I read that correctly?” not “Is that what you wrote/said?”
 - (2) If you have witness read it, there is added impact of having inconsistent testimony come from same mouth.
- v. Offer exhibit, under appropriate circumstances. Give or show it to jury.

The Tempo technique is further outlined in *Appendix F*. For an example of it in action, see *Appendix G*.

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One of the finest trial lawyers in New York State was Jack Litman, a longtime leader of the NYSBA Criminal Justice Section, and a mentor to countless young defense lawyers. Jack was particularly known for his skillful cross-examinations, especially of medical witnesses in the many homicide cases he tried. An example of one of his cross-examinations, illustrating mastery of many of the “rules” discussed in this outline, is found in *Appendix H*. Jack, who passed away several years ago, would be glad to know young lawyers are still learning from him.