

CROSS EXAMINATION: A Control Freak's Dream

WHAT IS IT?

Attorney tells the story

Nowhere in the trial will you have more control!

Get to ask leading questions

Witness must answer:

truthfully

under oath

on the record for later review

Witness cannot go anywhere

Unlike real life:

witness cannot argue back

you have a referee



GOALS

Obtain evidence that supports your case

Support your case theory

Many times only place you can get this evidence

More powerful if it comes from the other side's witnesses

Support your witness

Limit and clarify effect of direct

Discredit the witness

Attack the witness's testimony

PREPARATION

Complete mastery of the facts

Know where to go to use those facts (depositions, statements, exhibits)

Complete mastery of your theory

Know where you are going

Complete mastery of opponent's theory

Know where opponent is trying to go

Know what you want from the witness and identify those points

Identify the “big” points in advance

Make outline – do not write out questions

If prepared, listening to direct more effective

Can make modifications to plan **ONLY IF PREPARED**

Catch hidden gems that can win your case



ORGANIZATION

Admissions before discrediting or discredit first?

This decision is what you get paid for!

Which works best for your case?

Organize by topic

Do not repeat direct – reinforces direct as jury hears it twice

Exceptions:

as head note

impeachment

Do not set up a straw man

Draw blood early

Start big and end big



DELIVERY

LEAD, LEAD, LEAD!

What is a leading question?

Technically: any question that suggests an answer.

For your purposes in cross: the question does not suggest the answer, it states the answer!

“A declarative statement followed by a request for affirmation.”

Do not ask open ended questions:

If you ask the witness to explain, chances are they will!

FACT QUESTIONS ONLY! Do not ask for witness’s conclusions or opinions

“You saw the red car pass the blue car, right?”

“That pass occurred in a school zone?”

“You also saw that red car swerve back and forth from one lane to the next, right?”

“While the driver of the red car was doing those things, you saw him holding a cell phone in front of his face?”

“Defendant was driving recklessly, right?” NO, NO, NO!

DELIVERY cont.

Simple language

Short questions

Build bit by bit

Torture good facts

Use head notes to help a jury follow

Be brief – do not waste the jury's time

STYLE

CROSS EXAMINATION DOES NOT MEAN BEING CROSS

Remember: goal is to persuade!

What style works best for you?

What style works best for witness?

Quiet, polite assassin or aggressively confrontational?

It may change during witness, if witness gives you reason

Witness may give you license to be aggressive

Common tools:

Use your voice

Eye contact – possibly the subtle but powerful tool

Gestures and movement

A subtle head nod or eyebrow raised will convey what words cannot!

Find a reason to get up

CONTROL

Keep control with leading questions vs. lose control with open ended ones

Keep control with single fact questions vs. lose control with compounded questions

Keep control with fact only questions vs. lose control with questions seeking opinions or conclusions

Keep control with crisp pace vs. lose control with meandering pace

Tone and demeanor
What works for you?



CONTROL OF NON-RESPONSIVE OR HOSTILE WITNESS

Repeat question yourself: “Perhaps I did not ask a good question. . .”

Directly challenge witness: “That is not the question I asked. . .”

Ask court reporter to read it back

“Sir, I am sure that is the answer to some question, but not the one I asked.”
(not recommended, but effective)

If rambling answer, “So your answer to my question was ‘Yes’, right?”

Interrupt long winded, non-responsive answers – holding up your hand works wonders

Never answer witness’s questions

Get judge’s help as a last resort
“Objection, non-responsive”