The Five-Question Rule: Cross-Examination Simplified

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The trial lawyer lives and dies by the examination of adverse witnesses. The Greeks considered cross-examination fundamental to the persuasive process. Socrates' effort to defend himself reflects the seriousness with which the art of cross-examination was approached in ancient times.

In modern litigation, the confrontation between trial lawyer and adverse witness often provides the most dramatic moment of a trial. Even fictional cross-examination scenes have become classic trial lore: Recall evolutionist Henry Drummond cross-examining creationist Matthew Harrison Brady in *Inherit the Wind*, or the attorney played by Jose Ferrer cross-examining Humphrey Bogart's Captain Queeg in *The Caine Mutiny*.

Cross-examination may not always fulfill its dramatic promise. However, most lawyers agree that this stage of a trial presents the greatest potential for high courtroom drama.

The words "You may cross-examine the witness" presents a challenge to every advocate. The goals of cross-examination are identifiable:

- To redefine the story and add perspectives missing in the direct examination. The story that the witness has told about his or her qualifications, relationship with the parties, recollection of events, or opinions may not have been the whole story.
To impeach the witness’s credibility, knowledge, or recollection of the story by pointing out inconsistencies or lack of qualifications. In the case of a lay witness, the two primary areas of impeachment are the witness’s opportunity to observe or determine and the ability to accurately recall the events described.

To obtain helpful admissions or concessions from the witness.

To introduce additional evidence helpful to the jury’s understanding of the case. For example, the defense liability expert may present fertile territory for exploring issues and opinions that bear on damages.

To cause the jury to dislike or mistrust the witness.

To make the jury believe that the cross-examining lawyer is closer to the facts than the opposing lawyer.

To preview the closing argument.¹

Seldom should a lawyer try to achieve all possible objectives in cross-examination. Few witnesses present this opportunity. Rather, the lawyer must select the areas that present vulnerability. Which goals the attorney will pursue depend on the witness and the testimony offered.

If the testimony is false, the purpose of cross-examination is to destroy both the witness and the testimony. If the testimony is true in part and false in part, then the purpose must be to destroy only what is false. Skilled trial lawyers know that they must accept what they believe to be true even if it damages the client’s case. If the testimony is false only in the sense that it exaggerates or creates a wrong impression, the function of cross-examination is to whittle down the story to its proper size and show its proper relation to other facts.²

¹ SONYA HAMLIN, WHAT MAKES JURIES LISTEN 221 (1985).
Jurors pay more attention to cross-examination than to direct examination. Because of this, cross-examination presents a unique opportunity to further the client’s cause. It is an integral part of the persuasive process. The ideal cross — because it is controlled and organized — not only accomplishes the goals that have been identified, but also maintains the jury’s interest.

Most authorities recommend a cross-examination that makes only a few critical points. Asking too many questions in an effort to touch on every point the witness made in the direct testimony will dull the effectiveness of any solid blows that the attorney strikes at the weak points. The celebrated trial lawyer Rufus Choate’s motto was “Never cross-examine more than is absolutely necessary. If you don’t break your witness, he breaks you.”

Lawyers who extend cross-examination into unfamiliar areas or into matters that do not further the jury’s understanding of the client’s story are like travelers who become lost on the trial. The one-question-too-many trap ensnares lawyers who either did not have a map when they began or, if they did, discarded it along the way.

The rule of primacy says that the jury will be most attentive in the first few minutes of cross-examination. Of all the parts of the examination, the jury will likely recall best how it began and the first points that were made.

Within the first five questions, the attorney should communicate to jurors what subjects will be covered, what will be accomplished during further cross-examination, and what is expected from the jury. Does the lawyer expect the jury to accept some testimony or reject it all?

The first five questions asked must be carefully drafted and posed. They should be short, direct statements with which a reasonable witness must agree. If the witness accepts these initial propositions, further cross-examination may not be necessary.

For example, consider a hypothetical case in which the plaintiff was injured in a car crash. The defense expert is an orthopedist who has conducted an independent medical examination of the plaintiff at the request of the defendant’s insurance carrier. The doctor has said in a written report, on the basis of a single examination, that the plaintiff has completely recovered from any injuries

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3 See, e.g., Emory R. Buckner, Comments on the “Uses and Abuses” of Cros-Examination, in WELLMAN, id. at 217.

4 THOMAS A. MAJET, FUNDAMENTALS OF TRIAL TECHNIQUES 241 (1980); JEFFREY L. KESELER, QUESTIONING TECHNIQUES & TACTICS 54 (1982).

5 WELLMAN, supra note 2, at 222.

6 Ethics require that counsel attack only what they believe to be wrong, exaggerated, or deceptive. No client is entitled to have the lawyer score a triumph by superior its over a witness who the lawyer believes is telling the truth. See Buckner, supra note 3, at 216.
and should experience no future disability. The plaintiff’s physicians, who have treated the patient over time, will testify about the injuries and future disability.

This scenario presents a significant challenge. One approach would be to use the five-question rule. Under this disciplined system, the lawyer must identify at the outset the goals to be accomplished in cross-examination. Three objections seem reasonable:

► Impeach the witness’s finding of no future disability.

► Compare the foundation of this witness’s opinions with that of the treating doctors’ opinions. Develop evidence from which the jury can conclude that the treating doctors’ opinions are more credible.

► Lay the foundation for closing argument that the verdict should not be based on the defense expert’s opinions.

Having identified these goals, the attorney might conduct a five-question cross-examination as follows:

Q. Doctor, would you agree with these basic propositions that a physician who is giving medical opinions about an injury or disability suffered by a party to a lawsuit should be objective and not attempt to serve as an advocate for either side?

Q. To the extent a medical expert gives opinions that reflect a failure to be objective, those opinions should be discounted?

Q. The more pertinent information the physician has, the greater the likelihood the resulting medical opinions will be accurate?

Q. When there is a conflict of medical opinions between physicians of equal qualifications, the opinion of the physician who has had the benefit of greater information is more trustworthy?

Q. A medical opinion based on a limited, single physical examination and a limited medical history is more likely to be erroneous than one based on a number of physical examinations and a detailed medical history from a doctor who has treated the patient over time?

This scenario brings home the numerous advantages of the five-question rule. Depending on the witness’s responses, no further cross-examination may be necessary. If the witness gave affirmative responses to all these questions and counsel fears becoming bogged down in unfamiliar or tedious medical terrain or being overwhelmed by the wiles of an experienced defense expert,
cross-examination could be abandoned. After five questions the jury is aware of the limitations of
the expert’s opinions and the superior position of the plaintiff’s experts. The lawyer also has
obtained answers that support the theme of the closing argument.

On the other hand, if the witness vigorously disagrees with any of these propositions, the
expert has revealed an obvious bias. Further cross-examination may be warranted and fruitful.

In another example, a physician failed to timely diagnose and treat breast cancer. The
plaintiff went to her physicians with symptoms that should have led the doctor to proceed with
appropriate diagnostic testing, including mammography and biopsy. The tests were not undertaken
in a timely fashion. As a result, the cancer metastasized and became untreatable.

The defense expert will testify that the physician was not negligent and that, even if the
doctor were negligent, earlier diagnosis and treatment would not have made a difference.

The objectives of cross-examination might be as follows:

▶ Attack the witness’s opinions on liability and legal causation.

▶ Obtain agreement to general medical propositions that form the basis for the specific
conclusions of the plaintiff’s expert.

▶ Lay the foundation for closing argument that general medical principles and common sense
dictate a plaintiff’s verdict.

The cross-examination might follow these lines:

Q. Doctor, as a general proposition, the earlier cancer is diagnosed and treated, the better the
chance for more effective treatment?

Q. This general proposition is particularly true where the primary cancer is found in the breast?

Q. With regard to breast cancer, the rate of remission or cure as the public would understand this
term is 90 to 95 percent if the cancer is diagnosed and treated before it has spread beyond the
breast and if it is less than two centimeters in size?

Q. Today’s advanced medical techniques allows us to diagnose cancer in the vast majority of
patients before the cancer grows to two centimeters or spreads beyond the breast?
Q. At the time the defendant was seeing this patient, the cancer was probably less than two centimeters in size and had not spread beyond the breast?

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*Cross-examination presents the greatest potential for high courtroom drama*

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Again, whether further cross-examination should be pursued depends on several factors. If the witness was candid enough to agree to these propositions, the inferences left with the jury might warrant ending the examination.

A third example is from a products liability case involving a hip replacement. The defendant manufactured the hip prosthesis. The plaintiff used it for several years, until a break occurred at the welded seam in the ball that joined its two hemispheres. The prosthesis had to be removed.

The plaintiff’s experts will testify that the product was defectively designed and manufactured because a solid piece, rather than two welded pieces, should have been sued for the ball section. They will also say the weld they examined in the failed prosthesis did not meet the defendant’s specific standards or general standards of good welding practice. The defense expert will offer scientific opinions to support the design and will testify that the product was properly welded.

The following would be goals of the cross-examination:

- Reinforce the significance of design and manufacturing standards.

- Narrow the question of the weld failure.

- Lay foundations for closing argument that the weld failure caused plaintiff’s injuries.

The following five questions might be appropriate:

Q. Products acting as substitutes for parts of the human anatomy represent a significant threat to the user if they are not properly designed and manufactured?

Q. The proper design and manufacture of this type of product should take into account the severity of harm to the user that might result if the product fails to perform properly?
Q. When the surgeon placed this hip prosthesis into the plaintiff, there was no reason to expect it to fail while it was being used by the patient?

Q. The hip prosthesis did fail — the ball separated into two parts — while it was in the plaintiff's body?

Q. The failure of the ball occurred at the point of the weld?

A witness who is fair and not an advocate for the defense should agree with all these propositions. A witness who is evasive or flatly disagrees has fertilized the crop that will be harvested by further cross-examination.

Finally, consider the cross-examination of a lay or fact witness. The plaintiff is suing for substantial injuries she claims to have sustained in a fall at Quick Lil’s Hot Dogs.

The restaurant was crowded, and the plaintiff had eaten on the second-floor dining level. After finishing her lunch, she emptied her tray into a trash bin. As she walked away from the bin, she slipped on a large greasy area on the floor and fell down the stairs.

The defendant calls as a witness an employee who claims to have been clearing tables on the second level about 40 feet from the stairs. His testimony is that he saw the plaintiff get up from her table, and, because she was in a hurry, she stumbled as she started down the stairs. Her haste, not the grease spot, caused the fall.

Under this scenario, the attorney during the ensuing cross-examination might pursue these goals:

➤ Impeach the witness’s impartiality and willingness or ability to truthfully recall.

➤ Discredit his ability to see all he has claimed.

➤ Lay the foundation for harmonizing conflicting evidence during closing argument.

The attorney might pose these five questions:

Q. Mr. White, you have continued to work for Quick Lil’s Hot Dogs since Mrs. Green’s fall in 1989, and you hope to have a job there when this lawsuit is over?

Q. To keep your employer happy, you have to be completely dedicated and loyal to the company and demonstrate that you are using your best efforts on its behalf?
Q. At the time Mrs. Green fell, the second-floor dining area was about as crowded as it can get, and it took your best efforts to keep the tables clean?

Q. With you concentrating on your work, there would be no reason for you to be aware of Mrs. Green’s presence in that crowd until something unusual happened to call your attention to her?

Q. The first public statement you made about what you thought you remembered seeing was when you gave your deposition — more than three years after Mrs. Green’s fall?

Again, these questions help counsel determine the course of further cross-examination. If the witness denies any of these propositions, the attorney has created doubt about the witness’s candidness and objectivity.

Using Discipline

The five-question rule disciplines lawyers to give appropriate thought to cross-examination before conducting it. The rule requires attorneys to analyze the goals to be pursued and to carefully draft the initial questions. It also provides the flexibility to extend cross-examination under much more favorable circumstances than are ordinarily presented when attorneys do not follow this procedure.

Trial lawyers, regardless of their level of experience, should consider using this approach as a part of their cross-examination technique.

JMP, Sr./srp
Chapter Ten
Presenting Your Case in Chief: Direct Examination

Legal Purpose

"Case in chief" refers to the part of the trial when it is a party’s turn to present evidence. That party may call witnesses or introduce exhibits into evidence. This is primarily done by calling witnesses to the stand and asking them questions—"direct examination." The opposition may also introduce evidence, through cross-examination or the introduction of exhibits during cross-examination.

After the prosecution or plaintiff presents its case in chief, the defendant may then present its own case in chief. When the defense case is presented, the opposition may present additional evidence through cross-examining the defense witnesses.

The legal purpose of a plaintiff or prosecution case in chief is to introduce evidence to support the legal elements that must be proven to secure a favorable verdict. The legal purpose of the defense case in chief is to introduce evidence to disprove or undermine those elements or to establish an affirmative defense.

Advocacy Goals

1. Establish the legal elements you must prove to obtain a favorable verdict.
2. Tell your story, through witnesses and exhibits in a smooth, coherent, easy to follow manner.
3. Undermine claims or positions of the opposition.
4. Have the jurors like or identify with your witnesses, including your client.
5. Have the jurors want to decide in your favor.

Legal Principles

No leading questions.

A leading question is a question that suggests the answer. It is "leading" the witness to give a particular answer. Example: "On December 1st

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of last year, you were on the corner of Elm and Stuart streets at 10:00 a.m.?”
The witness—and everyone else in the courtroom—knows what answer you want and expect. “Where were you at 10:00 a.m. on December 1st of last year” is not leading because the question does not provide information for the answer.

The rule is that you may not ask leading questions of witnesses you have called to testify unless that witness is somehow adverse or hostile to your case.63

As with many evidentiary issues, the boundaries of propriety are drawn differently from courtroom to courtroom. “Did you see the color of the traffic light?” is arguably a leading question because it suggests there was a traffic light and that the witness was able to see it. “What is your name?” suggests the witness has a name. Ridiculous examples like these can tie you into mental knots and cause unnecessary labor and anxiety.

You will hear lawyers and judges argue extensively about whether a particular question is leading. The truth is, there is a lot of grey area here. Whether a question is leading also depends on context.

Rather than attempting to apply some rigid formula to the issue of whether a question is leading, better to remember the purpose behind the rule: we do not want lawyers coaching witnesses on the stand or effectively telling witnesses what to say.

On the other hand, we do not want to laboriously walk through uncontested material in a non-leading manner: “Do you have a name?” “Do you have a house?” “Did you leave your house on December 1st of last year?” “At what time?”

All judges allow what are arguably leading questions when, as a practical matter, the “leading” is unimportant, and helps move things along. Leading can be unimportant either because the fact being suggested is itself

63 Ariz. Evid. R. 611(c) (prohibiting leading questions on direct examination “except as necessary to develop the witness’ testimony” or where the witness is hostile, an adverse party, or identified with an adverse party); Cal. Evid. Code § 767(a)(1) (prohibiting leading questions except under special circumstances); People v. Spain, 154 Cal.App.2d 845, 201 Cal.Rptr. 555 (Cal. App. 1984) (noting that being faced with a hostile witness has long been considered “special circumstances”); Fla. Stat. Ann. § 90.612(3) (essentially the same as Ariz. Evid. R. 611(c)); Ill. Evid. R. 611(c) (essentially the same as Ariz. Evid. R. 611(c)); Ferri v. Ferri, 878 N.Y.S.2d 67, 68-69 (N.Y. App. 2009) (whether to permit leading questions on direct of adverse or hostile witness is within the sound discretion of trial court); Wash. Evid. R 611(c) (essentially the same as Ariz. Evid. R. 611(c)).
unimportant, or because the fact being suggested is uncontested. If both sides agree the witness was on the corner of Elm and Stuart on December 1st of last year, there is no harm in suggesting that in the question.

This is not to say you want to ask leading questions, just because they will be allowed. As a matter of style, tactics, or presentation, leading your own witness is often not as effective as letting her offer up the facts in her own words.

Generally speaking, the closer you are to the important, disputed issues in your case, the more care you must take not to lead. The further you are from important, disputed issues, the more leading will be allowed.

If you are unsure of yourself, or are being tormented by the judge or opposing counsel over leading questions, remember the journalistic device: Who, What, When, Where, Why and How. It is almost impossible to ask a leading question that begins with one of these words: “Did,” “do,” and “could” are also good words to start non-leading questions:

Where were you on December 1st of last year at 10:00 a.m.?
Did you see anything unusual?
What did you see?
Could you see the color of the traffic light?

Note that you can ask leading questions that start with these words: “Did you see the red Corvette race through the intersection?” But if you are trying to avoid leading questions, these words are a good start.

Implementation

Preparing your case-in-chief.

Go through the jury instructions—both yours and those you expect or have received from your opponent. What are the elements you must prove to receive a favorable verdict?

The instructions are your starting point for thinking about this issue, but you must go further. For example, if your client was hit by a car while crossing the street, the jury instruction will tell you that you must prove the defendant driver was negligent. But what does that mean, in practical terms?

If your claim is defendant was negligent because he ran a red light, then the fact that the light was red is one of the essential facts you must prove to receive a favorable verdict. You may also want to prove that your client was clearly visible to an alert driver, and that may also be a fact you will seek to prove to support a negligence verdict.

Conversely, representing the defendant driver, attempting to defeat a negligence claim, you may want to prove lack of negligence by showing: (1) the
light was green, (2) plaintiff was wearing dark clothing at night, (3) plaintiff unexpectedly ran across the road, and (4) defendant was driving at or below the speed limit.

Yes, you may want to prove these things, but how will you do it? Which witness(es) will establish each point? On plaintiff's side, you may have a witness walking alongside plaintiff who can say the light had changed before they started across the street. Perhaps that witness helps with the color of the light, but can say nothing about how fast the defendant's car was going. You may be lucky enough to have a passenger in defendant's car who never saw the traffic light, but can testify she was concerned about the speed of the car. Maybe you did your homework and obtained defendant's cell phone records which show he was talking on his phone at the time of the accident. Your case-in-chief outline might look something like this:

**Negligence**

**Red Light**

Mrs. Jones

**Plaintiff visible**

Mr. Smith

**Defendant inattentive**

Police officer [to establish time of accident from 911 call]

Phone company records custodian [to introduce phone records showing defendant on phone at time of call]

**Damages**

**Nature of injuries**

Dr. Wise [treating doctor]

**Wage loss**

Mr. Bell [boss, to show wage loss and that he's a good worker]

**Past medical expenses**

Mr. Green [to introduce medical bills]

**Future medical expenses**

Dr. Wise [treating doctor]
Non-economic damages

Dr. Wise [pain of procedures employed]
Wife [can’t sleep; can’t mow lawn or play with kids]
Hunting friends [can’t hunt; used to love it]
Co-worker [used to be happy at work; now very uncomfortable and unhappy]

Note that a single witness, like Dr. Wise in the outline above, may establish more than one point or element. And it may take a number of witnesses to prove a single point.

You may also wish to annotate your outline with the exhibit numbers of the documents which help establish each case element. This is especially important in a document intensive case.

Once you have figured out which witnesses and documents support each element of your case, it is time to prepare each witness outline.

Preparing your witness outlines

You should not call a witness unless he can help you establish (or refute) at least one important fact or element of the case. But each witness may also have things to say which you believe are helpful to your case, although not essential. For example, Mrs. Jones, who crossed the street with plaintiff when he got hit, may walk with him every Saturday morning to the YMCA where they both volunteer to work with disadvantaged children. Must you prove this to win your case? No. Does it help you win? You bet.

As you prepare your witness outline, it may be helpful to think of each witness as having at least one story to tell. You don’t have to get fancy or complicated here. Just think of each story as having a beginning, a middle and an end.

Beginning: Who is the witness and why do they have anything important to say?
Q: Where do you live?
A: 1734 Elm St.

Q: How long have you lived there?

64 Certain words are italicized in this example to illustrate the non-leading nature of the questions. You would not want to audibly emphasize the words as shown here.
A: Forty-two years.

Q: Do you know Mr. Taylor [the plaintiffi]?
A: Yes, we’ve been neighbors for about 20 years.

Q: Were you with him on December 1st of last year at about 10:00 in the morning?
A: Yes, that was a Saturday. We are together almost every Saturday morning.

Q: Why is that?
A: We volunteer together at the YMCA every Saturday from 10:30 to 3:00.

Q: Did you see the accident?
A: Yes I did.

Middle: What do they have to say?

Q: Can you tell us what happened?
A: John met me at the corner like he always does. We waited for the light to turn, and when the “walk” sign lit up, we started across the street.

Q: Can you show us on this diagram where you were when you started across the street?
A: Yes. We were standing right here; then when the light turned, we started across Elm like this.

Q: Did you see any cars as you started across the road?
A: I didn’t really look; I just saw the light change and we both started across.

The witness would go on, in response to your questioning, to describe the accident.

The End: Addressing Opponents’ Points, Summing up, and Editorializing
The end of the story is where the meaning becomes clear, the moral is delivered, and the opponent’s points are put to rest, if they haven’t been already.
You may need or want to address some points you know will be raised by your opponent:

Q: *Were* you wearing your regular glasses that day?
A: No, my regular glasses were broken, and I was wearing an older pair.

Q: *So how* can you be sure the light changed?
A: I had no trouble seeing the sign. The glasses I was wearing aren’t that old.

The end of this exam might be summed up like this:

Q: *Is* there any question in your mind that the “walk” light went on before you started across the street?

Q: *How* can you be so sure?

Or, you could insert some commentary:

Q: *Why* do you remember this so clearly?
A: It was one of the most frightening and horrible experiences of my life.

Each witness may have more than one important point to make. Again, it is helpful to think of each important point as its own story: Beginning—why does this witness know what she is about to tell us; Middle—what can she tell us; End—address opposition points, sum up and commentary.

Mrs. Jones may have another story to tell about calling 911 and going to the hospital with your client. The main point of this story might be how much your client suffered—or how brave and stoic he was. She may have yet another story about the impact of the injuries on your client. Each of these stories has its own beginning, middle and end. For example:

**Beginning.**
Q: You told us earlier you volunteered at the YMCA with Mr. Taylor.\textsuperscript{65}  
A: Yes.  

Q: How long have you been doing that with him?  
A: I don’t know how long he was doing it, but he got me involved about five years ago. We’ve been doing it almost every Saturday since then.  

Q: What do the two of you actually do there?  
A: John coaches basketball and baseball—for all ages. He teaches them really more than coaches. He’ll take a few kids aside and work with them on their skills. I usually supervise to make sure the kids are all behaving themselves.  

Q: On most Saturdays, would you be in a position to see John working with the kids?  
A: Oh yes, we are almost always within sight of each other.  

\textbf{Middle.}  
You could then ask question to elicit information about what John did with the kids before the accident, how active, energetic and happy he was. This would be followed by questions elicit observations about the problems he has had since the accident. Maybe he must frequently sit down to rest; he sees him wince in pain; he has had to go back to the doctor after a Saturday session at the Y.  

\textbf{End.}  
Q: Given all these problems, are you surprised that John keeps going to the Y?  
A: No, he loves working with those kids.  

Q: Does he ever talk about quitting?  
A: I tell him sometimes he should stop or shorten his hours, but he won’t hear of it.  

You can string story after story together—beginning, middle, end. When all your stories are strung together, you have your direct exam outline.  

\textsuperscript{65} Technically, this is leading, but she has already told the jury about this. In the unlikely event of an objection, you tell the judge you are just transitioning to a new topic and laying the foundation.
Preparing your witness

If you have followed the advice in Chapter Three, you have met with every witness who will testify at trial, except those you are legally prohibited from meeting. This includes witnesses who may be called by the other side.

Now it is time to meet with your witnesses and tell them what to expect at trial. Remind them of the context of their testimony—how they fit into the case. Go over the basic facts of each "story" they have to tell. Tell them about the style and personalities of the judge and opposing counsel. If you have time, bring them by the courtroom to show them the physical layout.

You are the witness’s guide to appropriate behavior in the courtroom. You might want to cover the following issues, with your client and your witnesses:

* Dress as if going to church or a business meeting.
* The jury is judging your non-verbal communication as well as the substance of what you say. They are always watching you, inside and outside of the courtroom.
* There is nothing wrong with having met with an attorney (you) before the trial. The attorney wanted to understand what you saw, heard or did.
* If you don’t understand a question, ask to have it repeated or explained.
* If a document or deposition is referred to by a lawyer, ask to see the portion he is referring to before you answer the question.
* There is nothing wrong with pausing to think about an answer. Silence can feel scary, but actually gives you more power.
* When the opposing lawyer is asking you questions, do not look over at me—ever.

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66 For example, you are not permitted to meet with the adverse party or if it is a corporation, its managing agents or decision-makers. E.g. Fla. R. Prof. Conduct 4-4.2 (barring communications "with a person the lawyer knows to be represented by another lawyer in the matter" without consent or under other certain limited circumstances). States vary in their formulation of how this general rule applies to the employees of a corporation and such nuances are beyond the scope of this book. You are also not permitted to communicate with the other side’s expert witnesses. County of Los Angeles v. Superior Court, 222 Cal.App.3d 647, 271 Cal.Rptr. 698 (Cal. App. 1990) (attorney who contacted opposing party’s expert was disqualified from case); Kenneth C. v. Delonda R., 814 N.Y.S.2d 562 (N.Y. Family Ct. 2006) (discussing ABA and New York ethic opinions which held that while contacting opponent’s expert may not be strictly prohibited by ethics rules, such contact is likely to violate court rules); In re Firestorm 1991, 916 P.2d 411 (Wash. 1998) (holding that Wash. Civil Rule 26(b)(5) prohibits ex parte contact with an expert retained by an opposing party). See generally Fed. R. Civ. P. 26(b)(4) (providing significant work product protection to expert preparation).
*Be polite at all times. Leave the sarcasm and wisecracks at home.

**Admitting Exhibits.**

When an exhibit is admitted into evidence, it becomes a part of the record that the jury or judge can consider in arriving at a decision. It can also later be designated as part of the appellate record.

The law of evidence controls whether an exhibit is admissible. Is it relevant? Is it overly prejudicial? Does it contain hearsay?

The admissibility of evidence is beyond the scope of this book. But before you can ask a judge to admit an exhibit, you must first “introduce” the exhibit, and “lay a foundation” for its admission. While this is also governed by the law of evidence, it is also an important practical part of a trying a case, and many evidence teachers do not do a very good job of explaining how to do this.

“Introducing” an exhibit is just what the term implies, either you or a witness are announcing what the exhibit is:

Q: Can you tell us what Exhibit 43 is?

**Or**

Q: I am handing you a letter from Mr. Smith to Mr. Jones dated March 18th, 2012, which we have marked as Exhibit 43; have you seen that before?

In the first example, the witness is asked to introduce the exhibit. In the second example, the lawyer is introducing it. It ordinarily makes no difference who introduces the exhibit; this is almost never a point of contention.

Laying a foundation is another matter. Many lawyers and judges are hyper-technical about “laying a proper foundation”—often without fully understanding the concept themselves.

To lay a proper foundation, enough information must be presented to the judge that she can decide a reasonable juror could conclude that the exhibit is authentic—that is, that it is what the proponent says it is.67

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67 See Fed. R. Evid. 104 (preliminary questions of admissibility of evidence are determined by the judge). This basic foundational principle expressed in Fed. R. Evid. 104 is similar in all American jurisdictions.

68 See Fed. R. Evid. 901(a) (“The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims.”). See also Fed. R. Evid. 104(b).
Stated in plain English: could a reasonable person conclude this is authentic, not a fake?

Note that this does not mean that you need not prove beyond doubt that the exhibit is authentic or even that you need to prove it at all. Rather, you need to offer sufficient evidence that would support a finding in your favor, in the absence of contrary evidence.\(^69\)

Particularly if your opponent has no evidence of fraud or fabrication, it is enough if direct or circumstantial evidence is presented to the judge from which it reasonably could be concluded that the evidence is what you say it is.\(^70\)

Let's try a few examples:

Q: I am handing you a letter from Mr. Smith to Mr. Jones date March 18\(^{th}\), 2012; have you seen that before?
A: Yes, I am the Mr. Jones the letter is addressed to; I received this letter in late March of 2021.

Foundation laid.

Q: I am handing you a letter from Mr. Smith to Mr. Jones dated March 18\(^{th}\), 2012, which we have marked as Exhibit 43; have you seen that before?
A: No. I stopped being Mr. Smith's secretary earlier that year.

Q: How long had you been his secretary?
A: Fifteen years.

Q: How many letters did you send out for him?
A: Thousands, maybe more.

Q: Are you familiar with the letterhead he would use?
A: Yes, that is it.

\(^{69}\) See State v. Lavers, 814 P.2d 333, 343 (Ariz. 1991) ("The judge does not determine whether the evidence is authentic, but only whether evidence exists from which the jury could reasonably conclude that it is authentic."); ITT Real Estate Equities, Inc. v. Chandler Ins. Agency, Inc., 617 So.2d 750, 750 (Fla. App. 1993) ("Evidence is authenticated when prima facie evidence is introduced to prove that the proffered evidence is authentic."); Rice v. Offshore Systems, Inc., 272 P.3d 865, 870 (2012) (stating that proponent of evidence must make a prima facie showing of authenticity and that, in evaluating issue, court considers only evidence in favor of admissibility); see also, Fed. R. Evid. 901(b) (listing illustrations of authentication and identification methods that comply with the rule).

\(^{70}\) See, e.g., Fed. R. Evid. 901(b)(4).
Q: Are you familiar with his signature?
A: Yes, that is it.

Foundation laid.

The foundation of business documents is often not contested. When it is contested, different judges require different levels of detail to establish foundation. Most are extremely impatient with foundation objections and foundation testimony when there is really no legitimate question as to a document's authenticity. But you always want to be thinking about how you will lay a foundation if necessary.

Whenever you hear a foundation objection—whether to an exhibit or testimony by a witness—the real questions you need to answer are “how does this witness know what he is trying to tell us?” or “how does this witness know this document is what he says it is?”

Some exhibits are designed to recreate an event. A computer animation of an accident or surgery would be an example. In the case of such exhibits, laying a foundation may take more time and involve more detailed questioning. The exact requirements vary between jurisdictions, and vary again depending on whether disputed scientific principles are incorporated in the exhibit, the purpose for which you are introducing the exhibit, and whether you are seeking to admit the exhibit or just show it to the jury to illustrate a point. In any event, you want to have researched the law in your jurisdiction ahead of time, and at a minimum, be prepared to show the judge that your exhibit is accurate, reliable and not misleading.

Once you have introduced and laid its foundation, you still need to ask to have it admitted. To admit an exhibit then, you must first:

**Identify the exhibit:**

Q: I am handing you a letter from Mr. Smith to Mr. Jones date March 18th, 2012, which we have marked as Exhibit 43; have you seen that before?

**Lay a Foundation for the exhibit:**

Q: Did you receive that letter from Mr. Smith sometime after March 18th?
A: Yes.

Q: Did you alter that letter in anyway? [This would usually be overkill.]
A: No.

*Ask that the exhibit be admitted into evidence.*

You: Your Honor, I would ask that Exhibit 43 be admitted into evidence.

Court: Any objection?
Opponent: No Your Honor.
Court: Exhibit 43 is admitted.

This is the basic pattern, and you won’t go far wrong trying to follow it. But if you have time, go to the courtroom and watch your judge conduct a trial. You will quickly pick up on how he likes to handle exhibits.

Once the exhibit is admitted, you can show it to the jury, read it to the jury and question witnesses about it.

**Objecting, responding to objections and bench conferences**

A good way to get a trial judge angry is to make or respond to objections in a way he dislikes. The three basic ways judges want objections handled were introduced in Chapter ___: speaking objections, one word/one phrase objections and bench conferences.

The truth is that almost every judge uses all three of these approaches in almost every trial. But the exact mix is different for each judge, and even varies for individual judges from trial to trial—or from day to day in the same trial.

The best way to stay out of trouble is to simply ask the judge how he wants you to handle objections, and then follow his lead. Stay flexible, and recognize all three approaches are likely to be utilized to some degree in your trial. Also recognize that the easiest way to get the judge angry is to start arguing your case in front of the jury when the judge is trying to deal with an evidentiary issue.

**Offers of proof**

If an important piece of evidence is being blocked by your opponent’s objection, be prepared to make an offer of proof. Offers of proof (also called proffers) occur when an attorney tells the judge what he will prove if permitted. They can be made orally, or in writing. Chapter ___ discusses the law and strategy behind offers of proof in more detail. For now it is enough to note that the offer of proof is an important tool in your arsenal for responding to objections. Let’s look at an example.
You are the plaintiff’s lawyer. Your client was injured by a drunk driver who ran a red light at 90 mph. The defendant had two prior DUIs. Your state does not allow punitive damages.

Defendant admits liability and then makes a motion in limine to exclude evidence of the prior DUIs or the facts of the accident. The defense argues these facts are not relevant and are prejudicial.

A judge’s first instinct is to grant this motion. If you simply argue in your brief that this evidence is relevant to damages because the facts of the accident have exacerbated your client’s injuries, you will probably lose. It is time for an offer of proof. This can be in the form of a sworn or unsworn statement from you, or a sworn statement from a witness. If from you, the statement could look like this:

Offer of Proof Regarding Defense MIL #5

David Smith, PhD is plaintiff’s psychologist. He has been treating plaintiff almost weekly since approximately two months after the accident.

Dr. Smith has diagnosed plaintiff with Post Traumatic Stress Disorder (“PTSD”). If allowed to so testify, Dr. Smith will testify that plaintiff’s PTSD has been particularly difficult to treat, and has a guarded prognosis, in part, because of the facts of the accident. In particular, Dr. Smith will testify that . . .

You would then outline in as much detail as possible, the basis for Dr. Smith’s opinion that plaintiff’s PTSD has been made worse due to plaintiff’s knowledge of the facts of the accident and the prior DUIs. Alternatively, you could submit an affidavit from Dr. Smith, or even his deposition testimony if it is compelling.

If the objection were to come at trial, while Dr. Smith is testifying, you would orally respond in much the same way.

Judges pay attention to offers of proof. They are used to lawyers bluffing and posturing. If you take the trouble to cite the detailed evidentiary basis for your position they are much more likely to listen to you. They also have more information—your information—to evaluate. Most judges are cautious by nature. By submitting an offer of proof, you are essentially saying “this is what I am going to show the court of appeals; wouldn’t you like to take a closer look first?”
favoritism toward or bias against the defendant's race or ethnicity. 80 Similarly, gang affiliation is a reasonable subject of cross-examination to show bias. 81 An expert witness's financial interest in the present case and future work is also fair game. 82 Essentially, if you can identify some factual reason a witness may be more favorably inclined toward the other side or against your client, you should be able to explore it in cross.

Courts may, however, limit cross-examination that is irrelevant, unfairly prejudicial, confusing, a waste of time, or needlessly cumulative, even in criminal cases. 83

A few other legal principles you should know:

May not ask argumentative questions. 84

You may not ask a question that suggests facts you do not have a good faith basis to believe are true. 85 For example, you cannot ask a witness, “you

80 See, e.g., In re Anthony P., 167 Cal.App.3d 502, 507-12, 213 Cal.Rptr. 424, 428-30 (Cal. App. 1985) (appropriate to allow cross-examination to explore bias against the defendant’s racial group, but also noting that as a practical matter such questioning might be risky for examiner) (citing cases from numerous jurisdictions); People v. Krug, 51 P.2d 445, 447 (Cal. 1935) (holding that questioning regarding nationality was permissible on theory that witnesses might testify more favorably toward countryman).

81 People v. Gonzalez, 472 N.E.2d 417, 419-20 (Ill. 1984); see also United States v. Abel, 469 U.S. 45, 52 (1984) (“A witness’ and a party’s common membership in an organization . . . is certainly probative of bias.”).


83 Delaware v Van Arsdall, 475 U.S. 673, 679 (1986) (“[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.”); see also cases cited in footnote 8 above.

84 See People v. Ramos, 938 P.2d 950, 977 (Cal. 1997) (“Counsel must not be permitted to take random shots at a reputation improvidently exposed, or to ask groundless questions ‘to waft an unwarranted innuendo into the jury box’.... There is also a responsibility on trial courts to scrupulously prevent cross-examination based upon mere fantasy.”) (quoting People v. Eli, 424 P.2d 356, 367 (Cal. 1967); People v. Duffy, 326 N.E.2d 804, 806 (N.Y. 1975)); State v. Briscoe, 474 P.2d 267, 269 (Wash. 1970) (“If it develops that
are a child molester, aren’t you, unless you have a reason to believe that is actually true.

Implementation
To cross or not?
The first question is always whether to cross-examine the witness at all. The two most common types of witnesses not to cross are (1) those that have not hurt your case at all and (2) those from whom you cannot hope to get any helpful testimony.

A records custodian from the phone company might fall into the first category, testifying that a certain exhibit contains your client’s phone records for the month of March. What can you gain by cross-examining this employee? Maybe nothing. In that case, don’t cross-examine.

It is rare to find a witness who falls within the second category. Almost every witness, no matter how skilled and biased, will have to admit some facts favorable to your case.

Collect and Organize.
Unless you are a genius, the key to good cross-examination is preparation—and even a genius will greatly improve with painstaking preparation. The first step in preparation is to organize all available information by topic. You will want to keep an electronic or hard copy file on each witness, and a sub-file on each topic the witness might possibly testify on—either for you or the other side. Everyone develops their own way of doing this, but you might want to start by referring to our journalistic device from Chapter ___: Who, What, When, Where, Why and How?

Who is the witness? What is her background? What evidence of bias do you have? Is she an ex-wife? What did she say about your client during divorce proceedings? Alternatively, maybe this witness has previously said many good things about your client. All material, good and bad about the witness’s background should be in your file.

What is she going to say? Do you have police reports, depositions, letters from the witness? All statements from the witness on issues possibly relevant to the case should be in your file.

the questions asked on cross-examination are not made in good faith and are without foundation in fact, then upon proper motion a mistrial should be ordered.”). Asking questions that imply that a matter is true without a good faith belief in its truth may also raise ethical concerns, as it implicates a lawyer’s duty of candor to the tribunal. See, e.g., Fla. R. Prof. Conduct 4-3.3.
When did the witness make the statements she made? When does she claim to have witnessed key events? Make sure the dates of these events and the dates the statements are made are in your timeline. Remember the timeline discussed in Chapter ____? A good timeline is crucial to most cross-examinations. When key events (and events you think are not “key”) are put in sequential order, flaws in the other side’s case can jump out at you.

Where was the witness when she observed key events or made important statements?

Why would the witness testify in this way? Jurors are particularly attuned to issues of motivation. Motivation means more than just a reason to dislike or hurt your client. A witness may have made a mistake in doing his job, and not want to admit it. Or maybe he is too proud to admit he needs glasses. The evidence may even point to mixed or contradictory motives. For now, you are just collecting evidence of possible motives; what you do with this evidence will be decided later.

How did this person come to be a witness for the other side? How can they know what they claim to know? How can her story be true? How does her story fit with the other evidence in the case?

However you decide to organize your information, you want to end up with easy access to everything potentially relevant to a direct and cross-examination of the witness. Then, you will want to make an outline addressing each topic or area you might want to question the witness about. If a police officer will testify against your client you might have a topic outline that looks like this:

**Bias/credibility**

Personnel file p.4 [Where officer disciplined for making racial remarks; your client is African-American.]

**Competence.**

State v. Davis p.3 [Order from judge in prior case rebuking officer for mishandling evidence.]

Police Report p.3 [Admission in this case by officer that some evidence was lost or mishandled.]

**Gun?**

Police report, p. 7—says saw something “metallic” in client’s hand.

Grand Jury testimony, p. 56—says saw “gun” in client’s hand.
Incriminating statements.
Police report—no mention of statements on way to police station. Grand Jury, p. 68—says on ride to police station, client refers to having a gun.

Favorable facts
Never saw client with drugs—Grand Jury testimony, p. 89.
Looked where he says client threw “gun” and found nothing—Grand Jury p. 93.
Client never ran or resisted. (Grand Jury p. 58)
Not client’s house. (Police report p. 17, Grand Jury page 63)

A topic outline like this can take up less than a page, or in the case of an important witness in a complex case, can take thirty or more pages. For an expert witness, the citations may include prior testimony in other cases, medical or scientific articles or texts, or even television interviews. Anything you might possibly want to question the witness about should be on this outline. Note that even potentially inadmissible material is in the outline. The reason is that the witness may give an answer while testifying that suddenly “opens the door” to this evidence. You want to be able to respond quickly. (A good deal of trial practice is preparing for things that never happen.)

If you do this right, all of the source material for your citations will be in a trial notebook, in a tab behind the witness’s name. (See Chapter ___) While preparing or conducting your cross, you will immediately be able to find any document or transcript you need.

Planning and writing your cross.
Once you have all of your material organized and a comprehensive outline, you can plan and write your cross. Note that outlining all matters is not enough. You still need to decide what you will actually ask, and the order of your questioning.

The lawyer should have two big advantages over the witness about to be cross-examined: (1) the lawyer should know the details of the case better than any witness and (2) the lawyer can decide what subjects to address with the witness and what subjects to avoid.

If, in the example above, another officer found a gun with your client’s fingerprints on it, in the general location the first officer said your client threw something, there is a good chance you do not want to cross on the subject of inconsistency between his police report and grand jury testimony.
Much of cross-examination is an exercise in judgment. To properly exercise that judgment, you must know every detail of the case. Once you are prepared, no one can teach you how to exercise that judgment. But most good cross-examiners are constantly asking themselves the questions: "Who is this witness?" "What motivates him?" "What will he say if I ask this question?" "What do I do if he answers that way?" "What do I do if he answers differently?"

Often, there will be good facts about your client or your case that you can be pretty sure the witness will not fight you on. It is usually better to ask questions about these subjects before moving on to areas where you know there will be a fight. In our example above, you might start out:

Q: When you entered the room, you noticed there was a back door?

Q: Mr. Smith could have turned and run through the door?

Q: He made no attempt to do so?

Q: He didn’t resist you in any way?

Q: You noticed he had a college history book in his hand?

The purpose of eliciting these facts might be to suggest they are inconsistent with your client having a guilty mental state. The "college history book" also suggests to the jurors that your client does not fit their image of a drug dealer.

If your client is being charged with possession of drugs found in the room, you might move on to other favorable, indisputable facts:

Q: After taking Mr. Smith to the police station, you looked at city property records?

Q: Mr. Smith’s driver’s license?

Q: Jimmy Jones’ driver’s license?

Q: Documents found in the house?

Q: You concluded this was Jimmy Jones’ house?

Q: You learned that Jimmy Jones was Mr. Smith’s cousin?

Q: You found no documents in the house addressed to Mr. Smith?

Q: No property of any kind belonging to him?
Q: Mr. Smith told you he was at the house to bring Jimmy a history book?
Q: You did find the history book?

These examples illustrate the point made at the start of this chapter. Much of good cross-examination is not so much attacking a witness or his story, as bringing out undisputed facts that favor your version of events.

Decide what order you want to address the various topics in your outline, and then draft questions to bring out the facts in the order you wish the jury to hear them. After each question, write in your outline any source material that supports your position regarding that question. If the witness gives an unexpected answer, you can quickly direct him to the document that supports your position.

To Lead or not to Lead?
You may ask leading questions in cross. A leading question is one which suggests the answer: “You found no documents in the house addressed to Mr. Smith?” tells the witness and everyone else the answer you are looking for.
Most leading questions can be answered with a simple “yes” or “no.”
“Can you tell us what documents you found in the house with Mr. Smith’s name on them?” is a non-leading question. You are not necessarily suggesting that there were or weren’t such documents in the house.

In the mid-1970’s, Professor Irving Younger began lecturing on the rules he thought should govern good cross-examination. He went so far as to call these rules “commandments.” His third commandment was “always ask leading questions.” His fourth commandment: “Don’t ask a question to which you do not know the answer.” His commandments caught on, and became articles of faith for many trial lawyers. They became tools for scrutinizing and critiquing the performance of lawyers who lost a case—i.e., “She broke the third and eighth commandments.”

There is a lot of wisdom in Younger’s commandments, and it is worth studying them and thinking about the reasons he wrote them the way he did.86

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86 The commandments are:
1. Be brief.
2. Short questions, plain words.
3. Always ask leading questions.
4. Don’t ask a question to which you do not know the answer.
5. Listen to the witness’s answers.
6. Don’t quarrel with the witness.
7. Don’t allow the witness to repeat his direct testimony.
In fact, most good trial lawyers violate many of these commandments in every trial. It is also true that all good trial lawyers know how to ask good, crisp, leading questions, and know there are many times in trial when such questions will not get the job done. Sometimes you must ask questions without knowing what answers you will receive.

Trying cases is not for the faint-hearted.

As you decide whether to lead or not, you should know that it is extraordinarily rare for a case to be lost on cross-examination. If you think about this for a minute, you will understand why. If a witness has bad things to say about your case, your adversary will know them and bring them out on direct. If you ask some poor questions, the bad things the witness said on direct will be repeated, but the jury has heard them already—hearing them again may be unpleasant, but not likely to kill your case. So, exploring in areas already covered in direct may not get you anywhere, but is unlikely to lead to catastrophe.

So perhaps you will want to ask non-leading questions about the direct testimony to see if the witness’s story makes sense. Does it really hold together? Are there pieces the witness has skipped over—intentionally or not?

Then there are areas not covered in direct. Maybe issues of bias or motive. Maybe you will ask a defense liability witness about damages. Again, chances are if there was material there to hurt you, it would have been brought up in direct. But maybe not... What do you really need from this witness? How much risk are you willing to take? If you have thoroughly prepared, you are in a position to evaluate risk, but are never guaranteed safety. There is no one right way to cross-examine a witness. One lawyer might use nothing but leading questions and achieve what he needs; another might use nothing but non-leading questions and achieve just as much or more.

**Again, you are very unlikely to lose a case on cross-examination.** There are two notable exceptions to this pronouncement. First, you can lose a case on cross if you go exploring in an area where there is highly prejudicial information available about your client that has been excluded from evidence by the judge. If your client has a conviction for child molestation that the judge has excluded in response to your motion in limine, you might not want to

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8. Don’t permit the witness to explain his answers.
9. Don’t ask the “one question too many.”
10. Save the ultimate point of your cross for summation.

*See* Irving Younger, *The Art of Cross-Examination, The Section of Litigation Monograph Series, No. 1*, published by the American Bar Association Section on Litigation, from a speech by Irving Younger at the ABA Annual Meeting in Montreal, August 1975 (I have not seen this. I got this cite from the web - also possibly "Ten Commandments" (Litigation, Vol. 3, Number 2, Winter, 1977))
ask a hostile witness about your client’s character. Always have the rulings on your motions in limine in mind when you cross-examine, and don’t ask questions that might give the witness the opportunity to answer with prejudicial material. The judge may rule that you have “opened the door” to that evidence by asking the question.

The other exception would be if you are rude and obnoxious towards the witness. If you work hard enough at this, you can get the jury to dislike you enough to rule against your client. But you are not going to do that, are you?

If you realize you are unlikely to lose a case on cross, it can free you up to relax a little and explore the witness’s story. The world will not come to an end if you don’t do this perfectly.

But what if you want to win the case on cross? This most often happens when one or more witnesses must be believed for the other side to prevail. What are the weaknesses in these witnesses’ stories? What are they saying that doesn’t make sense? Why are these witnesses unworthy of belief? When you have identified the weak points, construct questions to reveal them. You know how to do this. You have been doing it all your life. “If Sally broke the cookie jar, why are you, Johnny, the one with crumbs on your shirt?” “You told the police, five minutes after the accident that the light was red? [Implication: Why should anyone believe you now when you say it was green?]”

A technically beautiful cross is thrilling to watch; but you do not need technical excellence to win a case on cross. Ask commonsense questions about the other side’s weak points and watch what happens.

The last few paragraphs are meant to counter the fear-based teachings that have paralyzed many trial lawyers over the last few decades. They are not meant to encourage lazy preparation or undisciplined questioning. You have to know your case inside-out and carefully plan your lines of attack. This takes time—lots of it. And not just time, but time actively, thoughtfully thinking about the issues in your case and the issues presented by the witness. Once you have done that though, let yourself relax and enjoy the process of asking the hard questions. You know how to do that.

**Implementation—a Summary**

The one thing all great trial lawyers agree on is that preparation—mind-numbing, eye-blurring preparation is essential for success. And in no area of trial is this more true than for cross-examination.

No lawyer should try a case without first having read Pozner & Dodd’s *Cross-Examination: Science and Techniques*. This book does a superb job of teaching you how to organize and prepare a cross-examination. Then read
Dynamic Cross-examination, by James McComas to learn how to get to the next level.

Questions to Ask
Does the court allow re-cross examination?

Suggested Reading
Dynamic Cross-examination, James McComas (Trial Guides 2011)
The Art of Cross-Examination, Francis L. Wellman (1903)
Cross-Examination: Science and Techniques, Pozner & Dodd (20__)