

Cross-Examination

By Robert Don Gifford

To quote the celebrated nineteenth century trial lawyer and author, J.W. Donovan: "Think first what an icy pavement you tread upon; think how a willing witness may say too much that had been unproved without him; think how the rivet may be clinched and the strength redoubled by facts too often repeated and committed to memory; think how you may develop new theories for your adversary, and act with quiet discretion."

Cross-examination is often considered the benchmark of what makes a trial advocate average and one that is extraordinary. Cases can be won and lost on cross-examination, and many attorneys who have mastered the "art" can try their entire case during cross-examination of their opponent's witnesses. While considered the gospel in this area, Professor Irving Younger's "Ten Commandments of Cross-Examination" is a must-read, the following are amendments, codicils, and things that cannot be said enough.

- ◆ **Is it necessary?**
There will be some witnesses that simply do not require any cross-examination. Consider the antithesis of the Hippocratic oath: If you can do no good, at least do no harm. If a witness does no harm to your case - just stay in your seat.
- ◆ **Use Leading Questions.**
Rule 611(c) of the Federal Rules of Evidence, and many correlating state evidence rules, provides that "[o]rordinarily leading questions should be permitted on cross-examination." Leading questions are those questions that declare an answer up front and require a "yes" or "no" answer. They give you control and the opportunity to lay out the facts in the words that you choose.
- ◆ **Lay the theme and theory early and often.**
Your "theory" of the case is why you should win, while the "theme" is the sound bite that you hope will resonate throughout your case and be often quoted during deliberations by a jury. All your questions should be based on supporting your theme and theory.
- ◆ **Listen.**
This is harder than it sounds. You have prepared to deliver a series of questions that will lead the witness to confirm the facts that fit your theory to a judge or jury; however, you may receive an answer that you had not anticipated. Be prepared to have a contingency plan to take your questions down an alternate path, yet to the same goal in mind.
- ◆ **Introduce new facts into a case.**
The most effective cross-examination will bring out only one new fact per question, and the best questions are those that are brief. Precision through simplicity leaves no escape route for an otherwise evasive witness. By building your cross-examination one fact at a time, a finder-of-fact (judge or jury) will be more persuaded by those logical facts they learn from a witness than by conclusions as stated by the attorney.
- ◆ **Use a logical progression to lead to a specific result.**
Structuring your cross-examination will help a judge or jury find the facts that make your "goal" logically true. This common sense progression reduces the witness' ability to evade and actually penalizes the witness in a loss of credibility in attempting to avoid the obvious answer. This structure empowers the finder of fact to discover their own conclusions - albeit a conclusion you led them toward from the beginning.
- ◆ **Weaken or highlight a fact.**
Remind your opponent's eyewitness that the event happened in a short amount of time, the event was exciting, the distance was great, the lighting was poor, or the like.
- ◆ **Weaken or strengthen the credibility of a witness.**
Know the rules of impeachment and use them. Does the witness have a prior felony conviction? Any conviction relating to honesty? Can you emphasize that the character witness is only aware of the facts as he learned from your opponent, that he was not there at the time, or that he may have a natural bias due to friendship or relationship.
- ◆ **Be the Master of Your Case.**
Knowing every document, fact, and witness in the case is imperative. If you have the luxury of a prior deposition - you should already know every response of the witness and prepared to impeach him with it if necessary. Be wary of asking a question of which you do not know the answer - cross-examination is not the time or place to go on a "fishing expedition." There are few, if any, "Perry Mason" moments in which a witness completely collapses under a grueling cross-examination and admits to being the true villain.
- ◆ **Be an Expert on the Expert.**
Cross check your opponent's expert witness' CV or resume. Find transcripts of prior testimony, read the expert's publications, and voraciously read as much on the topic as well to "talk the talk" with the expert. Consult your own experts in preparing your own cross-examination.
- ◆ **Do Not Quarrel with the Witness.**
Remain the "voice of reason" to the judge or jury. Remain the professional that you are and not lose credibility by lowering yourself by arguing or overly employing sarcasm. You will have the last word on this witness during your closing argument. If the answer from the witness is irrational, contradictory, or obviously false - stop or move on to another topic. You have scored your point. Resist giving the witness the opportunity to explain away the absurdity of the answer and rehabilitates the witness.
- ◆ **Know when to stop.**
Probably the hardest to master is the "art" of cross-examination. When you have achieved your desired goal in eliciting the evidence you need or impeaching the witness, either complete your examination or move on to another topic/goal. Do not ask that one question too many that allows the witness to explain why his answer should be validated.
- ◆ **Never End a Cross-Examination with a Risky Question.**
Remember the goals of primacy and recency in starting strong and ending stronger. You do not want to take the wind out of your sails by allowing the witness to talk himself out of the corner you placed him. Let your opponent worry about rehabilitating the witness - if possible.

Cross-examination has been called an "art" and a "science," but regardless of your views - all would agree that it takes preparation, thought, and practice to become skilled in it. As Justice Powell stated in *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973): "The right of cross-examination is more than a desirable right of trial procedure. It is, indeed, 'an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.'"

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