NATIONAL DEFENDER TRAINING PROJECT
2017 PUBLIC DEFENDER
TRIAL ADVOCACY PROGRAM

University of Dayton School of Law, Dayton, Ohio
Friday, June 2, 2017 to Wednesday, June 7, 2017

The Best Offense is a Good Defense: Preparing, Organizing, and Executing Your Cross-Examination

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A. Purpose – cross-examination must advance the defense theory by eliciting answers which provide facts that either:

- **a. Affirmatively advance our defense theory, or**
- **b. Undermine/discredit the prosecution's evidence**

B. Structure

- **a. Compile the facts that are the building blocks of the defense theory**
- **b. Identify 3-5 important points you wish to make with these facts**
- **c. Write chapters**
  1. **each point becomes a chapter**
  2. **order the facts from general to specific to logically lead to the point of the chapter**
  3. **do not ask the ultimate question**
- **d. Organize the chapters**
  1. **primacy and recency**
  2. **tell a persuasive and coherent story**
- **e. Transition between chapters with headlines**

C. Control

- **a. Leading questions**
- **b. One fact per question**
- **c. Keep questions short and simple**
- **d. Never ask a question that calls for an answer you can't prove**
- **e. Listen**
- **f. Each question must have a purpose**
- **g. No tags**
- **h. Looping**
- **i. Consider language**
  1. **Talk like a "regular" person**
  2. **Use words that advance your defense theory**
- **j. Do not argue with/cut off the witness**
- **k. Do not treat all witnesses the same**

D. Preparation

- **a. Investigation (and other forms of fact gathering)**
  1. **Evidence of unreliability**
     - **i. perception**
     - **ii. memory**
  2. **Evidence of lack of credibility**
     - **i. Bias**
     - **ii. Prior Inconsistent Statements**
     - **iii. Prior Convictions**
     - **iv. Character Evidence**
- **b. Anticipate objections**
- **c. Have impeachment ready**

As we have learned, a trial is a battle of competing narratives. The prosecution attempts to marshal the evidence to tell a story of guilt; often accompanied by a narrative in which the defendant is a cruel and unlikable character. Alternatively, the defense must demonstrate that the evidence supports the defense theory; usually a narrative in which the client is a more sympathetic person, innocent of the allegations against him. Because the defense is not obligated to present any evidence, and often only does so for limited purposes, if at all, the defense attorney must learn to tell the client's story of innocence through cross examination.

Purpose - Why Do We Cross-Examine?

Cross examination must be conducted with an eye towards advancing the defense theory, which necessarily includes undermining the prosecution's theory. Because the defense theory incorporates legal, factual, and emotional components, the defense attorney must consider how to bring out each of these themes through cross-examination.1 Certain facts must be elicited in order to warrant the desired defense theory instruction at the end of trial (i.e. that the alleged assault victim was the first aggressor in a self-defense case, that the alleged rape victim willingly engaged in intercourse with the client in a consent case, or that the defendant was coerced and had no viable alternative but to break the law in a duress case). Additional facts will be needed to help weave together the story of innocence that the lawyer will tell during opening statements and closing arguments. Other facts will help develop the emotional themes so critical to the defense theory (i.e. the terrified and sympathetic client, the jilted and vengeful ex-lover, the opportunistic and manipulative snitch). While there will be times that some of these facts will only be available through a defense witness (or the client) the thoughtful lawyer must first consider how these facts can be elicited through cross examination.

As mentioned above, a significant goal of cross-examination is to undermine the prosecution's case (by showing that the state's witnesses are mistaken, confused, or flat-out lying). However, this is really just an extension of advancing the defense theory, as a well crafted defense theory includes the reasons why damaging witnesses cannot be believed.

While cross-examination is an essential tool of the defense attorney, it entails risks. Every time a lawyer takes on a witness, one side gains ground while the other loses. If the attorney is able to effectively make his or her point, the defense theory is advanced. However, if the witness is given an opportunity to

[1] There will invariably be times when defense counsel is unable to bring out through cross examination the legal, factual, and/or emotional themes necessary to advance the defense theory. These will be factors to consider when deciding whether and to what extent to present a defense case. This consideration is more fully explored in our discussion of the defense case and direct examination. However, defense counsel cannot make an informed decision about the defense case until s/he has explored strategies for developing these themes through cross examination.

offer additional damaging information or to make the lawyer appear dishonest, bullying, desperate, or wasting the jury's time, the momentum shifts towards the prosecution. Obviously, it will be necessary to subject some prosecution witnesses to thorough cross examination either because they are harmful to the defense theory and must be discredited or because they can provide helpful information that the prosecution did not elicit on direct examination. For these witnesses, the defense attorney must pursue those lines of cross examination for which the potential reward outweighs the risks. For example, if a jailhouse informant who is cooperating with the prosecution in exchange for a reduced sentence testifies that the defendant confessed to him, the defense attorney will need to bring out through cross examination the benefit the witness hopes to gain by helping the prosecution. On the other hand, if eliciting past criminal conduct on the part of the witness opens the door to the prosecution bringing out that the witness engaged in the criminal behavior at the direction of the defendant, defense counsel may conclude that the cost of this line of examination outweighs the benefit. Therefore, before pursuing any line of cross examination, the lawyer must weigh the potential gains against the possible negative consequences.

Some lawyers feel like they must cross examine every witness, even when the witness has nothing further to offer. The lawyer may ask a couple of meaningless questions which, while eliciting seemingly harmless information, do not advance the defense theory. There is a cost to this approach. The jury knows the lawyer is not scoring any points and may either become irritated that s/he is wasting their time, or conclude that s/he is grasping at straws in a desperate attempt to make something out of nothing. If a witness is not harmful to the defense case and has no information that can advance the defense theory, do not cross-examine him or her. For the same reasons, when there is only a fact or two needed from a witness that can be educed with a couple of questions, the lawyer should make the pertinent inquiry and conclude cross examination.

In short, the lawyer should not engage in any cross examination that does not potentially advance the defense theory and which, after assessing the potential risks to the line of questioning, s/he determines will result in a net benefit to his or her cause. There is no such thing as a draw in cross-examination. If a question does not elicit an answer that advances the defense theory, there is a cost to asking it. DON'T DO IT!

Structure – How Do We Organize Cross Examination?

1. Viewing the facts as the building blocks of the defense theory

Cross-examination advances the defense theory when it elicits facts that provide the building blocks that allow us to tell our client's story of innocence. If the defense theory is that the client was not the person who committed the crime and that the identifying witness is mistaken, the building blocks might be facts that show the witness gave a description of the perpetrator immediately after the incident that does not match the defendant. They might be facts that help explain that the scene was poorly lit, that the incident happened very quickly, or that the witness was intoxicated at the time of the crime. If the theory is that the witness is lying, rather than mistaken, the building blocks might include facts that show the witness dislikes the client, is receiving a benefit from the prosecution for his testimony, or otherwise has a motive to falsely accuse the defendant. Through cross-examination, we might bring out facts that show forensic evidence pointing to our client's guilt is either unreliable or subject to an alternate explanation. All of these are examples of building blocks critical to our defense theory. Through investigation, discovery, motions practice, pre-trial litigation, and client interviews we have an understanding of the universe of facts potentially available for the jury to consider. From this universe of facts we have constructed a defense theory calculated to most likely achieve our client's desired outcome. Through cross examination we must bring these facts into evidence in a coherent and organized manner that will allow the jury to appreciate how they are relevant to our theory as they are elicited. Through cross-examination, we do not simply educe these facts in any order; we seek to tell a story.

2. Identify the important points to make with the witness in light of the defense theory

The cross-examiner must be effective, yet efficient. S/he must highlight the critical points and not get bogged down in the minutia. For most witnesses, we want to select no more than three to five points to make. There is always the risk that the important points will be lost on some jurors if the examination is too long. Spending time hammering less significant points runs the risk of detracting from the important areas of cross.

When selecting the areas of cross examination, be mindful of your defense theory. One mistake that lawyers make is to conduct cross-examination in a vacuum. When the cross-examination is not derived from the defense theory, it can be counter-productive. So, for example, assume we are planning our cross-examination of a robbery victim who claims our client was the person who stole his money. Assume further that we believe we can elicit from the witness facts to make the following points:

a. the witness has a reputation as an untruthful person

b. the witness dislikes our client because our client slept with his girlfriend

c. the witness has a pending drug charge that he hopes to have dismissed by the prosecutor in exchange for his testimony
d. the witness gave a detailed description of the robber to the police immediately after the incident and the description does not match our client
e. the description given by the witness matches a violent gang member in the neighborhood
f. the witness did not have a good opportunity to observe the robber (it was nighttime, the lighting was poor, and the witness did not have his glasses)

Suppose our theory is that the witness got a good look at the robber and it was not our client. The witness is afraid of the actual robber and does not want to identify him for fear of retribution. Furthermore, the witness falsely accused our client to get back at him for sleeping with the witness' girlfriend. In this case the lawyer probably does not want to bring out point "f" since it undermines the power of the original description which does not match the client and which matches the violent gang member. In a vacuum point "f" seems like a great area for cross. But, it is inconsistent with out defense theory.

3. Write a "chapter" of your cross for each point you wish to make

Many schools of trial advocacy teach that cross examination should be organized using the "chapter" method. Under this method, each point that the examiner wishes to bring out through the witness becomes a chapter of the cross. In the hypothetical case above, we would have five chapters in our cross examination: a) witness is untruthful, b) witness doesn't like client, c) witness hopes to benefit from his testimony, d) description does not match client, and e) description is that of person witness fears.

Now, we must collect the facts we know we can get from the witness that together lead us to the point we wish to make with each chapter and organize them so that they logically lead to the desired conclusion. There are two rules to follow when writing the questions in each chapter: **1) start general and move to specific**, and **2) do not ask the ultimate question**.

Let's take for example point "b," the chapter that shows the witness does not like the client. You do not want to simply ask, "You don't like Mr. Client, do you?" There are two problems with this question. First, it does not give the jury any sense of why this must be true. It fails to give the jury of any context and deprives them of the facts necessary to logically reach the conclusion on their own. It does not tell a story. Second, by jumping to the ultimate issue, it gives the witness an "out." The witness immediately sees where the cross-examiner is going and may try to deny the point. The witness may respond that he loves the

client and come up with a reason why this is so that the cross-examiner did not anticipate. By building up to the desired conclusion, the witness may be led down the path that leads to the desired conclusion with much less opportunity to escape. Starting general and moving to the specific means taking "baby" steps that lead to the inescapable conclusion that the point of the chapter is true. Not asking the ultimate question means stopping at the point that every jury knows the point of the chapter is the inescapable conclusion desired without giving the witness the change to explain why it is not true. Therefore, this chapter may look something like:

In June 2008 you were seeing a woman?

Her name was Rhonda?

You had been together for three years?

You spent a lot of time together?

You traveled together?

You even took a trip to Paris together?

The two of you talked about marriage?

And you talked about raising a family together?

You loved her?

You trusted her?

Then one day, in June 2008, she broke that trust?

You found out she was unfaithful?

She was sleeping with another man?

You learned it was Mr. Client?

This series of question leads to the conclusion that the witness has a reason to dislike, and seek revenge against, our client. It is an example of starting generally (the witness was seeing a woman) and moving to the specific (the witness has a reason to dislike our client). The jury can follow the questions and reach the point of the chapter without being told. It is also an example of not asking the ultimate question. There is not need to say, "so you don't like Mr. Client," because the jury already understands that point. It avoids the risk that

the witness will have some clever response that minimizes the power of the cross (e.g. “well, I was mad initially, but over time I realized Rhonda was not the woman I thought she was and that he did me a favor and I have grown to be thankful to him for that.”)

4. Organize your chapters in a logical and compelling order

Now that we have written our chapters, we must decide how to order them. Two principles should guide us: **1) consider “primacy” and “recency,”** and **2) the chapters should be organized to tell a coherent and persuasive story.** This means that we want to start strong and end strong (based o the idea that people most remember the first and last things hear) and tell a compelling story throughout.

In our hypothetical case we may choose to start with the fact that the witness gave a description that does not match the client, then move to the point that the description does match a person the witness is terrified of, then bring out the facts that show the witness is not a believable person, then show that the witness has a lot to personally gain by helping the prosecution, and end with the point that the witness does not like the client. This is a logical order since the first and last points are pretty powerful and the chapters are organized in a way that tells a compelling story. However, once the chapters are written it is easy to interchange them to figure out an order that makes the most sense.

5. Transition between chapters using headlines

A headline is a sentence that allows the cross-examiner to signal to the jury that s/he is moving from one point to the next. It helps tell coherent story by ensuring the jury understands the transition the lawyer is making. A headline can move the jury from one time to another (“I want to take you to the night of June 23rd”); it can transition to a particular place (“Let’s go to the interrogation room in the police station where you were brought after our arrest”); it can focus the questioning on a specific person (I want to talk to you about Jimmy White); or it can move the story to any other topic (Let’s talk about X). For example, in our hypothetical case, suppose the lawyer wants to transition from the first chapter (the description does not match the client) to the next chapter (the description does match the feared gang member). The lawyer may use the following headline: “The description you gave of the robber immediately following the incident did not match Mr. Client . . . let’s talk about who it did match.” Or, in transitioning from the fourth chapter (the witness has much to gain by working with the prosecution) to the last (the witness does not like the client), the lawyer might use the following headline: Now that we have established what you have to gain today by saying Mr. Client was the robber, let’s talk about another reason you might wrongly accuse him of this crime.”

Headlines can help emphasize your first point as well. In our hypothetical case the cross may start with a headline: "I want to start by talking about the description of the person who actually robbed you." This then allows us to start the process of eliciting the building blocks that show the description given does not match the client. By tying the chapters together using headlines, the cross-examiner can ensure that the story told on cross is coherent and effective.

Control - How Do We Ask Questions?

The key to cross-examination is that the lawyer controls the witness. If the witness is allowed to say what s/he wants to say, the lawyer loses the battle. The trick is for the lawyer to provide the testimony through the question and for the witness to simply confirm what the lawyer has said. Unlike direct examination, a "witness-focused" process where the lawyer's job is to help present the story through the witness, cross examination is "lawyer-focused." The lawyer is testifying with the witness simply serving as a source of confirmation. Of course, the witness will not likely willingly play this role. Therefore, a good cross-examiner must ask questions that leave the witness no room to refuse. There are some rules that every developing attorney must follow on cross-examination, or risk catastrophic consequences for his or her client.[2]

Rule # 1: ALWAYS ask leading questions!

One of the first rules of controlling a witness is to ask leading questions. Leading questions are questions that contain the answer. Non-leading questions often start with who, what, where, when, why, or how. These are the words that begin your questions on direct examination. Avoid these words on cross examination. Questions that start with "did" also tend to be too non-leading for cross-examination3. Questions on cross examination should be short, declaratory statements which suggest a question because the examiner raises his or her voice at the end. The question leaves room for only one answer (or a denial which will be impeached as discussed below). Below is an example of a series

[2] I say every "developing" lawyer must follow these rules because unless very experienced, the examiner will not likely have the tools to recover from a witness who tries to seize control of the exchange. It is a sound practice for even the most seasoned lawyer to follow these rules as well, and most do. However, some very experienced lawyers will break one or more of these rules from time to time, confident in their ability to regain control if the risk does not pay off. Frequently lawyers in movies and on television completely abandon these rules, as it makes for a more dramatic performance. However, until the lawyer has become expert at cross-examination, or is following a script in a Hollywood performance, s/he would be ill-advised to deviate from these rules.

[3] Although, "did" is also too leading for direct examination. As a general rule, you should avoid the use of the word "did during either direct or cross examination. An example of why did is not leading enough from cross but too leading for direct is as follows: "Did you go to the store?" is a question that suggests the answer and therefore is too leading for many judges on direct examination. The appropriate question on direct would be: "Where did you go?" However, it is also not leading enough for a tight cross-examination. A better question for cross is, "You went to the store, didn't you?"

of leading questions that might show that a witness could not get a good look at the robber:

Let's talk about the robbery.

It was night?

It was cloudy?

The light from the moon was dim?

There were no street lights in the area?

In fact, there were no sources of artificial light?

Assuming you can show that all of these facts are true, there is nothing for the witness to do but to agree or to appear to be dishonest. Imagine a non leading question and the potential answer:

Q: *How well could you see the person who robbed you?*

A: Very well

This is an example of what can happen if a lawyer gives up control. Could the lawyer go back and try to fix it? Sure. But to do so necessarily invites the witness to explain the answer that is so harmful, and we might not like the explanation.

Rule # 2: One fact per question

Each question should only contain one fact. Questions that contain more than one fact invite confusion, often require the lawyer to backtrack in order to clarify, and can disrupt to rhythm of the cross-examination. Take for example, the following question and answer:

Q: It was nighttime, the moonlight was dim, and there were no stre

A: No

It is not clear whether the witness is denying that it was nighttime, that the moonlight was dim, that there were no streetlights, or some combination of the three. The examiner will need to backtrack to clarify with which question the witness disagrees in order to know how to proceed. Rather than saving time by jamming multiple facts in a single question, doing so often takes more time and sows confusion. The above question should be three separate inquiries:

It was nighttime?

The moonlight was dim?

There were no streetlights in the area?

Rule # 3: Keep questions short and simple

The cross-examiner wants to get into a rhythm in which s/he controls the cadence and there is no confusion by anyone about the facts with which the witness agrees. Questions that are overly wordy risk being confusing. They give the witness the opportunity to take control of the pace of the examination by asking the questioner to repeat the question without seeming evasive. This gives the witness more time to formulate an answer that s/he thinks will benefit the state without looking like s/he is stalling for time.

Because many of us are scared of silence, we talk and think at the same time, causing us to utter excess verbiage while we struggle to formulate the question. It is far better to simply pause for a couple of seconds to come up with an effective question than to add excessive words to avoid a perceived awkward pause. The pause probably isn't noticeable to the jury. The confusing question surely will be. So, before asking a question like:

Now, as far as the streetlights go, the illumination from those lights were really not a factor t

Take a moment, collect you thoughts, and say:

There were no streetlights in the area where the robbery occurred?

Rule # 4: Never ask a question to which you can't prove up the answer you want

One of the most important commandments of cross examination is that you know the answer to any question before you ask it. A corollary is that you be able to prove the answer you want if the witness tries to be evasive. Few things are more terrifying to a new lawyer than having a witness give you a harmful answer on cross examination. The terror is warranted if the lawyer is unable to show that the witness is wrong and to compel the witness to either admit his mistake or be proven a liar. However, when the lawyer is able to demonstrate that the s/he was correct in making the assumption underlying the question, and that the witness was being evasive, the credibility of the witness is brought down a notch and that of the lawyer increased.

The ability to demonstrate that the witness is either mistaken, lying, or being difficult should he be unwilling to agree with the lawyer's question is critical to "taming" the difficult witness. The goal is to get the witness to simply agree with the lawyer's question. If the witness refuses, the lawyer must "punish" the

witness by impeaching him, or revealing his deceit. After a couple times of being impeached, the witness will become much more cooperative and the jury will look to the lawyer as the person to whom they should look for the truth. Conversely, every time the lawyer asks a question that the witness denies and goes unimpeached, the attorney loses credibility.

There is often a "dance" that goes on between the witness and the questioner at the beginning of the cross-examination as the witness tries to feel out how much he can get away with. Therefore, the beginning lawyer may wish to start off with a line of questioning that will invite less resistance from the witness as s/he eases into the cross-examination. Nevertheless, the lawyer must be ready to prove up the desired answer if called upon to do so.

Rule # 5: LISTEN!

As we will discuss later on in this article, preparation is the key to a successful cross-examination. A good lawyer considers every question s/he might ask and plans out the sequence to most effectively make the desired point. However, witnesses sometimes give us answers that are unexpected. The lawyer cannot be so wed to a script that, in anticipation of the expected answer s/he doesn't listen and instead focuses on the next question. The lawyer must not lose the flexibility to listen and respond. Sometimes the unexpected answer is harmful, and the lawyer must be prepared to confront the damaging evidence. Other times the witness may throw out a helpful nugget that a conscientious lawyer will be able to build on if s/he is alert. For example, imagine the following exchange:

Q: *It was nighttime?*

A: *Well, it was dusk, but it was kinda hard to see because I didn't have my glasses*

Q: *The moon was dim?*

A: *Yes*

Q: *There were no streetlights?*

A: *True*

The lawyer above did not expect the answer about the witness not having his glasses. Rather than adapt and emphasize that point, the lawyer moved onto the next planned question. To the extent that any juror either did not hear the part about the glasses or failed to appreciate the significance, the lawyer missed an opportunity to emphasize the point.

Rule # 6: Each question must have a purpose

If the question does not help to advance your defense theory, don't ask it! Jurors have short attention spans. The longer the examination, the more likely they are to not process part of it. Every unnecessary exchange increases the chance that a juror will zone out on an important question. In addition, each question is a potential opportunity for the witness to find some way to interject damaging information. The less the witness is talking, the better. After you prepare each chapter, read over your questions and ask yourself if it is necessary or merely surplus.

Rule # 7: Drop the tags

We all have the bad habit of adding tags to either the beginning or end of questions. It serves as a crutch but can be very distracting. If you listen to most cross-examinations, you will hear a litany of tags like: and, right, correct, true, o.k., etc. I have had jurors tell me that they stopped paying attention to the questions and began counting the number of times a lawyer said, "correct?"

Ending every question with "o.k" or beginning each question with "and" obviously serves no purpose. However, some judges, and most prosecutors, believe that a leading question is only a question if the lawyer appends "correct?" or "right?" to the end. Sometimes a prosecutor will object when a defense attorney simply makes a short, declaratory statement. "Is that a question?" is the usual objection, although no such objection exists. Sometimes the judge will respond, "please ask a question counsel." This is the time that the lawyer may use a tag to make the point that it was clearly a question, and then revert back to the litany of declaratory statements that make for an effective cross-examination. The scenario usually plays out like this:

Defense: *It was nighttime?*

Prosecution: *Objection, is that a question?*

Judge: *Counsel, please ask a question.*

Defense: *It was nighttime, <u>wasn't it</u>?*

Witness: *Yes*

Defense: *The moonlight was dim?*

Witness: *Yes*

Defense: *There were no streetlights in the area?*

Witness: *True*

Everyone will understand that the prosecutor's objection was merely due to frustration over an effective cross examination and after a couple times, the prosecutor will stop interfering.

Rule # 8: Loop when possible

Looping, or building a previous answer into the next question, is a very effective technique that allows the examiner to repeat the good part of the previous answer and tie it into the next question. It is a way to emphasize good facts. The following cross examination snippet designed to bring out the witnesses motive to help the prosecution is an example of looping:

Q: You are pending sentencing on a murder charge?

A: Yes

Q: Because of this murder charge you are looking at spending the rest of your life in prison?

A: True

Q: Spending the rest of your life in prison is not something you want to do?

A: No

Q: Because you don't want to spend the rest of your life in prison, you would be grateful for a w

A: Yes

Q: The person who can offer you a way out is the prosecutor?

A: Yes

Q: So in an effort to find a way out, you met with the prosecutor?

A: Yes

Q: When you met with the prosecutor you talked about what she could do for you?

A: Yes

Q: During that same conversation where you talked about what the prosecutor could do for you, you discussed what you could do for the prosecutor in return?

Rule # 9: Be mindful of language

Language is very important. It is through language that we connect, or fail to connect, with the jury. It is through language that we convey, or fail to convey, important information to the jury. Although advocacy is the lawyer's craft, many of us do not sufficient appreciate language.

1. Talk like a "regular" person

It is easy for the lawyer to slip into the habit of talking like a lawyer, or a police officer. Some lawyers think it is important to convey a superior understanding of law and of language. These lawyers pepper their questions with words that they believe make them sound lawyerly. You may hear, "what was the ancillary impact of your decision?" in stead of "What happened when you told that to Joe?" Or, "You will admit that you engaged in odious behavior?" versus, "What you did was not very nice?"

Other lawyers adopt law enforcement language in their lexicon. These lawyers ask whether the suspect "alighted from his vehicle" instead of whether he "got out of his car," or whether the officer "responded to the vicinity" rather than "went to the crime scene."

2. Choose words that advance the defense theory

Our audience is a jury of regular people. We want the jury to see us as a regular person with whom they can connect. Language plays an important role. However, not only do we need to be mindful to speak like a "regular" person, but the "regular" words we choose are critically important. If our defense is self-defense we want to be sure to ask how "big" the complaining witness is instead of how "small." If we are trying to emphasize that the witness could not have been close enough to see what they claim they saw, we should ask how "far away" the witness was rather than how "close" they were. To describe a violent beating use the word "pounded" instead of "hit." We must make sure that we choose words that will help the jury to create the mental image that is most consistent with our defense theory. Words are descriptive and we must choose those that best advances our case.

Rule # 10: Don't argue with the witness / Don't cut the witness off

Sometimes the lawyer will confront a combative witness. These are witness who either refuse to answer the question posed or ramble on after answering the question in an effort to add what they want to say. There are four rules of thumb when dealing with this type of witness:

a. Do not argue with the witness – This detracts from the lawyer's professionalism and brings him or her down to the witness' level. No witness is worth trading the stature the lawyer has worked hard to build for the jury.

b. Do not cut the witness off – As a general proposition you do not want to interrupt the witness as it appears that there is information that you are trying to keep from the jury. Particularly, where the information is testimony the prosecutor will likely elicit on redirect, there is little to gain by cutting off the witness. Of course if the witness is about to reveal inadmissible and damaging information that has been excluded from trial, the lawyer may want to find a way to politely interrupt the witness and ask to approach the bench to deal with the issue at hand.

c. Never appear flustered – The jury is always watching to determine who appears to be winning the battle before them. Even when a witness is being difficult, the lawyer should not express frustration or angst. The better course of action is to calmly let the jury know that the witness is trying to avoid the question. This will convey that the witness has something to hide, not the lawyer.

d. Do not ask the judge for help – It is critical to convey to the jury that we are in control of the courtroom. We want the jury to see us as the party to whom to look to get answers. If we start a battle with a witness we must finish it. Asking the judge to bail us out will be seen as our having lost the battle by the jury. Besides, in most instances the judges do not want to help the defense demolish the witness on cross-examination, so they may make matters worse.

When a witness is being difficult, calmly wait for him or her to stop talking and repeat the question. If you have to do this more than once, the message will be clear to the jury that the witness is being difficult, implying that they have something to hide. You may preface your repeated questions with, "let me repeat the question" or "Now sir, can we try my question?" By making clear to the jury that the witness is being evasive and wasting their time, you will come out of the fray viewed as the reasonable person. Because the party who calls the witness is seen as endorsing him, the prosecution will lose points with the jury as the witness becomes more insistent in his refusal to cooperate.

Rule # 11: Do not treat all witnesses the same

Our natural instinct as defense lawyers is often to attack every witness. Some witnesses obviously deserve to be attacked, like the witness who, according to our defense theory, is lying about our client's involvement for his own benefit. But, other witness will appear far more sympathetic to the jury. We will have to take a gentler approach with these witnesses. Politely pointing out that a witness is mistaken may be the right approach in some instances. Others may start off sympathetic but grow more combative as the cross proceeds. A good rule is to never attack a witness until you have the jury's permission. In other words, if the jury does not believe the witness deserves to be attacked, they will resent you for being hostile.

Preparation – The Key to a Winning Cross-Examination!

Nothing is more important to a successful cross-examination than preparation! Given the mandate that we not ask a question to which we cannot prove up the answer we want, investigation is critical to a successful cross. This, and other methods of gathering information, allows us to know what information is out there as well as provides us the sources through which to prove it if needed. Knowing the rules of evidence is equally essential to a great cross-examination. This will allow us to figure out how to get the facts we need to build our theory into evidence. Preparing the documents we need to support the questions we ask is also necessary so that we are able to effortlessly impeach the witness if needed and maintain control of the examination. We will discuss each of these in turn.

1. Investigation and other fact gathering

During the pretrial period it is essential that we use every tool at our disposal to gather as much information as possible. Through investigation, Brady requests, discovery, client interviews, motions practice, and other pretrial litigation, we must endeavor to learn all we can about the case. This will give us the greatest flexibility in developing a defense theory by giving us a greater universe of facts from which to build it. Certainly, through this process, we will learn facts essential to our theory that we will bring out through cross-examination. However, in addition to thinking about how to affirmatively build a defense case, we also want to consider how to undermine the prosecutions case. Most of our cross examination will focus on discrediting the prosecution's story of guilt. Through the fact gathering process, we must always look for four broad categories of evidence or impeachment that will allow us to discredit prosecution witnesses.

a. Evidence that the witness is mistaken/unreliable

Obviously we need to be vigilant in identifying any information that can be used to demonstrate that a prosecution witness' testimony is unreliable. To this end we should always investigate the witness' perception at the time of the incident and his or her memory about the relevant facts. With respect to perception, we should look into factors like eyesight and hearing, distance, any potential distractions, obstructions, lighting, and evidence that impacts state of mind (drug use, alcohol, fear, etc.). As to the witness' memory we should explore the time between the event and the report, intervening events that may influence memory, and substance abuse that could impact recollection. Facts that help undermine the reliability of a witness' testimony are obviously critical to any cross-examination. However, in addition to investigating reliability, we have to also explore the credibility of the witness. To do this we explore the witness' motive to lie (bias), factors that suggest lack of trustworthiness (prior convictions and character evidence), and direct evidence of a willingness to lie (prior inconsistent statements). These are discussed below.

b. Evidence that the witness has a bias

The Sixth Amendment guarantees us the right to bring out a witness' motive to be untruthful, or his "bias." Therefore, when there is information that we want the jury to hear, it is always preferable to develop a theory under which it reveals a witness' bias. While a judge may not allow us to bring up the fact that a witness has three recent arrests for theft which resulted in dismissals to show that they are not trustworthy, if there is a viable argument that the witness could fear having the charges reinstituted, the judge must allow us to question him about his motive to curry favor with the prosecution. Likewise, if we discover that a witness on probation was smoking marijuana, the judge may not let us use the fact of his crime to show that he is a bad guy but s/he will have to let us explore whether the witness hopes his cooperation may help prevent his probation from being revoked.

While the most obvious bias cross examination is the witness who has made a deal with the prosecution, bias should be considered whenever a witness has a pending charge/sentencing, when there is evidence that a witness potentially broke the law and could therefore possibly fear prosecution, when a witness has a family member who is in trouble who they could conceivably believe they might be able to help, when the witness has any reason to dislike the client, when the witness has a relationship with law enforcement, when the witness has a friend or family member with an interest in the case, or when a witness has a motive to lie to cover up a potentially embarrassing fact. The right to confront a witness with his or her bias trumps a statutory protection like the privacy of juvenile or neglect cases or rape shield statutes. Therefore, when there is reason to believe that evidence of bias may be contained in records that are statutorily protected, the lawyer should consider requesting access to these records from the judge. The witness also may be able not hide behind a Fifth Amendment privilege if cross-examination into criminal behavior reveals bias. Therefore, a line of questioning that would inquire into criminal behavior could force the prosecution to either grant the witness immunity or decide not to call the witness. In short, whenever possible, the lawyer must consider a theory under which facts that will help the defense can be articulated as evidence of bias.

c. Evidence of prior convictions to challenge credibility

While there is always the potential that a witness on probation, parole, or supervised release may have engaged in behavior that could lead to revocation, and therefore give rise to bias cross-examination, even witnesses with convictions who have completed their sentence may be impeached with the fact of the conviction. Many prior convictions are admissible to demonstrate the a witness is not credible. Therefore, it is essential that the lawyer use all available tools to get a complete record of each witness' criminal history.

d. Discovering existing, and creating additional prior inconsistent statements

Along with evidence of bias, prior inconsistent statements are the most powerful form of impeachment. By showing that a witness previously said something that is inconsistent with his trial testimony, the lawyer can demonstrate that the witness is not believable. When the prior statement is helpful to the defense theory, the lawyer may also be able to establish the truth of the out of court statement. Because we never know what a witness will say at trial, every prior statement is potentially inconsistent. Therefore, it is critical that the defense attorney use discovery, Brady, and subpoena authority to access every prior statement of each witness. Additionally, the lawyer should independently try to obtain his or her own witness statements from every witness and consider litigation that will force prosecution witnesses to testify under oath prior to trial. Memorialized witness statements and recorded pretrial testimony both help the lawyer to know what questions to ask the witness and are often rife with impeachment.

e. Character evidence

Finally, the lawyer must look into any possible evidence that might be admissible to demonstrate a relevant trait that will undermine the character of the witness. In every case the defense should look into all witnesses character for untruthfulness. In self-defense cases, the character of the complaining witness for being violent may be admissible. Depending on the case, and the jurisdiction, other relevant character traits may be admissible as well.

In conclusion, the conscientious lawyer will use every tool available to try to uncover evidence of bias, prior convictions, prior statements, and character evidence. Once helpful facts are learned, the lawyer must think strategically about how to make that evidence admissible.

2. Anticipate objections

It is always safest for the defense attorney to assume that every line of questioning will draw an objection. For each line of questioning, the prudent lawyer will consider every possible objection and be prepared with a response. This obviously involves knowing constitutional law and the rules of evidence. While a theory that evidence is constitutionally admissible, like bias, is preferable, it is not always available. The lawyer must know the law that governs when convictions are impeachable and the forms of character evidence that are admissible. The lawyer must also know how to lay the proper foundations to impeach a witness with a prior inconsistent statement or admit character evidence. In short, one cannot be a great cross-examiner without being a master of the law and rules that govern the admissibility of evidence.

3. Writing the cross – Being prepared to impeach if needed

Now that we have developed our defense theory, gathered the facts necessary to advance that theory (and undermine the prosecution case), written and ordered our chapters, and anticipated all objections and considered our responses, we must organize all of our documents so that we can be prepared to prove any answer if the witness is difficult. In order to do this, we not only write out each question that will lead us to the inescapable conclusion of the chapter (as discussed above) but we also have to ensure that we can seamlessly access the evidence needed to confront the witness if proves uncooperative. This is a three-step process:

a. Compile all documents relating to the witness

Before you write the cross examination of any witness you should first compile all documents that relate to the witness. Some of these may be documents prepared by, read, or signed by the witness himself and others may be documents that indicate the witness made statements to other people or that a relevant fact about the witness is true (prior conviction, on probation, got into a fight at school, etc). These will be the universe of documents from where you pull the facts that allow you to ask questions to which you know you can prove the answers. The former category of documents can be used to confront the witness directly if he denies a fact contained within. The latter category may need to ultimately be proven through a different witness, but the lawyer will need to lay the proper foundation with the witness s/he wishes to impeach at the point that the witness becomes uncooperative.

By compiling these documents, the lawyer can easily compile the facts that are available to him or her and decide which advance the defense theory. From there the facts can be categorized under the various chapters and ordered in the most effective way to demonstrate the point of the chapter.

b. Organize the documents so they are easily accessible and identifiable

Once you have all of the documents relevant to the witness, you need to organize them so they are easily accessible and identifiable. Some lawyers do this using a trial notebook, with a section for each witness and every relevant document labeled within the section. Others use folders, with a larger accordion folder for each witness that has manila folders inside for each document. In either event, you should be able to easily pull out only those documents relevant to the witness you are cross-examining so that you do not confuse them with those unrelated to the task at hand.

I personally use the folder method. With an accordion folder for each witness, I can easily pull out the relevant accordion folder as each witness is called to the stand. In the front of the accordion folder is my cross examination (one page for each chapter that lists the facts I need to elicit for the chapter and where I can find each fact in the supporting documentation if necessary (see below). Behind the cross examination are several manila folders, one for each document relevant to the witness. Each folder is clearly marked so I can easily access any of the documents if necessary.

For example, suppose in a hypothetical case the primary prosecution witness is Joe Witness. Through our pre-trial efforts, we have been able to gather the following documents related to Joe: a police statement containing a narrative about an interview with Joe on the night of the incident (police statement), a statement taken by our defense investigator sometime later (defense statement), a transcript of Joe's testimony before a grand jury (GJ), and a transcript of Joe's testimony at the preliminary hearing (PH). We will have four manila folders (one clearly labeled "police statement," one "defense statement," one "GJ," and one "PH"). These four manila folders will be placed inside an accordion folder BOLDLY labeled "JOE WITNESS." At the front of the accordion folder will be our cross-examination of Joe. Assume we have three chapters in our cross of Joe and the first chapter is meant to show that Joe could not see what happened that night. There will be three pages (conceivable a chapter could be longer than one page) with each marked "Chapter X" and the point to be made.

When the examination begins we can reach for the accordion folder (or notebook if we prefer) labeled Joe Witness, assured that we have everything we need for cross.

c. Identify where impeachment can be found in each chapter

The final step in preparing to cross is to index <u>directly in each chapter</u> where the point can be found if we need to prove it up. To do this we take each chapter and draw a line down the middle of the page. On the left hand side we write the facts we need to establish in order to prove the point of the chapter. On the right

hand side we list the document, page, and line or paragraph where that fact can be found. For example:

CROSS OF JOE WITNESS

CHAPTER 1

POOR OPPORTUNITY TO OBSERVE

It was nighttime	Statement to police / p. 2 paragraph 1
It was cloudy	Statement to police / p. 2 par. 1
The moonlight was dim	Statement to defense / p.3 par. 4
No streetlight in area	GJ / p.6 line 7
No artificial light at all	PH / p.3 line. 5

Now, suppose we get to the moment that we are going to elicit that the moonlight was dim. We ask, "The moonlight was dim?" to which Joe responds, "No, it was very bright." We can now easily see that Joe previously said the moonlight was dim in his grand jury testimony on page 3 at line 4. We reach for the manila folder containing the grand jury transcript, pull out the document, and turn to page three as we begin to lay the foundation to impeach Joe. With everything at our fingertips, this can be done seamlessly and effortlessly.

It is worth noting that sometimes we cannot complete the impeachment with witness because the fact comes from a document the witness did not personally create, adopt, or approve. A witness' account listed in a police report is often an example. However, if the witness denies the fact we need to prove, we must still lay the foundation to show that the witness told this to the police. In laying the foundation we allow ourselves to later call the officer who wrote the report to establish that Joe Witness did indeed tell the officer the fact. We also signal to the jury at the critical moment that Joe is lying and they will soon find that out. So, assume we ask Joe, "It was cloudy?" to which he responds, "No, it was as clear as glass that night." We can now reach for the police statement and begin to lay the foundation, referring to the document so both the witness, and the jury, know that we have evidence of what we are asserting. The witness will then either agree that he told the police that it was cloudy, or be proven to be a liar when the officer is later called to complete the impeachment.

Conclusion

Cross examination is, perhaps, the most difficult and terrifying aspects of trial work. There is always the potential for the witness to "run away" from the lawyer, leaving the lawyer shell shocked. However, by putting in the preparation on the front end, keeping the examination simple, asking questions in a form that allow you to maintain control, and having your ducks lined up to tame the runaway witness, the lawyer can conduct a winning cross every time. Do not expect that Perry Mason moment when the witness breaks down crying as he admits that he is a liar. That does not happen. You do not need to destroy every witness. The key is to simply not let the witness win. A successful cross examination is one that methodically elicits the facts necessary to advance the defense theory in a way that is organized and tells a persuasive and coherent story. You will succeed in doing this consistently with preparation, organization, and control!