

On Litigation Strategy

Charles R. Rice

You know you're a litigator if you think that cross-examination is one of the great pleasures of life. It is a unique opportunity to confront the weaknesses of a witness and his or her story. But, if done poorly, it wastes everyone's time and, even worse, can give the witness another chance to score points.

Controlling the Witness

The focus of cross-examination should be to force the witness to choose between admitting the truth of the points you want to make or lying in a way that undercuts his or her overall credibility. In order to do that, you have to control the witness, so you have to ask questions that require straight answers, usually "yes" or "no." And you have to establish your own moral authority to demand such answers.

The conventional rule is that you should never ask a cross-examination question if you don't know the answer, but it is not enough just to know the answer. You have to be able to prove immediately that there is only one right answer and to show the witness that it would be a mistake to contradict you again.

Keep each question simple and straightforward, so the witness (and the fact-finder) can accept it in one bite. Limit yourself to one new fact per question, and build patiently. Stick to nouns and verbs and avoid the adjectives and adverbs. You don't need to get the witness to accept negative characterizations of the facts that they admit (for example, that they were lying in the past or that they are lying now). Trying to get the witness to agree to such conclusions will only provoke an argument and distract you from your program. Just prove the facts you need and save the argument for closing.

Getting Prepared

I usually start by making a list of short statements that build on each other and can be proven to be true with a document or deposition passage. These statements must track the exact language of the supporting evidence, so the witness can't use any different wording as a basis for disagreement. The key to controlling the witness is to eliminate any good faith basis for quibbling so that the witness has to accept your statement or look dishonest or evasive.

If you are well prepared, it is actually better if the witness disagrees with you at some point. You get to remind the witness of particular damaging evidence, and the judge and jury get to see that this witness may not be trustworthy. Good witnesses will realize this and not try to deny the obvious. But bad witnesses will fight you every step of the way and, in the process, convince everyone in the room that they cannot tell the truth under pressure.

Don't let your preparation make you rigid. Once the questioning starts, listen carefully to the witness so that you can follow up on any unexpected admission or particularly significant choice of words. Such moments can be particularly dramatic, precisely because they are not expected by you or anyone else, so don't miss them by keeping your nose stuck in your outline.

A Test of Character

Someone once said that cross-examination is ultimately a test of character — not just for the witness, but also for the attorney. The witness is faced with a series of challenges to tell the truth or to lie. But the questioner also faces a challenge: to use the power and attention that comes with the role in a way that inspires confidence and respect — even in the witness. If the attorney is evasive, dishonest or too aggressive, he or she will lose the test of character with the witness.

So, think of Gregory Peck in *To Kill a Mockingbird*. Don't be greedy or sneaky. Stick with what you can prove and think twice before freelancing. You may end up wasting time arguing with the witness without impeaching him or, even worse, giving her the opportunity to explain something in a new and more persuasive way.

Even more importantly, don't be a jerk or a bully and don't be snippy or sarcastic. If you keep to the moral high ground, it will be hard for the witness to fight with you effectively. The judge and jury know that you have a right to have your questions answered, and they can see when the witness is trying to avoid the truth. Just keep asking straightforward questions and restraining your emotions in order to heighten the contrast with the witness.

Building a Cage

Sean Penn once described preparing for a role as building a cage to go wild in. That seems like a good analogy for preparing for cross-examination and a lot of other things we litigators do. We need to be well prepared so that we can be spontaneous when necessary.

Cross-examination is inherently dramatic and communicates a wealth of information on many different levels. Before you start, you need to lay a factual and moral foundation for yourself so that you know exactly what you want to stress and what you want to avoid. But that is only the foundation. Once the bell rings, you need to show at every opportunity that you care more about truth than the witness does. If you can do that, you win the battle and are on your way to winning the war.