

On Cross-Examination

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Watching one of your witnesses be cross-examined is one of the most nerve-wracking experiences a litigator can have. By that point in the process, you don't have much ability to influence events. Of course, you can raise objections to improper questions, but asserting too many objections can backfire by making it look like you are afraid of what your witness may say. So most of your work needs to be done before your witness takes the stand.

I love the old adage that cross-examination is a test of character for both the witness and the questioning attorney. Jurors may not follow all of the intricacies of the evidence, but they can and will evaluate the competence and credibility of both the witness and the cross-examiner. And they will be heavily influenced by their sense of who seems to be winning the cross-examination.

Warn your witnesses that they will not win the cross-examination if that are too combative. Tell them that the point is to convince the jury that they are telling the truth, not to show how smart they are or how dumb the questioner is. Sarcasm and personal attacks on the cross-examiner should be scrupulously avoided, and humor should be used only if it is self-deprecatory or, at least, gentle. Train your witnesses to be polite, conscientious, thoughtful and patient and not to let themselves be rushed by the questioner or their own adrenaline.

In order to win a cross-examination, witnesses need to defend the crucial points of their direct testimony, admit the facts that cannot be successfully disputed and show good judgment about when to resist a leading question. That will not come naturally to most witnesses, so you will need to work with them to develop these skills. Role-playing will help, especially if you have a colleague play the cross-examiner. Another lawyer who does not already have a relationship with the witness is less likely to subvert the process by unintentionally pulling punches during the mock cross-examination. In addition, your witness will be less comfortable facing an unknown lawyer, which will make the exercise better practice for the real thing.

To help your witness fight effectively when necessary, you should develop a list of "safe harbors," *i.e.*, irrefutable points that the witness can fall back on when under attack. These safe harbors should be based on the major themes of your case and should be as simple, short and clear as possible. For example, if you are defending an investment manager who is accused of recklessly mismanaging a hedge fund, it will help your defense if the manager invested his own money in the fund so that his own interests were aligned with his investors. If that is the case, you should develop that theme on direct examination and also prepare your client to repeat that point when questioned about a challenged investment or strategy by saying, for example, "I put my own money where my mouth was."

These "safe harbors" should be as concise and pithy as possible so they can be stated quickly in the course of a cross-examination. Witnesses have a tendency to filibuster when facing a tough question, subconsciously assuming that they are winning if they are taking up the cross-examiner's air time. They draw out their answer to avoid the point of the question and postpone the next attack. That strategy can be effective in a deposition setting, but such filibustering will cause the jury and judge to feel that the witness is being unduly argumentative, evasive or even dishonest.

A witness must also be prepared to admit the points that have to be admitted. Fighting over every question looks bad — especially when an equivocal answer or denial can be effectively impeached with a document or prior deposition testimony. You and your witness should make sure that you are completely familiar with all of the documents that may come up on cross-examination. And you should both review the witness's deposition testimony exhaustively so that the witness will recognize any question that was asked at the deposition and remember the prior answer. In most cases, the witness should simply track the prior testimony unless there is a very good reason not to do so. If the witness has a good reason for changing her testimony, she should be prepared to explain the reason for the change as briefly and gracefully as possible.

Witnesses have a tendency to talk too much when making admissions, just as they do when fighting a question. A simple yes or no without showing any emotion is the best way to minimize the impact of an admission.

Practicing cross-examination should make the witness better at both fighting and admitting and at knowing which to do for any particular question. It will also help to manage your witness's expectations and goals. A competent cross-examiner will score at least some points, so the witness should not expect to win every battle. But it should be enough if they can defend their safe harbors and come across as likeable, honest and knowledgeable.