

Your Witness... - A few tips on conducting an effective cross-examination

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Someone once said that cross-examination is ultimately a test of character — not just for the witness but also for the attorney who asks the questions.

If done well, cross-examination forces the witness to face a series of challenges to tell the truth or to lie. Each line of questions should either prove a fact that is part of your case or erode the witness' credibility. Preferably, the questioning should lead to both results.

But the lawyer also faces a challenge: to use the power and attention that comes with the role in a way that inspires confidence and respect — even on the witness' part. If the attorney is confusing, dishonest or arrogant, he or she will lose the test of character with the witness. At that point, the cross-examination at best will be a waste of everyone's time. At worst, the witness will score points by explaining something in a new and more persuasive way.

Like a lot of other things that we litigators do, cross-examination requires us to be well-prepared without being rigid. If your nose is stuck in your outline, you will miss what the witness is saying and how the finder of fact is reacting. You have to listen carefully and think nimbly so that you can exploit the witness' phrasing or any unexpected admission in follow-up questions. Somewhat paradoxically, you need to prepare thoroughly without letting your preparation keep you from being "in the moment."

The actor Sean Penn once described his preparation for a role as being akin to "building a cage to go wild in." I think the analogy pertains as well to preparing for cross-examination. Long before your adrenaline kicks in, you need to think through what you want to convey and, perhaps even more importantly, what you don't want to convey. Ultimately, that comes down to controlling the witness and controlling yourself. The more that you think through these constraints ahead of time, the more comfortable and spontaneous you can be when the cross-examination begins. If the cage is well constructed, you can safely go wild inside it.

The focus of cross-examination should be to force the witness to choose between admitting the truth or lying in a way that undercuts his or her overall credibility. That typically requires questions that have an indisputably correct answer — usually "yes" or "no." You also need to be able to prove the truth clearly and quickly if the witness gets it wrong. You have to be ready at that point to show the witness a document or, even better, his or her own deposition testimony that establishes your point. If you do that, you'll succeed in demonstrating to the judge, jury or arbitrator that you can be trusted while also letting the witness know that it would be a mistake to contradict you again.

Keep each question simple and straightforward so the witness and factfinder can understand and swallow one bite at a time. Limit yourself to one new fact per question and build patiently. Stick to nouns and verbs and avoid 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. Focus on proving the facts that work in your client's favor and save your arguments for closing.

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. Each question should build modestly on the prior ones and, if possible, each one should track the exact language of the supporting evidence. The witness will look bad quibbling with your wording if you can show it came from his or her own deposition.

If you are well prepared, it is actually better if the witness disagrees with you at some point. You'll then have an opportunity to confront the witness with particularly damaging evidence and show the judge and jury that this witness may not be trustworthy. Good witnesses will realize this and not try to deny the obvious. But bad witnesses, by fighting you every step of the way, will convince everyone in the room that they won't tell the truth if it conflicts with their interests.

Once you begin your cross-examination, you should resist the temptation to be corrupted by the power that comes

with that role. If you abuse the witness or your position, you will lose the test of character. Don't waste everyone's time by being disorganized or argumentative. And make sure that you don't come off as a jerk or a bully. Be fair with the witness so that you can demand that the witness be fair with you by giving you straight answers. Resist the urge to react to a snippy or sarcastic comment from the witness with a similar tone in your own voice. You will get more credit with the finder of fact by suffering in silence and simply but doggedly continuing your questions.

When it comes to effective cross-examination, it certainly never hurts to try channeling Gregory Peck's portrayal of Atticus Finch from "To Kill a Mockingbird." 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'll be able to see when the witness is trying to avoid the truth. Keep asking clear questions and restrain your emotions in order to heighten the contrast with the witness.

At the same time, be careful not to let all of your preparation and self-restraint keep you from paying attention once the cross-examination begins. If you have built a good cage and thought through what you do and don't want to say, you can be more spontaneous in reacting to 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. Be careful not to miss those moments because you were thinking about your next question before the witness finished answering your last one.

Finally, keep a watchful eye on your audience. Judges and jurors frequently send all sorts of subtle and not-so-subtle cues about whether they are bored. That doesn't mean that you necessarily have to abandon the line of questions that might be fueling that boredom. But it does mean that you need to do something to remedy the situation. Perhaps you'll need to explain what you are doing, make your questions shorter and clearer or just pause for a dramatic silence. But if you lose your audience, you have failed.

Cross-examination communicates a wealth of information on many different levels. The words in the transcript are just part of what the finder of fact is evaluating. The nonverbal signals of competence and integrity may be even more important.

Before you start, you need to build a cage for yourself so that you know exactly what you do and do not want to show. Once the cross-examination begins, you should show that you care more about truth than the witness does by paying attention, playing fair and insisting on straight answers.