

The Art Of Cross-Examination¹

Cross examination is the highest art form ever devised in the history of the human race.² It is a ballet of hand and eye gestures, movement, vocal gymnastics and intellectual warfare. It is the ability to stare an enemy litigant in the eye with the understanding that you are going to take control of his mind and speech. Gymnasts and ballerinas are opposed only by inanimate objects and the force of gravity, each constant and predictable; each conquerable by rehearsal. The cross-examiner, on the other hand, is opposed by a trapped animal with the brain of a human, sometimes. Practice over time is required to develop the techniques necessary for effective cross-examination. Despite the complexity of the cross-examination process, the goals for both lay and expert witnesses may be summed up as follows:

Cross-Examination Goals

1. Discredit (impeach) the testimony of the witness.
 - A. Show physical impossibility or improbability of stated events.
 - B. Show a related, inconsistent prior statement.
 - C. Show that the witness has lied about material issues.
 - D. Show that witness has previously lied about collateral issues.
 - E. Attack Character (General Rules):
 - i. General Character: Not to prove conformity except when introduced by criminal accused: Accused 404(a)(1) or Victim 404(a)(2).
 - a. Proof by Reputation or Opinion 405(a)
 - b. Proof by Specific Instances - Only if trait is essential element of claim, charge or defense 405(b)
 - ii. Habit or routine practice can be used to prove conduct 406
 - iii. Untruthfulness of Witness: By Opinion or Reputation only 608(a); And Truthfulness only after it was attacked 608(b). Extrinsic Specific Instances only on Cross: Concerning truthfulness or concerning character of another witness who testified per above.

¹ §16.53, Guerrilla Discovery, Lipson, James Publishing, 2003.

² "Cross examination is the greatest engine for ascertaining truth," Wigmore on Evidence.

F. Prior Crimes (609).³

- i. Dishonesty/False Statement <= 10 Years [Always Admissible]
Dishonesty/False Statement >10 Years [Only if: Prob>>Prej + Notice]
- ii. Felony (Other than Accused) <= 10 [If Prob - <<Prej]
Felony (Other than Accused) >10 [Only if: Prob>>Prej + Notice]
Felony (Accused) <= 10 [If Prob>>Prej]
Felony (Accused) >10 [Only if: Prob>>Prej + Notice]
- iii. Misdemeanor other than Dishonesty/False Statement: Not Admissible
- iv. (On Direct Examination) Crimes or wrongs - Never, except to show:
[motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident] + Notice to Opposition. 404(b)

2. Diminish the testimony of the witness.

- A. Show that the observation has an "innocent" or favorable explanation.
- B. Show what the witness did not see, hear, or personally experience.
- C. Show failure to search for, or investigate, other options.
- D. Show bias, grudge or dislike on the part of the witness:
 - i. Interest in the outcome / Contingent compensation
 - ii. Relationship to party
 - iii. Interest in the outcome
 - iv. Solicitation for trial /Meetings / Discussions
- E. Show external restraints:
 - i. Distance \ Lighting \ Weather
 - ii. Noise \ Distraction
- F. Show internal:
 - i. Eyesight \ hearing \ age \ memory
 - ii. Drugs \ lack of sleep \ emotional distraction

3. Obtain favorable testimony, if possible.

- A. Show observation has exculpatory explanation.
- B. Obtain or lay foundation for, favorable evidence.

³ The symbol: " > " means "outweighs." " >> " means "substantially outweighs." " << " means "is substantially outweighed by." " - " means "not."

No cross-discussion would be complete without a list of *do's* and *do not's*. Here is Professor Irving Younger's oft quoted set? There are, of course, as many such lists as there are trial lawyers:⁴

- [1] Be brief,
- [2] Short questions; plain words,
- [3] Only leading questions; never "why" questions,
- [4] Don't ask the question if you do not know the answer,
- [5] Listen to the answer,
- [6] Don't quarrel with the witness,
- [7] Don't repeat the direct examination,
- [8] Don't permit the witness to explain,
- [9] Don't ask the one question too many, and
- [10] Save the ultimate point of the cross-examination for summation at trial.

⁴ No exception here. See *Guerrilla Discovery*, James Publishing, 2003-2007 for this list:

- [1] Know precisely what your goal is before you ever commence cross-examination.
- [2] Make certain that you have studied the pleadings, witness statements and any information that you have about the witness prior to cross-examination.
- [3] Be sure that you have become knowledgeable with respect to any technical matters before you begin cross-examination.
- [4] Know precisely when to quit, but do not quit too soon.
- [5] Don't ever accept "I don't remember," as an answer to a material question. You are permitted to use whatever means you can to refresh the recollection of the witness even if it involves inadmissible material.
- [6] The force of the attack on the opposing witness should vary directly with the strength of his or her attack on your client and should vary inversely with the witness' sympathy factor (sweet little nuns get a lot of sympathy, bookies and ex-cons don't).
- [7] In cross-examination attention is directed to the questions as opposed to the answers; Don't ever let them see you bleed. If a witness' answer did damage, quickly and unceremoniously move to another question.
- [8] Never jump the gun or become over-anxious as you lay your foundation for impeachment. Make certain that the fish has swallowed the hook.
- [9] Never lose your confidence; always stay in control. Never laugh at your own quips or responses, or engage in self-congratulation if you happen to score.
- [10] Don't overlook the obvious.
- [11] Never call the witness by his or her first name, unless its Adolph, Saddam or Osama.
- [12] Don't ever accept any list (even this one) as immutable; every case and every witness presents a unique set of circumstances.