

5 Steps To A Successful Cross-Examination

Law360, New York (December 13, 2013, 12:06 PM ET) -- Cross-examination is not for the faint of heart. Even an experienced trial lawyer may feel a surge of adrenaline facing a hostile witness and the unpredictable exchange that is inherent in cross-examination. If you follow the five laws of cross-examination, you will have a better chance of controlling the exchange.

1. Grab Control and Don't Let Go

In the battle between lawyer and witness, the one who establishes control in the first moments of the cross-examination will emerge the victor. Your questions must be leading, clear and short. You are testifying, and your goal is for the witness to say nothing but "yes."

If the witness veers into editorializing, use every resource available to get the witness back in line without appearing to cut off relevant or important testimony. Restate the question and politely insist on an answer. Ask the court to strike anything nonresponsive. Keep your impeachment material at your fingertips, and use it swiftly. If you establish control in the first five minutes, you are likely to keep it, and you cannot afford not to win this battle.

2. Stay on Message

You must go into cross-examination knowing exactly what you need from the witness. Have an outline of your questions, but also of the admissions you want from the witness. Hone your list down to the concessions that you are confident you can get, and that actually matter. Score your points, and sit down.

There is nothing worse than a lawyer who is bickering endlessly with the witness over some petty point, while the jurors are bored and annoyed. We once watched in disbelief as an opposing counsel tried repeatedly, and in vain, to get the witness to agree that there was a trivial contradiction between a company's two anti-discrimination policies. By the end of the exchange, the jury and witness were exchanging sympathetic looks. And if (God forbid), the judge asks you to move on, do it fast.

Note that with certain witnesses, your list of points may be very short. The witness may not have been deposed and may be just too unpredictable. Or the witness may be so incredibly sympathetic that the risks of an extensive examination are too great. Take for example, the grieving spouse or child of a plaintiff who claims to have been victimized by your client. In that event, there is a lot to be said for asking only a couple of relatively safe questions, and getting out.

3. Be (a Lot) More Prepared Than the Witness

You need to go into the battle far more prepared than the witness is. Know exactly how he testified at his deposition, and what every relevant exhibit says. Next to every point you need from the witness, list the source for that answer, and have the document or deposition transcript ready to go. Have copies of impeachment material ready quickly to hand up to the witness, opposing counsel, and the clerk and court reporter. Line up your trial technology so that you or your co-counsel can instantly highlight a line of the deposition transcript, or an exhibit, on the screen.

This organized process will keep you collected and the jury interested. The jury will begin to trust you, your client and your story. Better yet, the witness will learn to stay in line, because he knows that if he does not tell the truth, you will call him on it.

4. Don't Get Dragged Into the Mud

Do not let the process of cross-examination make you unlikable. Biting sarcasm, yelling or physically crowding the witness stand are likely to alienate the jury and/or draw a rebuke from the judge. We have seen many an opposing counsel appear red-faced and sweaty with anger or frustration during cross-examination. But by getting too hot, you lose control, and you may make even a dissembling witness appear reasonable or sympathetic by contrast.

Be particularly vigilant about your manner if the witness is sympathetic. A mean-spirited or condescending tone is never a good idea, particularly with a witness who appears vulnerable or unsophisticated, or with whom jurors may identify.

Similarly, if you are cross-examining a witness on a sensitive topic, modulate your voice and manner accordingly. Make sure your questions are grounded in the evidence. We have seen counsel ask salacious, accusatory questions of a witness, only to be reprimanded by the judge for mudslinging without foundation, leaving no one's reputation damaged but their own.

5. Be True to Your Own Style

There are as many styles of cross-examination as there are trial lawyers. Some attorneys can pull off an aggressive, theatrical style. Some can use a strategically raised voice to dramatically emphasize a central point. Others are more effective with an understated, intellectual approach that methodically scores admissions from the witness. Some lawyers adopt a folksy, quizzical tone, or use humor, to demonstrate that the witness' story just does not make sense.

Any of these approaches can be equally effective; the key is to find the style that is authentically you. If it seems fake, the jurors will sense it. Junior lawyers should watch more seasoned practitioners for ideas, and try styles on for size in the safer environment of a trial training program or deposition, to see what works for them.

The style of cross-examination appropriate for a particular trial or witness may also depend on factors such as the age, gender and physical stature of the examiner, and of the witness. We once watched an older male opposing counsel aggressively badger a young female manager, without seeming to realize that the jurors were aghast. By contrast, at one trial where the plaintiff showed up nine months pregnant, the cross-examiner adopted a gentlemanly tone that managed to gently but effectively reveal the many contradictions in the plaintiff's story.

Great cross-examination is an art developed over years of experience. Finding a winning balance of the right questions and presentation style depends on the unique facts of the case, the witness in front of you, the limits set by the judge, and myriad other factors. But the five laws of cross-examination will serve you well no matter who you face in the courtroom.

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