Trying Your First Case

A PRACTITIONER'S GUIDE

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Chapter 9

Cross-Examination

Aaron Krauss

Trial cross-examination happens just like it does in the movies. Really. It is—or at least should be—that scripted. You should know the answer to every question before you ask it, and the answer to all of the questions—in all areas of cross-examination—should always be "yes." To the extent the witness says anything other than "yes," you should be able to pull out a document (you don't have to pull it out of your inside jacket pocket, but that is a nice effect if the document is small enough to be folded neatly[1]) that says the answer is "yes," figuratively beat the witness over the head with it until the witness says "yes," and then move on to the next question (the answer to which should, of course, be "yes"). And, whatever you do, don't ask that dreaded one question too many.

A well-trained—and well-prepared—trial lawyer makes all of this look effortless, just like in the movies. What the judge and jury don't see is all of the work that went into this seemingly effortless examination. That work never makes it to the big screen (or even the small one). After all, who would watch ten hours of a lawyer poring over transcripts and

1. Although you generally have to disclose all of the exhibits you will use during your case-in-chief prior to trial, you do not have to disclose documents you will use "solely for impeachment." *See* FED. R. CIV. P. 26(a)(3). With that being said, if you "pull out" a previously undisclosed document during cross-examination, be prepared for a blizzard of authenticity and admissibility objections, especially if the document does not bear bates stamp numbers showing that it was produced during discovery. Indeed, if the document was not produced during discovery, you may face a sanctions motion for failing to disclose its existence.

exhibits to extract the nuggets of information that can be used to construct a great cross-examination? Then again, the hours of work drafting (and re-drafting) a movie script never get shown either. Nor do the 28 takes the actors and actresses went through to get that spontaneous eruption during cross-examination. And you have to get it right on the first take.[2]

Why Are You Cross-Examining This Witness?

Believe it or not, why you are cross-examining a specific witness is a very serious question. As tempting as it is to answer "Because it beats document review," or, better yet, "Because it beats doing all the work to prepare for a cross-examination and then handing the materials over to a more senior lawyer who will get to have all the fun at trial," you should know why you are cross-examining a witness before you get up to do it. As heretical as it may seem, you do not have to cross-examine every witness called to the stand. Sometimes "No questions, Your Honor" is the most devastating retort to a witness's testimony. Among other things, it suggests to the factfinder that the witness didn't matter.[3] If the factfinder believes that the other side is calling witnesses who don't matter, it is likely to believe that the other side is wasting the factfinder's time. Although such a belief won't necessarily make a factfinder decide in your client's favor, it certainly doesn't help a lawyer's case if the factfinder believes the lawyer is a time-waster.

Before you start cross-examining a witness, you should know what information you need to elicit from that witness and how that information will

2. There is a wonderful *New Yorker* cartoon of a witness on the stand with a lawyer yelling "Objection, Your Honor! That wasn't the answer we rehearsed." As humorous as this cartoon might be, such an objection is unlikely to be sustained, unless you are a very senior lawyer. As you have no doubt already noticed, some "deans of the bar" can get away with things that you (or I) cannot. I view this situation as additional incentive to become a dean of the bar someday.
3. If the witness did matter, forgoing cross-examination will get the witness off the stand faster, without giving the witness a chance to repeat damning testimony. This is not to say one should pass up the opportunity to cross-examine a witness who has hurt your case. It is, however, an acknowledgement that, sometimes, there is nothing you can do, and it is best to minimize any additional damage. As they say, you cannot dig yourself out of a hole. If you find that you are in a hole at trial, stop digging. Because a factfinder is likely to react negatively (from your perspective) if you cut short a cross-examination after getting burned badly by the witness, sometimes the wisest (and gutsiest) course is not to start a cross.

support your case. Keep that information in mind. Cross-examination is very dangerous. By definition, the witness you are cross-examining will be hostile to you and will do what she can to hurt you. This is not the time to "fish." Nor is it the time to gloat or to gild the lily. It is the time to know what you need to get, and to go in, get it, and get out quickly (and ideally) cleanly. Only make the points you have to make with this particular witness. If you can elicit the information from a friendly witness, don't try to drag the same information out of a hostile witness (unless, of course, it is important to your case to show that the other side's witness agreed with you on this particular point).

Similarly, resist the temptation to try to show every inconsistency in the witness's testimony during cross-examination or to make a mountain out of a molehill. An apocryphal story tells of a young lawyer cross-examining the victim of a robbery because the witness had testified in court that the criminal defendant was wearing black pants at the time of the robbery, in contrast to the police report that reflected the witness had said that the defendant was wearing dark blue pants. The witness retorted, "I guess I was paying more attention to the shotgun he was waving in my face than to his pants." (The jury convicted.) The moral of the story is that factfinders can easily tell when cross-examination descends into nit-picking, and they will react negatively to it. More importantly, if the factfinder thinks you are nit-picking, the factfinder is likely to overlook (or ignore) any substantive points you made during your cross-examination. As in so many other areas, the bad can (and usually will) drive out the good.

Unlike in the movies, the witness you are cross-examining is not going to break down and say "I did it."[4] Leaving aside the fact that a hostile witness is more likely to cut out his own tongue rather than give you such an answer, the only way you will be able to get a witness to give such an

4. At least I have never seen, or even heard of, this happening. Perhaps there is some Perry Mason out there somewhere who has made a witness break down on the stand. In reality, as discussed more fully below, a cross-examination consists of many small steps that lead the factfinder to a conclusion. The factfinder should, however, draw its own conclusions. If the factfinder draws the conclusion, the factfinder will (by definition) believe its conclusion. If you try and draw the conclusion for the factfinder, the factfinder will fight you because the conclusion will be yours, not the factfinder's. You do not want a factfinder to fight you. You will lose that fight.

answer is if you already have the answer in writing. And if you have the answer in writing, so does the other side. Would you put a witness on the stand who was subject to such a cross-examination? Of course not. Neither would your adversary.[5] As a result, do not expect the witness to break down.

Even if you could break down a witness, you may not wish to do so. If you are viewed as a bully, the factfinder will not view you or your case favorably. This is why it is so difficult to cross-examine the proverbial (or the literal) widow or orphan. Not only should you watch your tone with such a witness (as with every witness), you should also watch what you suggest. You don't need to convince the factfinder that the widow was lying. For example, you may only have to suggest that she may be mistaken. We all understand how that could happen. After all, she was doing the best she could, but she simply didn't have her glasses on. And, although she doesn't really need them, they are helpful, aren't they?

The bottom line is that an effective cross-examination does not need to make the witness recant or say things favorable to your case. Sometimes the most effective cross-examination neutralizes the direct testimony, either by showing that the witness didn't have a good factual foundation for (or wasn't sure of) the testimony, or by deflecting the witness's testimony in such a way as to make it not hurt your client. Again, know why you are cross-examining the witness. Know what you need the witness to say. Get the witness to say it. Then sit down.

What Are the Three Areas of Cross-Examination?

There are three different areas of cross-examination.

First, you can use cross to bring out information (including evidence of bias) that was omitted during direct examination. The classic example of this type of testimony is bringing out the fact that the witness is related to

5. A good rule of thumb is to assume that your adversary is at least as smart, as well trained, and as well prepared as you are. If this turns out not to be true, by all means capitalize. Luck favors the prepared. And it is always better to overestimate your adversary than to underestimate your adversary.

the party on whose behalf he is testifying.[6] Other examples of this type of testimony are bringing out either delays in reporting the events to which the witness testified, or, conversely, that the witness has made similar claims in the past. Depending on the situation, you can argue that the witness is either "crying wolf" or always thinks things of this sort are happening.

Ideally, you can bring out the fact that the witness agrees with at least one or two points you want to prove in your case. Doing so can allow you to argue in closing that "even the other side agrees that . . . ."

Second, you can use cross to suggest that either the witness is unsure of the testimony given on direct or the witness (although sure of his testimony) may have lacked the ability to accurately observe the events to which he testified. Some witnesses will admit either that they are not sure or that there could have been another explanation of the events they described.[7] Even if a witness will not admit to any uncertainty, it may be possible to bring out the fact that it is improbable that the witness actually made the observations that were the subject of his testimony. Again, the classic example is bringing out the fact that the witness was not wearing his or her glasses; other examples include that the sun was in his eyes, that he was distracted at the time, and so on. Alternatively, it may be possible to bring out the fact that the witness was not relying on his own observation but had instead internalized the observations of others. If this is the case, you should be pressing a hearsay objection.

Third, you can use cross to show that the witness changed his story in a material way. Depending on the magnitude of the change, these questions

6. It is unlikely that you will ever be able to point out that a witness "forgot" that she was related to your opposing party. If opposing counsel is worth his salt, he will have brought out that fact on direct and will not have left it to cross. You may, however, be able to bring out the fact that the witness has been friends with the opposing party for years or has some other reason (such as a financial interest) to testify in a particular way.

7. When I am preparing my own witnesses to withstand cross-examination, I always caution them to respond carefully to a question that begins "isn't it possible that . . . . " The best answer I ever heard to such a question was "Madam, anything is possible, but there is not one shred of evidence that anything even remotely like that actually happened in this case." Admittedly, that answer was given by an expert witness. It is, however, a textbook response to a common type of question.

can suggest that the witness is not really sure of his testimony, or that the witness is intentionally changing his testimony to benefit the other side.[8]

Depending on the facts, you may want to go into one or more of these areas. You should, however, make sure that your questioning is not at cross purposes. For example, if a witness previously gave some testimony that was favorable to your client, you may want to bring out that testimony. If, however, you then try to show that the witness did not actually observe the events to which the witness has testified, you will undercut the testimony favorable to your client. You should therefore make a choice as to which is more valuable, the factfinder hearing (and believing) testimony favorable to your client (along with the rest of the witness's testimony), or the factfinder not believing anything the witness said.

Why Should the Answer to Every Question Be Yes?

Embedded in the rule of having the answer to every question be "yes" is the rule that you should only ask leading questions on cross-examination.[9] Cross-examination is not the time to ask a witness "why." Doing so opens the door to a five-minute answer that you will not like. You will not like the answer for two reasons. First, it will not help your client. Second, it will allow the witness to "get away" and make a speech during what should be your cross-examination. You should therefore restrict yourself to asking closed-ended questions to which you already know the answer.

Especially when faced with closed ended-questions, a hostile witness's every instinct will be to fight with you and to disagree with you. Don't give the witness the chance. Ideally, you don't want to give the witness the chance to talk. Unlike on direct examination (where the witness should be the one telling the story), on cross-examination, you should be doing the talking. The witness should just be agreeing with you. And when the factfinder sees that even the other side's witness is agreeing with you, how could you be wrong?

8. In the unlikely event that the witness changed his story in a way that is favorable to your client, it is best not to bring the change in testimony to the factfinder's attention.
9. *See* United States v. Pierre, 486 Fed. App'x 59, 65 (11th Cir. 2012); FED. R. EVID. 611(c).

Many lawyers have a habit of using double negatives when cross-examining. How many times have you heard a question start either "Is it not true that . . ." or "It is true, is it not, that. . . ." Let me suggest that it is easier (for both you and the factfinder) to simply make a statement and end the sentence with "right?" or "true?" or "correct?" So, for example,

- You had been drinking with your friends on Saturday night, right?
- You started drinking at about 9, right?
- You started drinking at the Bent Elbow, right?
- The Bent Elbow is on Main Street, right?
- You aren't sure how many drinks you had at the Bent Elbow, right?
- You and your friends had left the Bent Elbow, right?
- You were heading towards O'Shey's, right?
- O'Shey's is on Main Street at Elm Street, right?
- You were walking down Main Street towards Elm Street, right?
- You were talking with your friends while you walked, right?
- You saw the accident while you were walking to O'Shey's, right?"

Having the answer to every question be "yes" also "trains" the witness. The witness will get into the habit of just saying "yes" to every question, even if he doesn't want to. This habit can be hard to break.[10]

One of the ways to make sure the answer to every question is "yes" is to have each question focus on a small, discrete fact. The cross-examination I outlined above suggests that the witness was, at a minimum, slightly impaired and distracted when the accident happened. The questions are, however, broken up into small steps with which the witness cannot disagree. A hostile witness is not going to admit that he was slightly drunk and wasn't really paying attention when the accident happened. You should

10. Experienced lawyers refer to this effect as getting a witness "into the tunnel." A witness who is "in the tunnel" cannot see where she is going and tends to be hypnotized by the single bright light at the end of the tunnel. When you get a witness into the tunnel, don't let her out. Ideally, you will sit down before the witness realizes exactly what has happened or figures out a way to get out of the tunnel. One way to prepare your witnesses to stay out of the tunnel is to remind them that they do not have to accept the cross-examiner's phrasing, or description of events. "That isn't how I would describe it" or "those aren't words I would use" or "that isn't quite right" are good phrases that keep a witness out of the tunnel.

not, therefore, jump to the ultimate question. A witness will (and will have to) admit what he was doing that night. You can therefore slowly walk the witness through the progression of events that took place before the accident, asking small questions to bring out the facts you want the factfinder to hear. The key is to focus only on the facts and to break each fact into a separate question with which the witness cannot disagree.[11]

Many lawyers make the mistake of having the answers to the lead-in questions be "yes," and then setting up the key question so the answer is "no." Try to resist this temptation. At the very least, it will break your (and the witness's) rhythm. It will also cause the witness to fight you in a new way. Make it easy for both of you and make sure that the answer to every question is yes.

How Do You Prepare an Effective Cross-Examination?

Cross-examination preparation begins with a review of the available exhibits and transcripts. The starting point is the witness's deposition. If the witness has answered a question under oath, the witness will have to give the same answer at trial. If the witness does not do so, you can pull out the transcript and (figuratively) beat the witness over the head with it until the witness gives consistent testimony—or at least admits that she testified differently at a point closer in time to the events that are the subject of the testimony.

What if the witness's deposition was videotaped?[12] It is possible, albeit very expensive and difficult, to cross-examine a witness by using a videotaped

11. Even if your adversary does not object to compound questions, a witness is much more likely to say something other than "yes" if a question includes multiple facts. At a minimum, if your question gets long and complicated, a witness is likely to "lose the question" and ask you to repeat it. That will break your rhythm and can make you look as if you are trying to confuse the witness. If, on the other hand, the witness claims to be confused by questions the factfinder can easily understand, the factfinder is likely to think that the witness is being evasive and is therefore not credible.

12. There are a number of reasons to videotape a witness's deposition. It acts as a safeguard against the witness not appearing at trial (if, for example, the witness is beyond the scope of a trial subpoena). It helps to control the witness and opposing counsel. Because a picture is worth a thousand words, it may be beneficial to videotape a witness who looks "shifty" (think of Bill Gates's infamous deposition in the Microsoft antitrust case during which his body language did significant damage to his credibility). A videotaped deposition may also reduce the

deposition. The expense is twofold. First, you must rent the appropriate projection equipment to show the video clips to the jury. Second (and this is where the real expense comes in), you must pay someone to edit and cue up each video clip. Usually, the video clips are linked to bar codes in your cross-examination outline so that you can, with a wave of an electronic wand, make the relevant clip appear on the screen.

So why wouldn't you do this? Leaving aside the expense, you can't adjust video cross-examination on the fly. If the video clip does not precisely match up with your question, the cross-examination will not be effective. If you are cross-examining using a transcript, you can adjust the lines you read to the jury on the fly. You can also get into areas that you didn't originally think would be necessary. And a savvy witness (or an aggressive opposing counsel) can interrupt the flow of a video cross-examination by demanding that the witness be shown the transcript and insisting that the question was taken out of context. If you cannot play additional video that the witness thinks is important, the factfinder may view your cross-examination as being unfair.

Believe it or not, it is possible to cross-examine a witness who has not been deposed. Doing so requires a close examination of the available documents. It is ideal if the witness authored or received the document in question, but one can cross-examine a witness based on a document the witness did not send or receive. As set forth below, although there is a risk that a witness will deny knowing anything about a document that the witness did not explicitly send or receive, such a denial might not be believable. For example, it is possible that a witness will deny knowing anything about a 1040 form she did not sign. A factfinder is, however, unlikely to believe a witness who claims that the income listed on a 1040 is too high.

The end result of your cross-examination preparation is a script (just like in the movies). All of the lines are written out. Although this may seem stilted, if you are asking the exact question that appears in the document and the witness says anything other than "yes," you will be able to impeach the witness effectively. If you ask the question differently than the way it

likelihood that opposing counsel will misbehave. At the same time, however, it also limits your ability to browbeat a witness. It reflects any stumbles or pauses in your questioning. Personally, I rarely think that videotaping a deposition is worth the additional cost.

was asked in the document, at best the witness will have an opportunity to explain why the answer was different. If the question you asked was very different than the way it was asked in the document, you will have a misfire where the factfinder will be unsure of why you are trying to impeach the witness. Impeachment is also much more effective if it is done quickly. That is why you want to write down the exact location (i.e., the page of the transcript, exhibit, or other document) of the material you will use for impeachment if impeachment is necessary. Not only will a jury look askance at you if you need five minutes to flip through a transcript to find what you want during cross-examination, but you will probably not like what a judge is likely to say to (or about) you if you do so.

The hardest part of constructing an effective cross-examination is paring down your questions. Cross-examination is definitely a situation where less is more. Leaving aside the potential for getting burned with every question, a factfinder can only absorb so much information. If your cross-examination goes on for hours, the factfinder is likely to forget your important points. The "golden nuggets" will get lost in the piles of slag. And you do not want to make the factfinder sift through a mountain of slag to find the gold in your cross-examination. On the contrary, you want to get the gold quickly and then sit down.

Although there is no hard-and-fast rule for how long a cross-examination should last, as a general matter it should not be longer than half the direct examination. There are, of course, exceptions to this rule. The foremost is if the opposing party has called one of your witnesses as on cross in their case-in-chief. If your adversary does so, you will have to decide whether to do your direct as part of your cross.[13] Assuming it is a strong witness who you can recall to the stand,[14] you probably want to take two bites at the apple and "merely" cross-examine the witness on the points brought

13. Sometimes a judge will make this decision for you by insisting that a witness, once called, will not be recalled to the stand. It is both unwise and ultimately futile to argue with a judge who has made such a ruling. Even if you do not expect such a ruling, you (and your witness) should be prepared for it. It is always better to be safe than sorry.

14. There are some witnesses, especially third parties and executives, who are difficult to keep in the courtroom for long periods of time. If you insist on recalling a witness such as this, you run the risk of the favorableness of her testimony decreasing in direct proportion to the inconvenience the witness believes you have imposed.

out on direct (that is to say, you want to stay within the scope of the direct examination). You can then put the witness back on the stand in your case and have the witness tell the story in the way (and in the order) you want. Doing so will reinforce the witness's testimony in the factfinder's mind. If, on the other hand, your witness is not so strong and may not withstand the additional cross-examination that would follow a return to the stand, you probably want to complete your entire examination of the witness at once.[15]

Cross-examination can be both positive and negative. This is to say, cross-examination can establish that a witness did something. Cross-examination can also establish that a witness did not do something. The following is an example of a cross-examination outline showing that a witness did something (that the witness's lawyer was unlikely to bring out on direct examination):

- You quit working for XYZ company on September 18, 2009. (Paul's dep. at 29) (EXHIBIT 16)
- You resigned as an officer. (Paul's dep. at 30)
- You would no longer be treasurer as of September 18, 2009. (Paul's dep. at 30)
- You resigned as a director. (Paul's dep. at 30)
- You resigned as an employee. (Paul's dep. at 31)
- While you were working for XYZ, XYZ had issued you a laptop computer. (Paul's dep. at 253)

15. Some lawyers believe there is an advantage to disrupting your adversary's case by making an extensive examination of your witness if called first by the adversary. While doing so can interrupt your adversary's presentation of evidence and can give the factfinder additional favorable evidence earlier in the case (when presumably the factfinder's mind is more open), it leaves you with less evidence to put on in your case-in-chief. You should therefore consider what other witnesses, and what other evidence, you will have to present before completing the direct of a witness who has been called as-on-cross. As a general matter, a jury is likely to wonder why you did not put on a defense or view a very short defense as insubstantial. This is not the case with a judge, who will understand why your case is so short. As an aside, in some jurisdictions, if a defendant goes beyond the scope of cross and introduces evidence during the plaintiff's case-in-chief, the defendant cannot move for a directed verdict. Some jurisdictions have either abrogated this rule or decided that going beyond the scope of direct is not truly the introduction of evidence. You should be aware of the rule in your jurisdiction before you decide whether to complete the witness's testimony or ask to recall the witness during your case-in-chief.

- When you quit, you knew you had to give your laptop back to XYZ. (Paul's dep. at 254)
- You gave your laptop back to XYZ through your counsel. (Paul's dep. at 254)
- Prior to returning your laptop computer, you sought legal advice related to the return of that computer. (Paul's dep. at 254)
- You sought that legal advice from Attorney Doe. (Paul's dep. at 254–55)
- You deleted documents off your laptop computer before giving the computer to Attorney Doe to return to XYZ. (Paul's dep. at 255–56)
- You specifically sought out a program that you thought would delete files irretrievably. (Paul's dep. at 257)
- It was called the XL Delete program. (Paul's dep. at 257)
- You used the XL Delete program. (Paul's dep. at 257)
- You don't remember what files you deleted. (Paul's dep. at 269)
- You agree that you deleted files related to your work for XYZ with the XL Delete program right before you gave your laptop back to Attorney Doe to pass on to XYZ. (Paul's dep. at 272)

Although you should "find your own voice" and prepare materials in the way best suited to your style,[16] let me point out that this outline works well because it proceeds in small steps and has at least one document reference (more than one document reference can be helpful) in case the witness says anything other than "yes." Although the bulk of the outline tracks deposition testimony, note that the cross-examination outline does not follow the same order as the deposition testimony. Instead, the "raw footage" of the deposition has been "re-cut" into a new order. Some of this results from the elimination of material that was either unhelpful or not significant enough to be included in the cross-examination. Some of this results from bringing together "good answers" that appeared in different parts of the deposition.

16. Personally, I tend to keep exhibits in folders with a marked-up copy for me and a clean copy to hand to the witness. Other lawyers with whom I have tried cases swear by trial notebooks in three-ring binders. Still others prefer velo-bound exhibit books. A younger lawyer with whom I recently tried a case kept everything on his iPad. Each of these methods has advantages (e.g., a folder can't crash, freeze up, or run out of power, and the witness can only see the exhibit you have handed up) and disadvantages (e.g., folders can get out of order or can get dropped on the floor). Find the method or combination of methods that works best for you.

An example of a cross-examination outline showing that a witness did not do something is as follows:

- You were in charge of tax matters for the XYZ company. (Paul's dep. at 25)
- Absent information provided by you, the accountants couldn't prepare XYZ's taxes. (Paul's dep. at 17)
- The accountants would send you XYZ's year-end financials. (Paul's dep. at 64) (EXHIBIT 7)
- You made whatever corrections you thought were necessary to the financials. (Paul's dep. at 65)
- You re-booked things if you thought that something had been charged to the wrong account. (Paul's dep. at 66–67)
- Those reclassifications happened. (Paul's dep. at 68)
- You were doing these reclassifications as recently as July 12, 2009. (Paul's dep. at 316–17) (EXHIBIT 13)
- At the end of the day, you and the accountants always agreed on the proper classifications for XYZ's expenses. (Paul's dep. at 68–69)
- Your complaint about defendant's expense reimbursement requests is that the bookkeeper couldn't charge them to the correct account. (Paul's dep. at 39)
- The accountants would only finalize the tax returns after you corrected and approved the financials. (Paul's dep. at 65)
- XYZ's tax returns were never filed without you having first approved the financial statements. (Paul's dep. at 82)
- You claim that you told the accountants that you would no longer sign XYZ's tax returns. (Paul's dep. at 32)
- You claim to have told the accountants this when they were at XYZ in August or September of 2008 for the year-end review. (Paul's dep. at 32 and 34)
- You claim to have told accountant 1, and perhaps accountant 2. (Paul's dep. at 33)
- You claim that you told accountant 1 and accountant 2 that you would no longer sign XYZ's tax returns because there were expenses being charged to XYZ that were not business related. (Paul's dep. at 32)

- You say you never put this in writing. (Paul's dep. at 32–33) (Paul's dep. at 99)
- You never put this in any of your e-mails to the accountants. (Paul's dep. at 35)
- EXHIBIT 11 is a September 5, 2008, e-mail you sent to the accountants. (Paul's dep. at 97–98)
- EXHIBIT 11 is the transmission to you of the financial statements that lead up to the tax return that is labeled EXHIBIT 60. (Paul's dep. at 98)
- You asked a tax question in EXHIBIT 11. (Paul's dep. at 99)
- You never told the accountants in your September 5, 2008, e-mail that you wouldn't sign the tax return. (EXHIBIT 11) (Paul's dep. at 99)
- You say that the accountants never put it in writing that you weren't going to sign XYZ's tax return. (Paul's dep. at 100–01)

Finally, cross-examination can make a witness take a position that the factfinder is likely to think is not credible. In many ways, it does not matter if the factfinder thinks the witness is testifying incorrectly or if the factfinder thinks the witness is out of touch with reality. In either event, the factfinder is unlikely to credit the witness's testimony. That is the goal of an effective cross-examination. An example of this type of cross-examination outline is as follows. In this example, the licensor licensed technology necessary for the XYZ Company to make 80 percent of its products.

- You weren't surprised to receive EXHIBIT 19 because the licensor had called you before he sent EXHIBIT 19 and complained that the royalty sheet you sent him didn't balance. (Paul's dep. at 185–86)
- You never told the president of XYZ company about this conversation when you forwarded EXHIBIT 19 to him. (Paul's dep. at 231)
- You didn't believe that the president of XYZ company would have been in a better position to make good decisions on behalf of XYZ if he had known the content of your conversation with the licensor. (Paul's dep. at 233)
- You believed you were acting in XYZ company's best interests when you had this conversation with the licensor. (Paul's dep. at 233 and 234)

- You also believed you were acting in XYZ company's best interests when you chose not to share the contents of the conversation you had with the licensor with the president of XYZ company. (Paul's dep. at 235)

One final note on preparing for cross-examination. Your cross-examination outline should include anything you think might be necessary during cross-examination. This will result in a (potential) cross-examination that is too long.[17] Before you begin cross-examining, pick up your red pen, go through your outline, and cross out what you will not use.[18] This is, by everyone's estimation, the hardest part of preparing for cross-examination. Not only must it be done on the fly, but you have to make the hard decisions about what you need to do. Again, focus on what you need the witness to say and why you need the witness to say it. And, having seen the witness testify, estimate how hard it is going to be to elicit the testimony you need. You then trim accordingly.

What Documents Can You Use to Beat the Witness Over the Head?

In addition to cross-examining a witness based on the deposition he gave in the case at bar, you can cross-examine a witness based on any other testimony the witness has given under oath.[19] If the witness has testified, it is not necessary for the party against whom the testimony is being offered to have been present at the deposition.[20] As a result, you can use tran-

17. Among other things, you may not be sure of the order in which witnesses will be cross-examined. If you have already made your point during the cross-examination of a prior witness, you may not wish to revisit the topic. In addition to potentially boring the fact-finder, if the current witness gives an answer that is less favorable than the one you previously obtained, you will not have helped your case.
18. The judge will usually give you a five-minute break to "get organized," especially if you say that you need five minutes to eliminate some material and streamline your examination. Judges are quick to give you five minutes if they believe doing so will save thirty.
19. *See* Fed. R. Evid. 801(d)(1)(A).
20. *See* United States v. Morgan, 376 F.3d 1002, 1007 (9th Cir. 2004). This contrasts with Fed. R. Civ. P. 32, which allows a party to use a deposition against a party who was present during the deposition. Rule 32 governs cases in which the witness does not testify at trial. *See*

scripts of a witness's testimony in related cases (such as testimony before an investigatory agency) or even completely unrelated cases. The ability to cross-examine based on testimony in unrelated cases can be particularly useful when cross-examining an expert witness. You can often locate transcripts of an expert's testimony in other cases, showing that an expert has taken contradictory positions in what would appear to be similar cases. This is a very effective way of convincing a factfinder that the expert is a hired gun who will say whatever he is asked to say in any given case.

Sworn statements (such as tax returns, governmental filings, and financial applications) can also be used effectively on cross-examination. Many of these documents contain fine print above the signature line stating that the signer makes the statement under penalty of perjury or that the signer represents and warrants that the statements are true and correct, to the best of the signer's knowledge, information, and belief.

Even if a written statement does not contain this type of fine print, any document authored by the witness can be fodder for cross-examination.[21] Although the witness may claim that the statement in the document is erroneous, a factfinder is unlikely to believe such a claim if there is no written evidence of a retraction. Similarly, if a witness has received a document, but did not respond promptly and claim that the statements in that document are inaccurate, the factfinder is likely to disbelieve a currently voiced claim that the statements in the document were wrong.[22]

Finally, you can cross-examine a witness based on a document authored by someone else in the witness's organization, especially if the author is senior to the witness. A witness is usually understandably reluctant to contradict his boss. And if the witness does so, the factfinder is left to wonder

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Nationwide Life Ins. Co. v. Richards, 541 F.3d 903, 913–15 (9th Cir. 2008). FED. R. EVID. 801(d)(1)(a) governs cases in which the witness does testify at trial. *See* United States v. Demmitt, 706 F.2d 665, 670–74 (5th Cir. 2013).

21. Many documents, such as notes and e-mails, are not "signed." Even so, they can be used effectively on cross-examination.

22. It is for this reason that lawyers are loath to leave a letter or an e-mail "hanging out there" if the statements in the document are false. Although there are many instances in which a step-by-step refutation of the incorrect statements would not be productive, you can protect the record by sending a written response that says (in sum and substance) that although you disagree with the statements, you do not believe it would be productive to discuss your disagreement at this time. Such a response can serve as a placeholder without unduly provoking the other side.

who is incorrect, the witness or the boss. Either result would be favorable for your client.

A side note on the Fifth Amendment: unlike in criminal cases, in a civil case the factfinder *can* draw an adverse inference if a witness asserts her Fifth Amendment rights.[23] It is therefore highly desirable to make an adverse witness in a civil case "take the Fifth." You still, however, have to ask the questions in the same way you would ask them if the witness were giving substantive answers. Lay the foundation, and lead the factfinder up to the desired conclusion, just as you would if the answer to every question was "yes." As tempting as it may be when you have a witness "in the tunnel" mindlessly repeating "I take the Fifth," you cannot ask a question for which you do not have a good faith basis for believing that the answer would be "yes."[24] For example, you cannot throw in a question such as "And you were high on crack cocaine at the time, right?" (unless, of course, you have a good faith basis for believing that the witness really was high on crack).

An important (but seldom used) hint for the effective use of exhibits relates to the fact that most lawyers mark deposition exhibits on the fly. They arrive at a deposition with a pile of papers and then instruct the court reporter to mark the papers as exhibits as they are used. Each exhibit gets its own number, usually preceded by the name of the witness. Jones 1 is followed by Jones 2, which is followed by Jones 3, and so on. That, in and of itself, is not a problem. The problem arises at the next deposition when what was marked as "Jones 1" is now marked as "Smith 1" (or worse yet, "Smith 28"). By the time the case gets to trial, the same document (the contract, for example) may have been given several different exhibit numbers. To make matters worse, the document is often given a new trial exhibit number.

The problem comes into focus when you sit down to prepare your cross-examination. Jones may have made a helpful admission about the contract. That admission, however, will look something like this:

Q: I show you the contract marked as Jones 1. Did you sign Jones 1?
A: Yes.

23. *See* Louis Vuitton Malletier S.A. v. LY USA, Inc., 676 F.3d 83, 97–98 (2d Cir. 2012).
24. *See* ABA Model Rules of Prof'l Conduct R. 3.4(e) (a lawyer may not "allude to any matter . . . that will not be supported by admissible evidence").

Q: When you signed Jones 1, did you realize that it required you to pay my client's attorney's fees?
A: Yes.

As helpful as this admission is, it will lose a great deal of force if, at trial, the contract is marked as anything other than Jones 1. If, for example, the factfinder has seen and heard the contract referred to as Plaintiff's Exhibit 3, it will be wondering why this cross-examination regarding Jones 1 is important. It gets even more confusing if you are using Jones's testimony to cross-examine Smith.

The solution is easy. Once you mark an exhibit, do not change the exhibit number. Ever. Nothing says that the witness's name has to precede the exhibit number. Similarly, nothing says that you have to use (or even mark) exhibits in numerical order. You can begin Jones's deposition by showing the witness Plaintiff's Exhibit 28.[25] You can also file a motion to which you attach Plaintiff's Exhibits 3, 28, and 92 and the Jones deposition. Nothing says exhibits to a motion have to be referred to as "Exhibit A," "Exhibit B," and "Exhibit C." Similarly, exhibits to a motion don't have to be referred to as "Exhibit 1," "Exhibit 2," and "Exhibit 3." And you don't have to give the Jones deposition an exhibit number. The judge really will be able to find the Jones deposition if you refer to it by name.[26]

There are two additional benefits to pre-marking your exhibits. First, it allows you to insert exhibit references into your deposition outlines. These reminders to ask questions about specific documents can be very helpful at a deposition. It also makes it easier to use your deposition outline as a starting point for your cross-examination outline. Second, it eliminates the need to bring spare copies of exhibits to future depositions. If you have already handed opposing counsel(s) a copy of Plaintiff's Exhibit 28 at the Jones deposition, you don't have to hand out an additional copy at the Smith

25. If you do this, the court reporter or opposing counsel will often ask you if you mean "Jones 28" or even "Jones 1." Say no, you mean Plaintiff's Exhibit 28. If you have pre-marked your exhibits, the court reporter will be thrilled not to have to do so. And if you stick to your guns, there is nothing that opposing counsel can do. After all, it is your exhibit, and you can call it whatever you like.
26. In jurisdictions where hard, as opposed to electronic, copies are the norm, it is easy enough to make a tab that says "Jones dep." and insert it before the transcript of the Jones deposition.

deposition.[27] While not having to hand out additional copies of exhibits at future depositions may cut down on your exercise,[28] it does make it easier to fit your exhibits under the seat in front of you when you have to travel.

How Do You Know When You Have Asked One Question Too Many?

The traditional answer to the question of how you know when you have asked one question too many is that when you ask the question, you wish you could—in true cartoon fashion—chase your words across the courtroom and tackle them before they get to the witness. More helpfully, there are two telltale signs that you may be asking one question too many. First, if your question begins with the words "summary" or "conclusion," or (heaven forbid) includes the words "explain" or "explanation," it is probably one question too many. Leaving aside the fact that an adverse witness will not agree with your conclusions, you want the factfinder to draw its own conclusions.

Second, if you feel insufferably smug when you are phrasing the question, you probably don't want to ask it. Not only is such a question likely to backfire, even if it does not, the factfinder may feel sorry for the witness. That is not the impression you want to leave. As a result, you should quit while you are ahead, and say the magic words, "No further questions, Your Honor."

27. It is courteous to remind opposing counsel that you will not bring additional copies of exhibits to future depositions, and that you will only bring a copy for the witness. I suggest that you take the witness's copy back at the end of the deposition and re-file it. That way you will be prepared for the next deposition.
28. Many lawyers forgo gym memberships in favor of lugging trial bags full of exhibits to and from various proceedings.