

CROSS EXAMINATION

Introductory Comments

I want to approach the subject from two points of view:

- (a) first by outlining some points which I think apply before you have asked a single question;
- (b) secondly, by outlining points about how you ask your questions.

The skill of cross examination is partly a mastery of the relevant law and partly a mastery of the techniques of cross examination. The Rules of Law in relation to cross examination are fairly clear. They circumscribe the techniques that can be used.

On the other hand although there are "rules" in relation to the technique of cross examination I would say that for every rule of technique it is possible to find an example of an effective piece of cross examination which breaches one of those rules. In other words, the rules on technique should be borne in mind but never applied in an inflexible way.

Read widely, turning to the many books on cross examination in particular and advocacy in general.

Critically analyze each of your performances to review how successful you were. Consider what errors you made and how you can improve on the performance or correct the errors as the case may be.

The end of one stage in a larger process

Cross examination is part of a whole process. A step along the way

Cross examination is part of a whole process which consists of:

- (a) preparation
- (b) execution
- (c) address, and
- (d) sometimes appeal.

Importance of preparation for cross examination

Unless you know your case thoroughly and have anticipated your opponents case in as much detail as possible your capacity to cross examine will be significantly diminished. An important part of preparation is to assess where the main factual issues will be joined.

If any scientific or mechanical questions are involved, you would have familiarized yourself completely with the principles involved.

Have a plan for your cross examination, avoid fishing, and when you have achieved your plan sit down. Above all, cross examine to your case. That is, cross examine to lay the factual base on which you intend to ground your legal submissions.

Cross examine to your case

In cross examining your opponent's witnesses you seek, wherever possible, to extract from those witnesses anything that will support the factual material and the legal principles that you intend to rely on. Also you have to have a keen alertness to any failure of the other side to adduce evidence in some critical area. It is vital that you should not, by your cross examination, fill

a cross examination directed at eliciting factual material from your opponent's witnesses which is in your favor^u.

Even if after all of this you do not succeed in a no-case submission, your cross examination to the case that you intend to establish will help the tribunal to see your case early and to understand the other party's case in the light of the contentions that you have projected by your cross examination.

Assessment of witnesses

A properly thought out cross examination should have been prepared based on an assessment of what it is you hope to get from the witness and what is your assessment of the kind of witness the person is likely to be. Also make a judgement of the witness as evidence in chief is being led.

The importance of challenge

If the witness' evidence is being disputed, then that part of the testimony must be challenged in cross examination. It must be made plain in the course of your opponent's case which matters are in dispute. There is no rigid form of words that is required in order to do this.

The general rule is that if you do not challenge a witness, you can be taken to have accepted the witness' evidence on that point. It is also important tactically because if you are for defendant or accused it is important to let the tribunal know before hand what is the general nature of your case. Cross examination gives you an

the facts other than what the plaintiff or the prosecution is putting forward as part of its case.

So you should cross examine to your case that is, to the factual and legal issues that you want the tribunal to decide in your favor.

rules of
Knowledge of the evidence rules

The rules of evidence are the tools that you use to blend the principles of law with the facts of your case

In order to effectively cross examine you need a comprehensive knowledge, that is, the kind of knowledge that you can draw on while you are on your feet - a comprehensive knowledge of the principles of evidence.

Basic to this is an understanding of the hearsay rule and in particular its exceptions. Also important is a working knowledge of the rules about how you can challenge a witness in cross examination.

Unless you have a full grasp of the relevant principles of evidence your ability to cross examine is bound to be hampered because you will be failing to phrase the question in keeping with the law. This creates opportunities for the other side to take objections. Objections, particularly if they are well founded, break the flow of your cross examination. If the objection is well founded, there is also the danger that it will undermine your self-confidence and

is damaging to your case or fail to be alert to possible areas for cross examination which could advance your case.

Before you start your cross examination bear in mind that:

Styles of cross examination differ and what is appropriate depends on a number of variable factors:

- (a) Your own personality;
- (b) The tribunal you are before, its type and individual composition;
- (c) The witness;
- (d) The nature of the confronting material;
- (e) The nature of the discrepancy sought to be established;
- (f) The purpose of the cross examination;
 - i. do you want to discredit,
 - ii. do you want to persuade,
 - iii. do you just want to make the witness uncertain or seem doubtful of his testimony,
 - iv. do you want to show the witness is merely mistaken;
- (g) What is your command of the material:
 - i. do you have complete instructions;
 - ii. can you prove them if necessary,
 - iii. is it the kind of issue on which you can call a witness,
 - iv. are you in command of the legal principles surrounding your right to pursue the line of questioning,
 - v. are you able to pursue another method of eliciting the same effect.

(a) Cross examining to previous inconsistent statements:

Oral statements;

Written statements;

(b) Cross examining to documents;

Documents made by the Witness;

Do you want to keep the document out of evidence;

Documents from which the Witness has refreshed memory;

Documents not made by the Witness;

Is the document admissible, do you intend to put it in;

(c) Depositions:

(d) Cross examining to credit. Exceptions:-

i. cross examining to show bias or motive;

ii. cross examining to show mental instability;

iii. cross examining to previous convictions;

~~iv.~~ **T**he cross examiner should always seek to lay a basis ~~in her cross examination~~ so that the trial judge will be obliged to have to give the kind of direction on credibility that is favorable to the cross examiner's case.

~~A skillful cross examiner has to bear in mind the possibility of having to have the matter argued on appeal in relation to the treatment of the credibility of the opposing witness.~~

To summarize

Good Cross examination starts with the preparation of your case. It

examination as a basis for a no case submission. If you fail in that submission or you decide that it should not be made, make sure that you lead the evidence that supports your cross examination so that there is an actual joining of issues. A sound cross examination is ^{also of value} ~~important~~ at the address stage, when you pull together your client's side of the story and seek to present it in as favorable a light as possible. A successful cross examination supported by evidence from your side becomes the basis for a forceful address to the tribunal of fact. Cross examination successful pursued also forces the trial judge to give directions on the effect of that cross examination and how it influences the determination of issues. If the trial judge fails to adequately review the evidence in that light, that failure is a sound basis for arguing on appeal that the judgement should not stand.

When the questioning starts

1. Don't take yourself too seriously.
2. Be relaxed as possible.
3. Be cautious in your decision to be combative and only ^{be} so if it is really necessary.
4. Be fair, courteous and patient.
5. Don't put offensive suggestions unless they are necessary for the case - make sure you have evidence to support them.
6. Put single questions on single issues.
7. Phrase the question simply.
8. Keep the questions short.
9. ^{Be alert to} ~~Never ignore~~ whether the tribunal of fact is following your cross examination.

eventually become clear why your opponent is making them. Nevertheless, always keep in mind what your objective is and try not to be distracted by the interruption.

12. If the objection is well founded, that is, you erred in the formulation of the question, develop the capacity to adjust while on your feet so that you can elicit the same information in a permissible form.

13. Watch the Judge's notetaking.

14. Give the Court sufficient time to record your answers and to absorb the significance of them.

15. Avoid showing your pleasure or displeasure at receiving a particular answer.

16. Avoid repeating the answer that the witness has given.

17. Avoid injecting comments into your questions or after the witness answers.

18. Bear in mind the dangers of over cross examination as against the dangers of leaving openings for re-examination.

19. Find out who are good cross examiners and spend some time observing them.

20. But avoid mimicking others' personalities.

21. Be yourself except for the bad points.

Richard Small
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