

DIANA'S "DO'S AND DON'T'S" OF CROSS EXAMINATION

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Cross examination is defined as, "the examination of a witness upon a trial or hearing...by the party opposed to the one who produced him...to test its truth, to further develop it, or for other purposes." ¹ Francis Wellman, a New York lawyer, wrote in his 1903 treatise entitled, *The Art of Cross-Examination*, "It requires the greatest ingenuity; a habit of logical thought; clearness of perception in general; infinite patience and self-control; power to read men's minds intuitively, to judge their characters by their faces, to appreciate their motives; ability to act with force and precision; a masterful knowledge of the subject matter itself; and extreme caution; and, above all, instinct to discover the weak point in the witness under examination."²

Cross examination is your opportunity to test the credibility or validity of your opponent's witnesses. Trial experts state it is the most difficult part of trial techniques to master. A poorly-done cross examination can hurt more than help an advocate's case. Consequently, there will be times when a witness should not be cross examined.

First Great Principle of Cross Examination: Do Not Feel Compelled to Cross Examine Every Witness.

- I. **Pre-hearing preparation. An effective cross examination begins well before the hearing.**

¹ Black's Law Dictionary, Henry Campbell Black, M.A., revised 4th ed., West Publishing Co., 1968, p. 450

² as quoted in Howard L. Nations Law Offices,
www.howardnations.com/crossexamination/cross_ex.html,

- A. Identify the witness, if possible.
1. Utilize laws and regulations of the state to find out as much information about the witness as possible.
 - a. What are the witness's qualifications?
 - (1) Will the witness be testifying as an expert?
 - (a) Qualified expert witnesses are able to testify as to opinions and conclusions within their area of expertise.
 - (b) Is the witness qualified to render a medical opinion or conclusion?
 - (c) For example, in New York, the "expert" may be a pharmacist or dentist rather than a physical therapist.
 - (2) You may find information by running the witness's name through a search engine such as "Google."
 - (3) Has the witness written any articles?
 - b. What is the witness's relationship to the agency or opponent?
 - (1) For example, is the witness an employee of your opponent or an independent contractor?
 - (2) An established relationship to the opponent may indicate a bias on the part of the witness and therefore draw into question the validity of any observations, opinions or conclusions that witness has formed.
 2. Is there a written report, evaluation or summary of the facts by this witness regarding the appellant's request for funding?
 - a. Make sure you obtain a copy prior to the hearing.
 - b. Show the report to your expert (the medical professional who is treating the appellant or who prescribed the device) and discuss it in depth.

- (1) Do you or your expert notice any errors or omissions in the report or evaluation?
 - (2) Do you or your expert notice any defects in the manner or procedure in which the request for funding was reviewed?
- c. Compare the witness's report or evaluation to your letters of medical justification (LMN) that were submitted to see if the witness ignored or misstated important facts.
- (1) Do not assume the LMN was read thoroughly. Significant medical facts in the LMN may have been overlooked or altogether ignored.
 - (2) *For example, the treating physical therapist wrote in one LMN that the patient has a history of pressure sores and therefore needs a tilt-in-space as an accessory to a new power wheelchair. In sharp contrast, the agency stated in its summary that the patient had no history of pressure sores.*
- d. How do the opinions stated in the witness's report line up with published studies or articles, or accepted medical opinion?
- (1) Your expert may be able to provide medical articles which set forth the current prevailing medical standard.
 - (2) There are many internet sites which provide medical articles and the result of scientific studies.
- e. Do the opinions expressed in the witness's report line up with the applicable state laws and regulations?
- (1) *For example, a tilt-in-space may be requested as an accessory for a wheelchair if the appellant lacks the ability to reposition himself and the tilt is needed to prevent the development of pressure sores. In New York State, prevention of a condition is a specific factor of medical necessity. Did the report that*

prevention is not a medical necessity?

Second Great Principle of Cross Examination: You Should Not Cross Examine a Witness Just Because the Witness Has Testified.

B. Decide whether, and how, to use this witness:

1. As part of pre-hearing preparation, have you identified any weak points with this witness?
 - a. Is the witness an expert qualified to draw her/his opinions and conclusions?
 - b. Is the witness's relationship to the agency or your opponent such that it might draw into question the credibility or validity of her/his observations or opinions?
 - c. How much contact has the witness had with the appellant? In many cases, your expert's contacts with the appellant will be significantly more and therefore, your expert's opinions should be considered more valid by the finder of fact.
 - d. Did the witness fail to reference important facts about the appellant?
 - e. Did the witness misapply the law, the regulations, or agency policy?
2. The witness may have made points that are in your favor and you may decide to reinforce these positive points during cross examination.

II. Conduct of the hearing:

- A. **Listen, listen, listen.** Do not become so focused on your questions that you fail to listen to the answers or watch the witness's demeanor during testimony.
 1. The witness may have given away a point on direct examination. *For example, perhaps the witness admitted the appellant needs a power wheelchair instead of a manual one and is really only questioning the necessity of some of the accessories like a tilt-in-*

space.

2. Some jurisdictions limit cross examination to issues raised during direct and to issues involving credibility and bias.³
3. The witness may have made a concession on cross. *For example, during cross, the witness may admit that his opinions are based on facts as presented to him by another reviewer and that he did not read the LMN himself.*
4. The witness may have omitted a critical point on direct. You will never know if you do not listen to the answers.

Third Great Principle of Cross Examination: It Is Dangerous to Cross Examine. It Should Only Be Done When Necessary.

- B. Your opponent will have opportunity to re-direct after your cross examination.
- C. After thorough preparation and careful attention to testimony and demeanor of the opponent's witness, you must decide whether you need to cross examine.
 1. If the witness did not hurt your case too badly, you will be giving your opponent another opportunity to strike a blow.
 2. The witness's testimony and credentials may have been so strong that she left no weak link to attack. The risk here is that you will be giving her an opportunity to reinforce already strong evidence.
 3. If the witness omitted a critical fact on direct, you will give the witness attorney an opportunity to rectify the omission either through your cross examination or through follow-up direct.

³ See Federal Rules of Evidence, Rule 611(b) (b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

4. If testimony was confusing or apparently contradictory, you may give the witness an opportunity to clarify or correct.
 5. There may be other, less risky ways to respond to your opponent's witness.
- D. Once you decide to cross examine, you must maintain a degree of control over the witness or cross examination will not be effective and may even be harmful to your case.
1. The use of leading questions will help you maintain control.⁴
 - a. Try framing questions so that they only call for a "yes" or "no" answer. You may preface or conclude question with phrases like, "isn't it true?", "isn't it correct?"
 - b. Open ended questions should be altogether avoided because they will allow the witness to explain and qualify his answers.
 - c. Do not allow the witness to repeat direct examination. This is a classic and common error by experienced trial attorneys.
- E. Keep questions brief, and addressed to one point at a time. *For example, consider the question: "isn't it true that you are a dentist and you lack the qualifications to determine whether the power wheelchair is medically necessary?" Even if the witness is a dentist, she could answer "no" if she thinks she has some qualification derived from job experience to make such determinations. Better to ask the first part of the question, and then argue the second point during your summary.*
- F. Do not ask a Question for which you do not know the answer. Preparation is critical if you want to make sure you are not surprised during cross examination.
- G. Remember that if you are cross examining an expert witness, it is unlikely

⁴ Federal Rules of Evidence, Rule 611.(c) Leading questions.
Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

that you know more about the subject than the expert.

- H. Do not argue with the witness. Some forums will closely monitor your attitude and conduct toward the witness and you may lose points with the finder of fact if you are unduly antagonistic, hostile or accusatory.⁵
- I. Know when to stop. Once you have made an important point or obtained an important admission or concession, stop.

Fourth Great Principle of Cross Examination: Do Not Ask That One Last Question You Think Will Clinch Your Cross.

- 1. *For example, in the scenario above, once you have the witness's admission that she is a dentist rather than a physical therapist, you might feel tempted to ask an additional question about her lack of qualifications. Resist, resist, resist. You will lose the advantage you have just gained if you give the dentist an opportunity to explain why she is qualified notwithstanding the fact that she is a dentist.*
- J. Keep cross as brief as possible.
 - 1. The more questions you ask, the more opportunity you give the witness to seize the moment and gain an advantage. In the case of cross examination, it cannot be overstated that less is better.

Fifth and Final Great Principle of Cross Examination: Remember That There May Be Instances in Which You Should Not Cross Examine.

⁵ See Federal Rules of Evidence, Rule 611 (a) Control by court.

The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

ADDITIONAL REFERENCES

Federal Rules of Evidence, Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Irving Younger's 10 Commandments of Cross Examination, summarized from *The Art of Cross Examination* by Irving Younger, American Bar Association Section of Litigation, from a speech given by Irving Younger at ABA Annual Meeting in Montreal, Canada, Aug., 1975

Howard L. Nations Law Offices,
www.howardnations.com/crossexamination/cross_ex.html

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