

# CROSS-EXAMINATION

## INTRODUCTION

Cross-examination at trial is controlled by Fed. R. Evid. 611(b):

Cross examination should be limited to the subject matter of direct examination in 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.

The federal rule limits the scope of cross-examination to the subject matter of direct and matters affecting the credibility of the witness. By contrast, in state court, Tennessee follows the “wide open” rule of cross-examination:

A witness may be cross-examined on any matter relevant to any issue in the case, including credibility, except as provided in paragraph (d) of this rule.

Tennessee Rule of Evidence 611(d), the “adverse witness rule,” provides:

When a party in a civil action calls an adverse party (or an officer, director or managing agent of a public or private corporation or of a partnership, association or individual proprietorship, which is an adverse party), interrogation, on direct examination, may be by leading questions. The scope of cross-examination under this paragraph shall be limited to the subject matter of direct and cross-examination may be by leading questions.

Thus, when a party is called under the adverse witness rule, direct examination proceeds as if it is really cross-examination with the questioner asking leading questions. When the adverse witness is being crossed, the scope is limited to the subject matter of direct and cross-examination “may be by leading questions.”

In short, the rules of evidence provide for a right to conduct cross-examination of a witness and give the opportunity to frame leading questions to facilitate the examination.

### **WHAT IS THE ROLE OF THE ADVOCATE IN CROSS-EXAMINATION?**

Cross-examination is literally confronting the opposing witness. It is a way to test, inspect and examine what the other side is really saying. Cross-examination begins in discovery with a plan for each witness. Usually depositions are the methods by which trial lawyers explore areas of testimony. The jury will be judging you as the attorney during the cross-examination. The jury will watch you closely as to how you produce evidence during cross-examination and whether you are courteous and respectful to the witness. If you can bring out facts without being discourteous to the witness or forceful, the jury will appreciate it; however, do not avoid being forceful if that is what it takes to reveal the truth. The skill is in knowing how to be forceful and not offensive and how to maintain the right impression. Consider the following:

1. The lawyer must prepare extensively to conduct effective cross-examination. All witness statements should be examined for inconsistencies and admission that will corroborate the lawyer's case. Any bias of a witness should be uncovered. For expert witnesses, it is important to discover authorities that may contradict the authorities they relied on and to investigate the expert's qualifications.
2. Lawyers should never ask a question unless they are reasonably certain what the answer will be.
3. Lawyers should expose any witness bias.
4. Lawyers should not give witnesses the opportunity to re-emphasize damaging points.

5. Lawyers should ask questions about incidents out of chronological order.
6. Lawyers should try to elicit admissions that will make the witnesses' testimony seem improbable.
7. Lawyers should take any hypothetical questions posed to an expert and include assumptions that are favorable to the lawyer's client.
8. Lawyers should know when to stop. They should not belabor cross-examination with irrelevancies.
9. Ask a series of questions in cross-examination. Do not think of cross-examining as asking the witness questions, but rather as making statements of fact followed by a few words that turn the statements into questions. For example, instead of asking, at the beginning of a question, "Wouldn't you agree," or "Isn't it true that," make the statement and then at the end say, "Isn't that true?" or "Don't you agree?" with the question coming at the end.
10. Do not write out cross-examination questions. Before cross-examinations you will have already deposed the adverse witness. Draw the cross-examination questions from the witnesses' verbatim answers during the deposition indexed to the page and line. Most of the questions consist of favorable answers testified to at the deposition. If the witness disagrees with the question, it is simple to impeach him by referring to deposition. This technique allows you to tightly control the examination. With answers that are particularly damaging to the witness, you may want to ask a further question that will demonstrate the vulnerability or unreasonableness of the witness.
11. During cross-examination, look to the judge for help if you are having difficulty controlling the witness. If the witness is not being responsive, do not turn to the judge to help you until you have tried to control the witness yourself. Be polite and

firm and interrupt the witness if you have to but always be attuned to the jury's reaction. Tell the witness when it is important that he or she answer the question you are asking and that if there are additional matters she wishes to testify to, to do so afterwards or on re-direct. However, if the witness does not comply, the juror should be able to see that you have done everything you can to get your answers to questions. At that point you should turn to the judge and say, "Your Honor?" and have the judge to instruct the witness to answer the question.

### **PURPOSES OF CROSS-EXAMINATION**

There are basically four purposes of cross-examination: 1) to discredit the witness; 2) to elicit testimony from the witness, which discredits unfavorable testimony given by other witnesses on the same side, creating a conflict with testimony of other witnesses on the same side; 3) to elicit testimony to corroborate favorable testimony; and, 4) to elicit testimony to contribute independently to the development of your case.

Stated another way, the goals of cross-examination are to discredit the witness and/or testimony, to discredit the other side's case and to support your case.

### **TYPES OF CROSS-EXAMINATION**

There are basically three types of cross-examination:

1. Apparent Cross-Examination. This type of cross-examination does not attempt to deal with the merits or substance of the expert's testimony, but rather attacks the witnesses' qualifications and prejudice.

2. Real Cross-Examination. This cross-examination is just the opposite of apparent cross-examination in that it deals with the merits and substance of the witnesses' testimony.

3. Combination of Real and Apparent Cross-Examination. This is the most common type of cross-examination employed, and just as the description implies, deals with the merits and substance of the witnesses' testimony and the prejudice and lack of qualification of the witness.

In apparent cross-examination (when you can't meet the expert head-on or on the merits), try to emphasize the lack of qualifications--academic versus practical standing, stretching into different fields, that the witness is not aware of standards in the literature, everything that he or she reviewed.

### **EXPOSING PREJUDICE**

Is there a close relationship with the defendant, the profession or industry? How many times has the witness testified in court? How many times has the witness reviewed cases? Prior contacts with the law firm and dates of contacts. Advertising. Percentage of income made testifying.

Real Cross Examination. Conflicts with prior testimony in the deposition or affidavit. Conflicts with recognized authority. Omitting facts to make it appear as if the expert is not informed or is unprepared. Creating a conflict with the expert's attorney or Plaintiff.

### **CONTROL AND TECHNIQUES OF QUESTIONING**

1. Ask leading questions. Isn't it true there was a high temperature (fever), spiking, pain and warmth to the touch? Do not ask why, how, when or where questions. Ask rapid, simple questions and insist on clear answers. Have a brief cross-examination and go in no particular order. Always cross-examine an expert. Deal only with major issues. Ask hypothetical questions that are favorable to you. Use

dramatic pauses and silence. Obtain favorable testimony first, especially at deposition. Don't show your hurt or expression and don't pause. Listen to the witness and look at the jury while asking the questions, especially when the testimony is very questionable.

2. Use plain words and short questions and occasionally consider asking non-leading questions such as why or how. Do not exaggerate. Ask only questions that can be handled effectively and favorably regardless of the answer. "Did you learn that in medical school." Do not seek perfect answers. Avoid asking too many questions. Be satisfied once an answer is given because it probably will not get any better. Concentrate and listen to the witnesses' answers. Many cross-examiners continue to ask question after question without really analyzing the responses.

3. Do not argue or denigrate the witness. Fighting with the witness is not prudent.

4. Let the jurors play detective. Hold back a few point for summation. Do not try to solve the case in cross-examination.

## **REVIEW**

The main points of cross-examination are to expose the witness, pin the witness down to a solidified position, demonstrate mistakes and errors, obtain concession and favorable testimony, develop new and advantageous facts, and show that the witness does not conform to your opponent's portrayal.

## **HISTORICAL TIDBITS**

1. John Henry Wigmore stated, "Cross-examination is the greatest legal engine ever invented for the discovery of truth. You can do anything with a bayonet

except sit on it. A lawyer can do anything with cross-examination if he is skillful enough not to impale his own cause upon it.”

2. Scott Baldwin based his cross-examination on the following sequence of logic:

“Man above all wants to appear respectable, but truth and respectability do not go hand-in-hand. Truth and logic, however, go hand-in-hand. Man will be illogical in order to remain respectable. Therefore, if you challenge his respectability he will become illogical and hence expose his untruthfulness. One who practices the art of cross-examination will find constant challenges to the respectability of the witness, thereby prodding the witness into the wonderland of illogic.”

3. Max Steur: “If a witness is a decent, unprejudiced citizen who has told substantial truth or has said little to hurt you leave him alone, smile at him, but don’t cross examine him. If you decide to cross-examine you should definitely have in mind what you hope to gain by cross-examination.” Steur limited cross-examination to two objectives: 1) to destroy the story told by the witness, or 2) to destroy the witness himself. If neither of these objectives is obtainable and if you have properly repaired your case pointless and scoreless cross-examination does your case more harm than good, and when you have scored your point on cross-examination, for heaven’s sake, quit.

4. Francis X. Busch noted that in most trial situations it is the witness not the cross-examiner who has the position of strength and the sympathy of the jury. The lawyer is down-graded because he is a paid advocate who has a contingent interest in the case. The witness is generally disinterested and appearing involuntarily is sworn to tell the truth of what he or she knows. Cross-examination carries the risk of repeating every item in direct examination and reinforcing the story. Every experienced trial lawyer knows that an unexpectedly pertinent, dramatic answer at cross-examination more than doubles the harm that would have been done had it been given on direct.

## **CROSS EXAMINATION AND VOIR DIRE**

Explain the meaning of cross-examination to the jurors and voir dire. Be the instructor who teaches them the real effect of cross-examination.

### **OPENING STATEMENT**

In your opening statement explain again the meaning and purpose of cross-examination, including in it your assertion of what the evidence will show and as you describe the case to the jury remember that each member of the panel must have a clear understanding of what cross-examination means. Let the jurors know that cross-examination is a way for one side to test the credibility of the other side's testimony and the witnesses' motives, intentions and credibility. Jurors rarely perceive the result of the cross-examination as neutral, rather they perceive that the attorney has either won or lost after questioning each witness.

### **DIRECT EXAMINATION**

The direct examination of your witness must relate to the cross-examination to be conducted. Planning must be detailed. Key points of your argument should be established. If necessary, go over it with them again and again. Once the points have been made the stage is set for cross-examining. For example, in qualifying your expert on direct examination you might show that they are a board certified obstetrician and all of the steps they went through to become board certified. Then, when you cross-examine the defendant physician you can show the person was not as board eligible but not board certified. In the direct examination of your witness you have set up the cross-examination of the opposing witness. For example, the Plaintiff takes the stand

and testifies about his injuries in a personal injury case. Over the course of a few minutes the defense lawyer might ask to state since the time of the injury the Plaintiff has not been able to participate in recreational activities like jogging or volleyball. Then you bring a private investigator who shows that the witness has been able to engage in these activities.

## SUMMATION

Once you understand that cross-examination is the first step of final argument it becomes obvious that the failure to relate cross-examination will doom your case. Cross-examination is the time when you reach conclusions and arrive at solutions.

## CROSS-EXAMINATION OF EXPERT WITNESSES

1. Painting the witness as a "hired gun." Number of times testified in court. The number of cases the witness has reviewed. The number of litigation physical exams performed. Prior contacts with the particular law firm. How the witness was first contacted and by whom. Does the witness advertise. Percentage of appearance for plaintiffs as opposed to defendants.

2. Financial matters. In depth inquiry into the area of witness fees may be appropriate. Percentage of income pertaining from medical-legal activities. Total income derived from medical-legal matters. Total income derived in the witnesses' career. The percentage of the witness' professional time given to medical or legal matters.

3. Credentials. Is there board certification? Is the witness affiliated with a teaching institution? Has the witness published on the particular issue in question? 4. Is t  
or was the provision of the material selected? Was the omission significant? Does the

witness acknowledge materials as authoritative? Can you obtain prior transcripts and depositions? Has the witness previously testified in broader areas? Specifics of your case. Highlight those areas where the expert agrees and attempt to obtain concessions. List the support of your experts before engaging in cross-examination.

**CROSS EXAMINATION**

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