

CROSS EXAMINATIONS

(See Student Attachment #6)

The purpose of the cross examination is to show the judge and jury that a given witness should not be believed because that witness:

- 1) can not remember the facts;
- 2) did not give all of the facts in the direct examination;
- 3) told a different story at some other time;
- 4) has a reputation for lying;
- 5) has a special relationship to one of the parties (maybe a relative or close friend);
or
- 6) bears a grudge toward one of the parties.

The cross-examination questions are designed to bring out one or more of the above factors.

Objective: To make the other side's witnesses less believable in the eyes of the trier of fact.

- Attempt to establish that a witness is lying (or at least, not telling the "whole truth").
- Attempt to show prejudice on the part of the witness.
- Attempt to show that the testimony was improbable.
- Get the witness to admit certain prejudicial facts.
- Show that the witness gave questionable opinions because of inability to see, hear, etc.
- Show the incompetence of expert witness.
- Attempt to uncover contrary statements that may have been made.

Notes on Conduct

- Use the natural fear of the witness as an ally.
- Be fair to the witness
- Hold the eye of the witness (study his/her gestures for any clues)
- Roll with the punches (keep your composure!)
- Do not "beat a dead horse" (this will arouse sympathy for the witness)
- Make sure the jury keeps up with your questions
- Don't resort to making unnecessary objections when the cross examination of your witness is going poorly.

Advice (for Attorneys) on Preparing:

Types of Questions to Ask:

- Questions that establish that the witness is lying on important points (e.g., the witness first testifies to not being at the scene of the accident and soon after admits to being there.)
- Questions that show the witness is prejudiced or biased (e.g., the witness testifies that he has hated the defendant since childhood.)
- Questions that weaken the testimony of the witness by showing his opinion is questionable because of poor lighting (e.g., the witness with poor eyesight claims to have observed all the details of a fight that took place 500 feet away in a crowded bar.)
- Questions that show that an expert witness or even a lay witness who has testified to an opinion is not competent or unqualified due to lack of training or experience (e.g., a psychiatrist testifying to the defendant's need for dental work or a high school graduate testifying that in his opinion the defendant suffers from a chronic blood disease.)
- Questions that reflect on the witness' credibility by showing that he has given a contrary statement at another time. (e.g., the witness testifies to the exact opposite of what he testified to during the pre-trial hearing. This may be done by asking the witness, "Did you make this statement on June 1st?" then read it, or show a signed statement to the witness and ask, "Is this your statement?" Finally, ask the witness to read part of it aloud or read it to the witness yourself and ask, "Did you say that?")

Other Suggestions:

- Anticipate each witness' testimony and write your cross-examining questions accordingly. Be ready to adapt your questions at trial depending on the actual testimony.
- Never ask anything but a leading question (questions that suggest the answers and normally only require a "yes" or "no" answer.)
- Be brief. Don't ask so many questions that well-made points are lost.
- Prepare short questions using easily understood language.
- Ask only questions to which you already knew the answer.

Advice in Presenting:

- Be relaxed and ready to adapt your prepared questions to the testimony that is actually heard during the direct examination.
- Always listen to the witness' answer.
- Don't give the witness the opportunity to re-emphasize the strong points made during direct examination.
- Don't quarrel with the witness.
- Never try to allow the witness to explain anything. Keep to the lies or "no" answer whenever possible. Try to stop the witness if his/her answer or explanation is going on and hurting your case by saying, "You may stop there, thank you," or "You answered the question, thank you."
- Don't harass or intimidate the witness by the questions you ask them.

Forming Questions for Witnesses:

- Questions should be “closed.” Never ask open-ended questions and limit your witness to “yes” and “no” responses as much as possible.
- You control what is said. LEAD the witness where YOU want through your questions.
- Have a question ready for each response possible: have a “flow chart” of questions for either a “yes” or “no” response for each of your questions.

Example: QUESTION

If “yes”: Question 2a

If “no”: Question 2b

If “yes”: Q 3a If “no”: Q 3b

If “yes”: Q 3c If “no”: Q 3d

- HOWEVER, BE FLEXIBLE! If a witness gives you an unexpected answer which helps your case, go with it and create new “yes” or “no” questions.
- Know the witness’ statement/record and be able to impeach the witness when s/he contradicts that statement.

Example: *“Do you recall making an affidavit in this case?”*

“Your Honor, may I approach the witness?”

Show affidavit; ask if it is the witness’ signature and for the witness to identify the document.

“Didn’t you say in your affidavit . . . ?” OR “Could you please read from . . . to?”

- Always make sure your line of questioning impeaches the witness or proves the issues of your case.

DOs AND DON'Ts OF A CROSS EXAMINATION

DO	DON'T
1. Prepare short questions using easily understandable language.	1. Don't ask so many questions that well-made points are lost.
2. Make sure questions are relevant to the case.	2. Don't ask questions that call for a narrative answer.
3. Ask only questions to which you already know the answer.	3. Don't beat a dead horse – once you've made your point, move on.
4. Ask only leading questions.	4. Don't resort to frivolous objections if the cross of your witness is going poorly for your side.
5. Listen to the answers.	

Styling Points:

- **Attorney Conducting Cross Examinations:** This attorney must know precisely what kind of weaknesses he or she wants to show in the witness, and then design the questions to point them out. Questions should be short; “leading” questions (see *Teaching the Rules of Evidence and Procedures* section) are allowed (for example the attorney may use questions with phrases like, “Isn't it true that. . .?”) Questions should not be long or argumentative, nor should they ask the witness “How,” “Why,” or “Could you explain.” Questions are best that call for a simple “yes” or “no” answer. Questions that give the witness a chance to make an explanation will usually not help the cross examiner's case.
- **Opposing Attorney:** Listen carefully for violations of the Rules of Evidence, and be prepared to make objections. Listen carefully to the kind of attack the cross examiner is making; decide whether the attack is successful. After the cross examination, the opposing attorney may conduct a “redirect” examination to give the witness a chance to explain or correct some points made in the cross-examination.
- **Witness:** Witnesses should try to give explanations whenever possible. Witnesses must pay close attention during the cross examination, since the attorney may try to confuse the witness. They should try to stick to the facts they recited on direct examination.

NOTE: Redirect and re-cross examinations are at the discretion of the presiding judge. If permitted, at the close of the redirect examination, the same cross-examining attorney may do a re-cross. The purpose is to reiterate a point made during cross examination following the opposing counsel's efforts to "rehabilitate" its witness. A re-cross examination follows the same rules as the cross; however, the questions are limited to the subjects discussed on redirect.

What to Include:

- Cross-examination is not limited and may cover the subject matter of the direct examination, matters affecting the credibility of the witness and additional matters, otherwise admissible, that were not covered on direct examination. A firm idea of your objectives at this point in the trial is just as important to an effective cross-examination as an understanding of the laws and rules of evidence.