How to be an effective cross-examiner without trial experience

Cross-examination is about obtaining results and telling the story, not just impeaching the witness

By Angel Carrazco, Jr.

What is cross-examination?

Most lawyers would agree: "Questions on cross-exam solicit a verbal request for admissions." This is the lawyer definition of cross-exam, but there is more to cross-exmaination than soliciting requests for admissions.

Cross-examination can be taught, learned, and practiced. It is not a battle with the witness, but rather, an opportunity to develop your theme and tell your story through witnesses that belong to your opponent. Cross-examination is about obtaining results, not just impeaching. Nonetheless, every time you score a point on cross-examination, such as with an adverse expert, defendant or witness, it counts for two points. Every time you score a point with a favorable witness, such as your own expert or plaintiff, it only counts for half a point. This means you have to work a lot harder to prepare for cross-examination.

Effective cross-examination requires thorough preparation. It should flow with the theme of your case and story you are telling jurors. The theme of your case needs to be integrated and repeated in the mini-opening, voir dire, opening, direct, cross and closing. The best themes are those that make jurors reflect on common life experiences. A common life experience combined with a betrayal story usually results in justice.

Setting up your cross-examination starts in discovery

A prepared cross-examination will be short, have all the answers to all the questions, and tell the theme of your case and story you want to tell the jury. Cross-examination is like taking the California State Bar. It is a time-pressured examination with only one correct answer. The correct answer is what your audience has already decided is the "correct answer." Therefore, you need to precondition the jurors during your mini-opening, voir dire, and opening statement about what the correct answer is, so they can agree and relate to the answer during cross-examination and closing arguments.

The "correct answer" comes from the discovery. From the very beginning of the case, think about the closing argument you want to make at trial and frame the case from that perspective. Extract the evidence you need for your closing argument and opening statement in the discovery process. Only through discovery will you have the evidence you need for cross-examination. Preparing for cross-examination starts with the evidence you want to argue in closing arguments, then opening statements, and ends with trial. Setting up your cross-examination in discovery is crucial.

Use closing arguments to prepare cross-examination

The starting point of cross-examination is your *closing argument*, which should mirror the opening statement. I use about six or seven frames in all closing arguments. Frames are the structure of your case.

I start with frame: "*What do defendants want to make this case about?*" Fill this frame with evidence of all the possible arguments defendants will make in their case by writing each argument on a flashcard. You will end up with about 30 or more flashcards representing defendants' arguments. Categorize the flashcards into defendants' top three arguments and use the remaining arguments for cross-examination during depositions.

The next closing frame is, "*What is this case about?*" This frame is where you discuss the verdict form and jury instructions with the jury. I use the top three jury instructions that favor plaintiff's case. Each jury instruction is broken down into its elements. For example, if defendant is going to try to blame plaintiff for causing the accident by plaintiff's own negligence:

QUESTION NO. 5: Was Plaintiff negligent?
ANSWER: __Yes X No

Why? The law is designed to protect plaintiffs involved in sudden and unexpected emergencies.

That is, **CACI No. 452. Sudden Emergency**: Plaintiff claims that she was not negligent because she acted with reasonable care in an emergency situation. Plaintiff was not negligent if she proves all of the following:

- That there was a sudden and unexpected emergency situation in which someone was in actual or apparent danger of immediate injury;
- Plaintiff did not cause the emergency; and
- Plaintiff acted as a reasonably careful person would have acted in similar circumstances, even if it appears later that a different course of action would have been safer.

During the period of discovering the story, I get testimony from defense experts, witnesses, and defendants that prove the elements of jury instruction CACI No. 452. Importantly, most of the evidence you will need to set up the cross-examination comes from depositions, request for admissions, form and special interrogatories, and production of documents.

Use opening statement to prepare cross-examination

Opening statements are the best opportunity to tell the jurors the theme and

story of your case, provide credibility to your witnesses and attack the credibility of the opponent's witnesses. I use six or seven frames in all opening statements. The opening usually mirrors the closing arguments.

Opening statements are a road map of what is coming. Opening statements condition the minds of the jurors to believe or disbelieve the witnesses before they ever take the stand. Importantly, jurors need to understand the theme of the case before witness examination because the theme provides directions to direct and cross-examination.

If you will be using demonstrative exhibits in cross-examination, and opposing counsel is not objecting, you need to use those exhibits in your opening. Demonstrative exhibits pull together facts that come from many witnesses. For example, timelines are often used to orient judges, witnsseses and jurors. Timelines are also used to point out how important facts fit into the sequence of events.

Other methods to prepare cross-examination

Re-creating the stage and role-playing the incident with characters provides a deeper understanding of what was happening at the time of the incident. More importantly, it helps you learn the case from the perspective of each character involved. Use this information to prepare for depositions and set up the cross-examination for trial.

One such technique is psychodrama, developed by Dr. Jacob L. Moreno. This is a "show me, don't tell me" method, where we use dramatization, role playing, and self-presentation to learn and gain insight into our characters' lives. This helps attorneys experience and feel what is going on with the characters involved in the story you are telling to the jurors. Indeed, it creates a deeper emotional connection between the attorneys and jurors.

Psychodrama also includes theater, creating a space that serves as a stage, and the use of props. This method allows witnesses and plaintiffs to reenact real life experiences of past situations (or inner mental processes), by acting them out in present time. Participants then have the opportunity to evaluate their behavior, reflect on how the past incident is getting played out in the present and deeply understand particular situations in their lives.

For example, in the civil rights case of *Aguilar v. County of Los Angeles*, Mr. Aguilar was killed in a struggle with two deputies, which was videotaped. I went to the scene of the struggle and reviewed the videotapes. Before taking the deputy depositions, I re-created the stage in my office and used characters (staff members) to reenact the struggle. The reenactments revealed the deputies' stories of how the event occurred and their reasons for killing Mr. Aguilar were simply false.

Set up expert cross-examination with depositions

Once I understand defendants' arguments, the verdict form, applicable laws, and opening statement, I take depositions of experts, witnesses and defendants.

Before taking expert depositions and setting up the cross-examination for trial, review prior depositions of the same expert. However, you should always take the expert deposition so you can learn who they are as a human being. This helps set up the story you want to tell about the expert during cross examination.

For example, when I took the deposition of Dr. Robert C. Klapper, I learned he is a "runaway witness." That is, he responds to a "yes" or "no" answer with a narrative that evades the questions being asked. I filed a motion in limine to limit his testimony to the questions asked, warned the judge about him being a runaway witness, and only asked leading questions during cross-examination.

During Dr. Klapper's deposition, I set up the following cross-examination for trial:

• Plaintiff is not your patient nor has she ever been under your care, right?
• You do not have any obligation as to your opinions regarding her, true?
• You get paid for your opinions by lawyers, correct?
• The opinions you provide are not for your patients, true?
• 25 percent of your income comes from these type of written opinions paid by lawyers, right?
• You have been an expert for more than 20 years, yes?
• You consider yourself a professional testifier, correct?
• You make about $600,000 per year giving med-legal opinions, right?
• This means you have made about $12,000,000 in your career for giving med-legal opinions, correct?
• Usually your opinion is that patient has soft-tissue injuries, when you testify in trial, right?
• In fact, 99.9 percent of the times you testify in trial, it is considered soft-tissue or pre-existing, yes?"

Delivering the cross-examination at trial

There are many rules to cross-examination; an entire book can be written on the rules. The rules I consider most important are: (1) leading questions only; (2) never ask questions you do not know answers to; (3) one new fact per question; and (4) break cross-examination from general to specific goal questions.

A leading question states the desired answer to solicit a "yes" or "no" response. With leading questions, cross-examiners can control all questions and the duration of the witnesses on the stand. Leading questions should be short and end with "right," "yes," "true," or "correct." Use leading questions to tell your theme and story to the jurors.

Never ask a question on cross-examination you do not know the answer to! That is what depositions and discovery are for. Always avoid words that give control to the witness such as who, what, where, when, how, why, and explain.

Each question should have one fact per question. This forces the cross-examiner to

integrate facts into questions, rather than conclusions or vague words that are not facts.

It is always easier to cross-examine a witness in a chronological progression from general to specific. That is, start with the general questions and progress to specific questions. This structure makes it easier for the jurors to understand the theme and story of your case.

Prepare a witness binder for cross-examination

Each witness you intend to cross-examine should have a binder. Organize each binder in the following order: (1) leading questions with line and page numbers; (2) summary of deposition; (3) deposition transcript; (4) exhibits; and (5) impeachment materials for cross-examintion.

Start preparing your cross-examination when you receive the deposition transcript. First, review the expert opinions and, if possible, create hypotheticals that show the testimony is out of context, exaggerated or simply false. For a lay witness, review the deposition transcript to learn whether other testimony contradicts the testimony from this witness. Most of the time, witnesses who see the same incident experience it differently. Because of the different experience, the incident will be described differently.

Next, start preparing the story you want to tell with each witness. Note each page and line number from the deposition transcript you intend to use to tell your story – you will need it for impeachment or to control the witness. If the witness starts telling a different story than the one in his deposition, you can refer to the page and line number of the deposition transcript for purposes of impeachment or to establish control of the witness's testimony.

I set up the cross-examination for trial with page and line number from a deposition transcript as follows:

• You do not have any obligations as to your opinions regarding plaintiffs, right? 21, 7-9

• You do have an ethical obligation to do no harm, yes? 22, 1-2

• You agree Plaintiff was asymptomatic prior to this accident, correct? 31, 4-9

Organizing your cross-examination in this format makes the page/line citations you need to impeach the witness clear and easy to find. Cross-examination has a rhythm and flow. You don't want to lose your momentum by fumbling around, looking for the impeachment testimony in the transcript. Not only will you be wasting time, but you also lose the opportunity to show the witness, judge, and jury that you are prepared and in control of the story.

How do you use non-verbal communication for cross-examination?

William Shakespeare wrote, "all the world's a stage and all the men and women merely players." The courtroom is not a stage, but it has similarities in terms of positioning of counsel and witnesses.

I am a true believer that communication is 20 percent words and 80 percent non-verbal communication. Lawyers should always control their emotions, gestures, movements, and timing because jurors are always watching. Physical cues such as tone of voice, movement within the courtroom, body language, and timing are techniques you can use during cross-examination to assist jurors in understanding the important facts.

Since 80 percent of communication is non-verbal, it is crucial that you control your position and the position of the witness you are cross-examining. Social science has shown that people generally do not trust a person who will not look them in the eye, or who avoids eye contact when answering a question. Many people think, either consciously or subconsciously, that a person who is not looking at them while saying something important is lying. Social science has also shown that people regard a person who stands when speaking as authoritative and truthful; for example, a professor in front of the class or a coach in front of his or her team. This is "non-verbal" communication.

Because so much communication is non-verbal, lawyers prepare their own witnesses to look at the jury on direct examination. Lawyers direct their own experts to get on their feet to demonstrate or re-enact concepts or ideas to look authoritative. As lawyers, we stand near the end of the jury box on direct examination so our witness will look at the jury in a natural way when answering questions.

All of that staging is flipped on cross-examination. Position yourself behind defense counsel's table when you are making a key point on cross-examination, or maybe even for the whole cross-examination. You are now on the far-side of the courtroom. The witness you are cross-examining will tend to look at you to get the question from you, and to answer it. When the witness is looking at you, the jury will be see the back of his head. If he answers the question to you, the jury will see him turned away as he answers. Non-verbal "avoidance" can be powerful when combined with damaging testimony or impeachment from the witness's deposition.

Additionally, when you are standing behind the seated defense counsel examining the seated witness, you are powerful and authoritative. An added benefit of this positioning is that if the witness is forced to make a key admission on cross-examination, the jury will see you standing and the seated defense counsel's face while hearing the turned-away witness making a damaging admission. This trifecta can be a powerful tool on cross-examination, especially when defense counsel is unable to control the expression of disappointment on their face (which happens pretty frequently), or furiously scribbling a note for re-direct.

How do you control a "runaway witness?"

A "runaway witness" is a witness who is unresponsive to questions asked on cross-examination. For example, witnesses who give an unintelligible answer, refuse to answer, or answer with their own narrative that tells opposing counsel's theme and story to the jurors.

You must learn who your witness is as a person during the discovery period so you can prepare your cross-examination at trial. This means learning in depositions how witnesses communicate (verbally and non-verbally), react to questions, and their role in your case.

Expert and professional witnesses, such as police officers, usually know how to artfully dodge questions on cross-examination. Specifically, in civil rights cases involving police shootings, officers have their own narrative and when you ask closed-end questions in depositions that solicit a yes or no response, the police officers commonly repeat the following narrative: "I feared for my life"; "I was protecting the community"; and "I wanted to go home to my family."

There are many types of "runaway witnesses" and techniques to control them during cross-examination, but all of these techniques are grounded in the four rules discussed above. In applying the appropriate control technique, know your witness, don't be offensive, and always be professional.

Controlling the witness does not have to be negative. Behavior can be molded by consequences. Good behavior is rewarded, and bad behavior is punished. Reward your witness for good behavior by using a positive nod of the head, pleasant teaching voice, and efficient body movements for the next questions or subjects.

Other trial techniques to consider for "runaway witnesses" are: (1) maintain eye contact; (2) control every body movement; (3) listen (to both verbal and non-verbal communication); (4) keep asking to repeat, repeat (this signals to the judge and jurors the witness is being unresponsive); (5) ask short questions; (6) have the court reporter read back the question; (7) interrupt the witness (be professional and polite); (8) use a blackboard and write every question you intend to ask; (9) use a poster; (10) hold your hand up like a traffic control officer to stop the witness; (11) shake your head from side to side; (12) walk to the table and sit down; (13) combine techniques; and (14) if none of the techniques are working, use "objection, non-responsive answer." This will invite the judge to assist in controlling the witness.

How do you use silence for cross-examination?

We are all familiar with the phrase, "Less is more," originated by the architect Ludwig Mies Van Der Rohe (1886-1969). But have you heard, "silence speaks louder than words"? Most attorneys are uncomfortable with silence during cross-examination. We think silence must be filled in with words or actions to keep the judge and jurors engaged. However, you can use silence to control the witnesses and courtrooms.

Silence disturbs the witness and creates witness anxiety. Silence refocuses the judge and jurors on the attorney asking the questions and the facts about to be disclosed. Silence is a powerful technique attorneys often ignore.

How do you master these techniques without trial experience?

To master these techniques, you need to prepare, practice and practice some more. Start working on closing argument when you get the case, and cross-examining inanimate objects to master the four rules of cross-examination: (1) leading questions only; (2) never ask questions you do not know answers to; (3) one new fact per question; and (4) break cross-examination from general to specific goals questions.

Next, work with office staff on cross-examination. Have some of the staff members play the parts of experts, witnesses and defendants. Set the stage and start role-playing with experts, witnesses and defendants. Also, try videotaping your cross-examinations. Ask others to review the video and provide constructive criticism.

Finally, start cross-examining experts and professional witnesses because they will make you a better cross-examiner.


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