

AN INTRODUCTION TO CROSS-EXAMINATION

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Cross-examination. It has been called the greatest legal engine ever invented for the discovery of the truth.¹ This article discusses the purposes of, and provides guidelines to be used on, cross-examination. It also reviews the scope of cross-examination and several common areas of impeachment.

Purposes of Cross-Examination

The first decision to make is whether you should even cross-examine a witness. In order to make that decision, you must know what you want to accomplish by cross-examining a witness. Authorities on trial practice² suggest that the following factors should be considered in making that decision:

1. Did the witness hurt your case by the testimony given on direct examination? If so, can you minimize or repair the damage on cross-examination?
2. Can you obtain testimony on cross-examination to help your case?
3. Can you obtain testimony on cross-examination that will hurt your adversary's case?
4. Do you need the witness to establish an evidentiary foundation to admit a document or other exhibit in evidence?
5. Can you discredit the testimony given on direct examination? In other words, can you demonstrate inconsistencies in the testimony given on direct examination? Can you demonstrate that the testimony given on direct examination conflicts with the testimony of other witnesses?

6. Can you discredit the witness? For example, can you show that the witness is biased? Prejudiced in favor of your adversary and/or against your client? Has a motive to lie? Is personally, financially, or otherwise interested in the outcome of the litigation? Was not in a position to see or hear the event that he/she testified about on direct examination?
7. Can the cross-examination be used to enhance or destroy the credibility of other witnesses?
8. Is the witness so important that you should undertake some sort of cross-examination to fulfill the expectations of the jury?

Unless the answer to one or more of these questions is “yes,” you would be well-advised not to cross-examine the witness. Indeed, the jury may well be impressed when you state “No questions.” The jury may even understand that you have no questions for the witness because the testimony given on direct examination was not important.

Guidelines for the Cross-Examination

Cross-examination almost always ventures into dangerous territory. The reason for this is that the witness is usually adverse or hostile to your client’s position. Therefore, you must control the witness and, more particularly, the witness’ testimony. This can be accomplished by following certain guidelines during the cross-examination.³

1. Do not ask a question unless you are reasonably certain that you already know the answer. (Some would say do not ask the question unless you are certain you know the answer). Cross-examination is not the time to discover new facts. It is not the time to be curious. Remember, curiosity killed the cat. It may likewise kill your case.

2. Treat the witness fairly. You should not be hostile, especially if you want to gain concessions from the witness, including that he/she may have been mistaken in his/her testimony on direct examination.
3. Use leading questions. A leading question suggests the answer, which is usually “yes” or “no.”⁴
4. Never ask open-ended questions—questions that ask “how” or “why” or that require the witness to explain. These types of questions can lead to disaster. Never allow a witness to explain anything on cross-examination.
5. Listen to the answers. Do not mechanically ask one question after another without listening to the witness’ answers. The answers may contain the favorable testimony that you are seeking to obtain in the cross-examination. When this happens, you have accomplished your task and you should consider ending your cross-examination. On the other hand, if you do not listen to the answers you may not hear damaging testimony that should be addressed.
6. Do not allow the witness to repeat (and therefore reinforce in the minds of the jury) the testimony given on direct examination. There is no reason to ask a question that allows the witness to repeat his testimony. The odds are very small that the witness will testify differently on cross-examination. You know the testimony given on direct examination, the witness knows the testimony, the jury knows the testimony. So just dive into your cross-examination.

7. Keep your questions “short and sweet” and in plain English. Your goal is to obtain one fact with each question. Ideally, each question should be posed as a declaratory statement of a single fact calling for affirmation by the witness. This will make the cross-examination much more manageable for you, prevent objections from your adversary (for example, that you are asking compound questions), and allow the jury to more easily follow and understand your cross-examination.
8. Ask the important questions at the beginning and end of your cross-examination. People, including jurors, remember best what they hear first and last. Conclude your cross-examination on a high note—your strongest point.
9. Your cross-examination should be brief. Remember, you are trying to “score points” to be used in your closing argument. In a lengthy cross-examination, your strongest points will be lost and the less significant points will be forgotten by the jury.
10. Control the witness’ answers. The best way to control the witness’ answers is to ask simple and clear questions. By doing so, you will not give the witness an opportunity to provide harmful testimony. If your question calls for a “yes” or “no” answer and the witness provides additional testimony that is harmful to your case, you should ask the court to strike the testimony as being nonresponsive to your question. Although you cannot “unring a bell,” the jury eventually will understand that the

witness' conduct is improper. If the witness answers a question other than the one you asked, ask it again, and yet again if necessary.

11. Do not ask one question too many. Remember the purpose of cross-examination—you are trying to obtain favorable testimony so it can be used in your closing argument. You need not ask the ultimate question that will drive your point home to the jury. Instead, your cross-examination should only suggest the point to the jury. Your closing argument will drive the point home. Remember Irving Younger's line from his famous lecture on cross-examinations: "Sit down!"

The use of these guidelines will allow you to be in control of the cross-examination. By being in control, you will be in a better position to obtain the testimony to fulfill the purposes of your cross-examination.

Scope of Cross-Examination

The evidence rules provide that "[c]ross-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."⁵ Thus, "[c]ross-examination on a witness' credibility need not be based on evidence adduced at trial."⁶ As a result, you will always be entitled to establish, for example, that the witness is biased or prejudiced, has a motive to lie, is interested in the outcome of the case or has made a prior inconsistent statement.⁷ These areas of impeachment will be briefly examined shortly.

In addition to the subject matter of the direct examination and matters affecting the credibility of the witness, the cross-examination may also delve into "additional

matters”, subject to the court’s discretion. This means that a witness who “opens the door” to additional matters during the cross-examination may be questioned on the matters as if they were discussed during the direct examination.⁸ Moreover, as a practical matter, at the “end” of your cross-examination, you may ask the court for permission to examine the witness on matters not covered on direct examination rather than later calling the person back to the stand as your witness.⁹

Challenging the Reliability of the Testimony

At this point, you should have an understanding, or at least an appreciation, of the purposes, guidelines and scope of cross-examination. Now we will examine several specific areas of cross-examination, including challenging the reliability of the witness’ testimony and impeaching the credibility of the witness by demonstrating bias, interest, prejudice, motive, and prior inconsistent statements.

Assuming that you proceed with cross-examination, you must, if at all possible, challenge the reliability of the witness’ testimony.¹⁰ This area of cross-examination involves examining the witness on what he/she saw, heard, remembers and is able to describe about an event. It seeks to discredit the witness’ testimony. For example, on direct examination a witness may testify about the cause of an accident (what he/she saw or heard). On cross-examination, you should seek to obtain testimony that the accident occurred quickly and unexpectedly, that the witness was not in a good position to see the accident, etc. The cross-examination should plant a seed in the minds of the jury that the accident may not have happened as described by the witness on direct examination.

You should also establish that the witness has forgotten details of the event and/or is unable to accurately testify about an event. This will cause the jury to question the

accuracy or reliability of the witness' testimony on direct examination. For example, on direct examination the witness may have testified about the distances between vehicles before an accident. On cross-examination, you should seek to establish that the witness' testimony about the distances is not accurate or reliable.

Impeachment

Impeachment means discrediting the witness. In other words, attacking the credibility of a witness. The goal is to demonstrate to the jury that the witness and/or the witness' testimony on direct examination should not be believed. There are various methods of impeachment, including bias, interest, motive, prejudice and prior inconsistent statements.¹¹

N.J.S.A. 2A:81-12 provides that “[f]or the purpose of affecting the credibility of any witness, his interest in the result of the action, proceeding or matter ... may be shown by examination or otherwise” One authority suggests that the statute therefore specifically authorizes impeaching the credibility of a witness by showing bias, motive, prejudice as well as interest.¹² In any event, New Jersey Rule of Evidence 607 allows you to examine a witness for the purpose of impairing the credibility of a witness. The case law provides that the interest, motive, bias and prejudice of a witness may affect his/her credibility.¹³ If the witness denies the matter (or equivocates about the matter, such as not being sure or not remembering), New Jersey Rule of Evidence 607 allows you to prove the impeaching fact with extrinsic evidence, subject to the court's discretion.¹⁴ Extrinsic evidence is any other evidence that proves the matter is other than as testified to by the witness.¹⁵

Bias and prejudice are a tendency or inclination preventing a witness from being impartial. A person may be biased or prejudiced in favor of or against a party or a position.¹⁶

A witness' interest (personal, financial or otherwise) in the outcome of a case means that the witness may possibly benefit from the outcome, which may affect the witness' testimony. On cross-examination, you should establish interest by pointing out how the witness will gain or lose as a result of the outcome of the case. For example, the mother of a personal injury plaintiff obviously has a personal interest in the outcome of the case and therefore, may have a tendency to testify in a certain way. A witness may also have the motive to testify in a certain way. For example, a witness' motive may include "emotional attachments, revenge, chauvinism, preexisting belief or adherence to a school of thought."¹⁷

If the opportunity presents itself, you must demonstrate to the jury that the witness or his/her testimony should not be believed because the witness is biased, interested in the outcome of the case, has a motive to lie, or is prejudiced in favor of or against a party or position.

Prior Inconsistent Statements

Another method of impeachment is to show that the witness has made a prior statement inconsistent with his/her testimony at trial. One type of prior inconsistent statement (perhaps the most common) is deposition testimony. Inconsistent statements may also be found in documents, pleadings, answers to interrogatories, testimony in other matters, and other oral statements.¹⁸

Two authorities on trial practice suggest that three steps must be taken to impeach a witness with a prior inconsistent statement.¹⁹ First, you must recommit the witness to his/her testimony. This is done to establish the difference between the testimony at trial and the prior inconsistent statement. The simplest way to do this is to summarize the prior testimony of the witness at trial that conflicts with the prior statement. Of course, you should only go through this exercise if the inconsistency is important enough to warrant it.

Next, you must establish that the witness made the prior statement. In other words, the witness must testify regarding when and how the earlier statement was made; for example, at a deposition. In doing so, you should build up the importance of the prior statement, including that it was made when the witness' memory was fresher and, in the case of a deposition, was made under oath.

Finally, you must confront the witness with the prior inconsistent statement and get the witness to admit that he/she made the statement. You have then completed impeaching the credibility of the witness by demonstrating that he/she made a prior statement inconsistent with his/her testimony at trial.

Conclusion

This article is merely an introduction to the area of cross-examination. You should strengthen your knowledge and understanding of the subject by reviewing the sample cross-examinations contained in the authoritative texts set forth in the endnotes of this article. Only then will you be in a position to conduct an effective cross-examination.

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¹ 5 Wigmore, Evidence (Chadborn Rev. 1794) §1367. See also Francis L. Wellman, the Art of Cross-Examination; Larry S. Pozner and Roger J. Dodd, Cross-Examination: Science and Techniques (Michie 1993). As their titles suggest, Wellman viewed cross-examination as an art, while Pozner and Dodd view it as a science.

² See Steven Lubet, Modern Trial Advocacy: Analysis and Practice (NITA 1993) at 55 [hereinafter "Lubet"]; Thomas A. Mauet, Fundamentals of Trial Techniques (2d. ed. 1988) §6.2 at 211-213 [hereinafter "Mauet"].

³ The guidelines are derived from texts by Professor Mauet and Judge Arnold. See Mauet, §6.4 at 214-222; Leonard N. Arnold, 32 New Jersey Practice: Criminal Practice and Procedure §1081 at 515 (West Supp. 1997) [hereinafter "Arnold"].

⁴ N.J.R.E. 611(c) provides that "[o]rordinarily leading questions should be permitted on cross-examination."

⁵ N.J.R.E. 611(b). Indeed, the entire scope of cross-examination rests in the court's discretion. See, e.g., State v. Martini, 131 N.J. 176, 255 (1993).

⁶ Martini, 131 N.J. at 255 (citation omitted).

⁷ See State v. Silva, 131 N.J. 438, 444 (1993) (enumerating five areas of attacking the credibility of a witness).

⁸ See Lubet at 53 (discussing the scope of cross-examination).

⁹ See Arnold, §1097 at 543-544.

¹⁰ This section of the article is derived from Professor Mauet's text. See Mauet, §6.6 at 226-232 (the text sets forth several sample cross-examinations relating to a witness' perception, memory, and ability to communicate).

¹¹ There are other methods of impeachment that, due to space limitations, cannot be addressed in this article, including, for example, a witness' prior convictions or bad acts and the witness' reputation for truthfulness.

¹² See Arnold, §1083 at 516.

¹³ See State v. Bicancih, 132 N.J. Super. 393, 395-96 (App. Div. 1973) (the interest, motive, bias or prejudice of a witness may affect his credibility); State v. Taylor, 38 N.J. Super. 6, 25 (App. Div. 1955) (same).

¹⁴ See also State v. Gorrell, 297 N.J. Super. 142, 149 (App. Div. 1996) (extrinsic evidence may be used to prove bias of witness); State v. Johnson, 216 N.J. Super. 588, 603 (App. Div. 1987) (“A party may introduce extrinsic evidence relevant to credibility, whether or not that extrinsic evidence bears upon the subject matter of the action”).

¹⁵ See Silva, 131 N.J. at 444 (citation omitted). See also Mark P. Denbeaux, Jack Arseneault and Edward J. Imwinkelried, New Jersey Evidentiary Foundations (Michie 1995) at 110 [hereinafter “Denbeaux, Arseneault & Imwinkelreid”].

¹⁶ See State v. Holmes, 290 N.J. Super. 302, 313 (App. Div. 1996) (bias “describe[s] the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party.”) (citation and internal quotations omitted).

¹⁷ See Lubet at 161-62; Mauet, §6.7 at 236-240 (both texts include sample cross-examinations on how to prove interest, motive, bias and prejudice).

¹⁸ See Mauet, §6.7 at 242-253 (the text contains cross-examinations on various types of prior inconsistent statements). See also Denbeaux, Arseneault & Imwinkelried at 101-112. (discussing and providing examples of the evidentiary foundation for prior inconsistent statements).

¹⁹ See Lubet at 119-136; Mauet, §6.7 at 242-455 & 256-60 (both texts discuss prior inconsistent statements and set forth examples of cross-examination).