

The Nitty Gritty of Cross Examination

By Cris Lamb

Many of us became trial lawyers because we had seen too many sexy scenes on T.V. of the underdog defense lawyer taking down and exposing a low-down testi-Liar, resulting in the truth being revealed against enormous odds. Or we watched the quiet dignity of Atticus Finch cross-examining the trashy, sad, Mayella Ewell in *To Kill a Mockingbird*, and thought, "I wanna be on Atticus' team." And then we became trial lawyers, and quickly found out that asking effective questions on cross-examination was a whole lot harder than it looks on film. And it was too late to get back our tuition fees. So, here you are. Let's go through the basics, and discuss what it takes to become competent on cross-examination.

I. What it takes to be competent, in order of importance:

- a. time/practice
 - b. preparation
 - c. good listening skills
 - d. clear, concise questions
 - e. leading questions
 - f. one fact per question
 - g. no questions you don't know the answer to before you ask
 - h. only asking questions that promote, support, or further your theory of the case
- If you follow these rules, you will be competent.

II. Where to Begin.

The biggest mistake that lawyers make in cross examination, is repeating information brought out on direct. If you do that, you are merely highlighting your opponent's case.

The point of cross-examination is to highlight your theory of the case, bringing out facts that are helpful to your theory of innocence. Think of it this way, on direct examination, it should be the witness testifying. On cross-examination, it should be the lawyer testifying.

In order to be effective at cross, you must first decide what your theory of the case is.

Below are the broad categories of defense theories, in order of difficulty to win at trial:

1. It never happened. (Lying complaining witness)
2. It happened, but my client is innocent - Some Other Dude Did It (i.e., the "SODDI" defense)
3. It happened, my client did "it," but "it" ain't a crime (prosecutorial ignorance defense)
4. It happened, my client did it, "it" is a crime, but he has a bona fide defense:
 - a. self-defense
 - b. mistake of fact
 - c. duress
 - d. other defense, as defined in the statute
5. It happened, my client did it, "it" is a crime, but not the crime charged. (The prosecutor mis- or over-charged the case).
6. It happened, my client did it, "it" was a crime, and he had no legal defense, but you should never the less find him "not guilty." Examples:
 - a. trashy victim; the "he needed killin'" defense
 - b. reprehensible governmental conduct in procuring evidence, or charging and prosecuting the crime.
 - c. jury nullification, which is a jury power, but not recognized in our law as being a jury "right."

NOTE: It is illegal in CA to argue nullification outright, but very talented lawyers have figured out how to argue it clandestinely.

Figure out which one of these theories fit your case, and start marshalling the “facts beyond change,” which is Larry Pozner’s way of saying the facts that cannot be disputed. Figure out which ones help your theory of the case. Your cross should highlight both your theory of the case, and your opponent’s weaknesses.

III. The formula for attacking credibility by prior inconsistent statement or omission

Remember IRAC from law school? Well, RAC is the formula for attacking credibility either from an inconsistent statement, or omission:

R = Recommit

A = Accredit

C = Confront

Here’s how it works:

Let’s say that a witness has just stated something different on the witness stand than she had previously stated to the police. Let’s say she told the police that she saw a black poodle crossing the road. On the stand the witness testifies that she saw a large Persian cat, not a poodle, crossing the road.

Recommit: Ms. Doe, you stated on direct that you saw a Persian cat crossing the road?

Accredit: Before coming to court today, you had given a statement to the police?

And when you spoke to the police, it was right after you saw an animal cross the road?

When you spoke to the police, things were fresh in your mind?

You spoke to the police for over an hour?

And when you spoke to the police right after you saw an animal cross the road, you told them everything?

And when you gave the police a statement right after the incident occurred, you told them the truth?

You had no reason to lie about what you saw, did you?

Confront: Ms. Doe, do you remember telling Officer Davis that you saw a poodle cross the road?

You never mentioned a Persian cat to Officer Davis, did you?

NOTE: Depending on the witness, you may want to change the order from RAC to ARC. This is particularly the case when you are dealing with people, like police, who testify often and are familiar with the drill.

IV. Attacking credibility – other areas:

Figure out which of the opponent’s crucial witnesses have credibility issues that you can attack.

The general ways of attacking the credibility of a witness are:

1. Misperception (the witness isn’t lying, he or she is just mistaken – ask yourself if there are areas which you can attack the witnesses ability to know or perceive the things he or she testifies to)
2. Prior convictions for moral turpitude.
3. Prior inconsistent statements
4. Bias or motive to lie

V. Control the witness

Remember, cross-examination is supposed to tell your theory of the case, not to allow the opponent's witnesses to retell their damaging direct testimony. So, control is crucial.

You will get witnesses who have an agenda, who will fight you, and offer unsolicited testimony, and try to take control.

Do not let that puppy piddle on your leg! Teach him early and often who is in control.

You do not do this through snarling or by using an offensive tone. You do this by teaching him or her that you will not be thrown off your mission. Here are some techniques to help you get and maintain control:

1. The most important method of control is to repeat your question when you get a non-answer, or a non-responsive answer. If you do this consistently throughout your cross, all but the most combative witnesses will usually learn that they should just answer because you are not going to be thrown off your mission.

So, if you just asked the witness, "you saw the poodle cross the road?", and the witness starts telling you what she had for dinner instead of answering with a simple "yes" or "no," then repeat your question verbatim, "you saw the poodle cross the road?"

If the witness persists in answering with a non-answer, repeat the question verbatim preceded by a "my question was." So you would ask, "My question was, 'You saw the poodle cross the road?'"

If the witness still will not answer, then you can ask the opposite question, "So, your testimony is you DID NOT see the poodle cross the road?"

Occasionally you will get a witness who has an agenda and is not going to answer your "yes" or "no" questions without a real fight.

I am personally in the category of folks who does not believe that you should ever ask the judge for help in front of a jury; it telegraphs to the jury that you are not in control. Reasonable minds differ on this, however.

If you have a particularly recalcitrant witness who wants to answer everything but what you are asking, and you have repeated your question verbatim several times, and have asked the question from the opposite perspective attempting to get an answer to your question, but still the witness will not answer directly, then you can go to DEFCON 4 – do not use this method unless you have tried everything else first.

Go to the blackboard or to a white piece of paper. Turn your back on the witness, and write your question in large red letters – make sure you write the question you have been asking verbatim.

Turn to the witness, and read your question while pointing to each individual word as you ask it. Then ask the witness, "Ms. Doe, is there any word in this question that you do not understand?"

The key to getting and keeping control on cross is to NEVER ALLOW A WITNESS TO GET AWAY WITH NOT ANSWERING YOUR QUESTION! And make sure that the witness HAS actually answered your question – police are great at appearing to answer, but not *really* answering the question you asked.

Once the witness understands that you are not going to let them get away with not answering your question, most witnesses, even the professional witness, and the witness with an agenda, will start just answering your questions.

VI. Hey Ma, Can You See Me Now? Some tips for looking good on cross

1. Use transition phrases to let the witness and the jury know that you are changing topics. “Now, let’s go back to December 27th . . .” or “Now I want to talk about . . .”
2. Use phrases like, “We can agree that . . .?”
3. Loop the words that the witness uses if they help you. Let’s say that you finally got Ms. Doe to say that she saw the poodle crossing the road, and boy, ol’ boy, was he slow. This fact and description just happens to help your case – loop the helpful phrase, adopting the language of the witness: “You remember the poodle crossing the road, because boy, ol’ boy, he took a long time to cross that road, right?”
4. Tell a story on cross. Your cross questions should be sequenced in such a way as to reveal and tell your story of the case. Put your questions in an order that the jury will understand what that story is.
5. Use precise language. Qualitative language will get you in trouble, because it is subjective, and you have no way to know if your definition of a qualitative word is the same as the witness’. For example, if you ask a witness, “She was ugly, wasn’t she?” And the witness says no, you have no way of knowing if the witness is lying or just has a different definition of ugly than you do. But if you ask:
 - “Would you agree, she has a prominent nose?”
 - “Her prominent nose ends in a point?”
 - “And on the very end of her prominent, pointy nose is a mole?”
 - “And the mole on her nose has hairs growing out of it?”
 - “In addition to the hairy mole on the end of her prominent nose, she is missing an eye?”

Even if your witness agrees with all of the factual statements above, you would NEVER, EVER ask that one qualitative question: “So, she is ugly, you’d agree?” Because after all of your hard work, the witness could answer, “no, I think she is lovely.” Subjective or conclusory questions must be abandoned totally. Paint your picture with factual questions. If you do this, the jury will arrive at the conclusion that you want.

VII. Conclusion

The moral of the story is you, too, can look good on cross. Remember, always have a point – don’t just ask a question because you *can*. Know where you are going and what your point is before asking a question on cross. Some witnesses you need not ask any questions of – if there is nothing to be gained by it, don’t do it.

Good luck out there! And remember, as a CACJ member, you never have to try a case alone.