

A Discussion of the objectives of Cross Examination of the Defense Toxicologist

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1. Destructive Cross

- *Discredit the testifying witness or another witness*
- *Reduce the credibility of the witness or the persuasive value of evidence*

Goal: Establish control of the witness in your mind and in the mind of the jury

2. Supportive Cross

- *Bolster your theory of the case and tell the defense story*
- *Develop favorable aspects of your case*
- *Support your witness or impeach other witnesses*

Practice Note: Not every witness requires cross examination. Ask yourself:

- Did the witness' testimony hurt my case?
- Would asking questions improve or reinforce my case?

- *How important is the witness to your case?*
- *Will the jury think you are conceding everything the witness said if you do not cross?*
- *Did plaintiff leave out an area on direct that may be a trap if you ask about it?*
- *Do you want to give the witness a chance to repeat his or her testimony?*
- *Can the witness be impeached?*

Practice Note: A harsh cross exam of a non-party fact witness is generally not well received by the jury

Develop a Plan

- Cross examination must be carefully planned
- Evaluate and establish a goal for each witness
- Decide the facts you must prove with each witness
- Each cross needs to have a purpose – to advance the case objectives

Practice Notes:

- Ask leading questions to enable you to “testify”
- Each question needs to fit within the planned scope of examination
- If the question does not fit the plan or further the goals, do not ask the question

The Ten (Original) Commandments of Cross Examination

- Irving Younger, 1975

- Be brief
- Use plain words
- Use only leading questions
- Prepare
- Listen

- Do not quarrel
- Avoid repetition
- Disallow witness explanation
- Limit questioning
- Save for summation

The Modern Ten Commandments of Cross Examination

- Timothy Pratt, 2003

1. Prepare

- Know the topics to cover and the details to emphasize for the jury
- The jury will assess your depth of knowledge and commitment to the case by your ability to handle the details of cross

2. Know your objective

- Understand which points are critical for your case, and which can be extracted most appropriately from each witness
- Know where the cross is going; if you do not know where the cross is headed, neither will the jury

3. Take baby steps

- Patience and pacing: take the jurors on a step-by-step journey where the cross is headed
- Gauge the importance of each point and determine what it will take to deliver each point effectively to the jury

4. Lead the witness (usually)

- Control: Use the witness to testify for you and ratify your ideas
- Vary your questions: don't repeat "isn't that correct?" after each question
- Leading questions are not always needed; instead, ask an expert, for example, "How much money did you make last year testifying for plaintiffs around the country?"

5. Adapt your style to the occasion

- Do what is comfortable for you; don't mimic other trial lawyers
- Be aggressive, not a jerk; tough, not mean; confident, not arrogant; control, do not dominate; the jury knows the difference

6. Know when to quit

- Stay attuned to how the cross is progressing and to the courtroom atmosphere; adapt based on the jury and judge's response
- Two times to quit:
 - When the witness is discredited or makes a monumental concession
 - When the witness is killing your case ;
- Appear confident and conclude the cross with a question that the witness will agree with counsel

7. Know what to take to the podium

- Streamline your cross outline to adapt during questioning and make the points that are most effective at the moment
- Impeachment:
 - Know that the opportunity exists
 - Know the materials and have them readily available
 - Use sparingly and only for critical points

8. Know your audience

- Reduce the technical to the simple, but do not patronize the jury; if the jury does not understand that you bested plaintiff's witness, time has been wasted
- Decide what points are important for the jury to understand and whether they can be made effectively on cross
- When a witness concedes a point, make sure the jury understands the advantage

9. Know the Rules of Evidence

- Anticipate evidentiary issues such as authenticity and admissibility of documents needed for cross
- Motions in limine addressing problem areas in advance

10. Know your Judge

- Investigate and observe
- Ask other attorneys how the judge allows documents to be used on cross

- This can be the most crucial component of a trial
- Expert testimony can provide powerful, convincing evidence, however, plaintiff's attorney will be able to cross examine your expert too
- It is imperative that you prepare your own witness as well

Attacking the Credibility of Opposing Witnesses

- Recognizing that “professional witnesses are available to render an opinion on almost any theory, regardless of merit,” judges are directed to be “gatekeepers for all expert testimony.” *Daubert v. Merrell Dow Pharms., Inc.*, 509 US 579 (1993)
- To determine whether expert testimony is admissible:
 1. the expert must be qualified; and
 2. the testimony must be relevant and reliable. The courts applying *Daubert* have broad discretion to consider a variety of factors.

DEPOSITION IF PERMITTED

- lock plaintiff's experts into their exact opinions they intend to give at trial, the basis of those opinions, and any assumptions made in reaching those opinions
- Ask open-ended questions to obtain all opinions of the expert, but also include specific leading questions to assist in proving your case
- Also include questions that may undermine the reliability of the expert's opinion for use in a potential *Daubert* hearing
- Conclude expert depositions with a catch-all question asking if they intend to give any other opinions at the time of trial

Investigation

- Carefully research the expert's qualifications, standing in his own field, and prior experience testifying
- Prior cases involving the same expert can provide a wealth of information, including if he has been precluded from testifying following a *Daubert* challenge

Investigation – con'd

- Carefully research the expert's qualifications, standing in his own field, and prior experience testifying
- Prior case testimony and if precluded from testifying following a *Daubert* challenge
- Know the expert's report inside and out, including every error
- Do not challenge the expert; he likely knows more about the field than you do, and the fight will soon lose its intrigue for the jury if it become bogged down in hypertechnical details

Trial Tips for Cross Examination

- Prepare
- Outline your attack, including references to the expert's deposition testimony and report
- Focus on a few key points of attack to avoid confusing or boring the judge and/or jury; consider the following:
 - Poor qualifications and/or lack of expertise
 - Rushed or incomplete analysis
 - Insufficient data or information to perform analysis
 - Wrong assumptions
 - Bias
 - Incorrect methodology
 - Inaccurate work

Trial Tips for Cross Examination

- Questions should be direct and not leave the expert any “outs”, but do not underestimate the ability of a seasoned expert to deflect your attacks
- Keep questions short
- Keep the cross moving
- If you want to set a trap, think through all of the possible responses and explanations, and have follow up questions for each possibility

Impeachment can be accomplished by demonstrating:

- Bias, prejudice or clear partisanship;
- Prior inconsistent statements contained in reports, letters, prior deposition or trial testimony, articles, writings, etc;
- Testimony of the expert is contrary to recognized authorities;
- Testimony is unreasonable or improper; and/or
- Credentials or qualifications of the expert do not entitle his opinions to consideration.

- Be flexible as cross evolves and be prepared to abandon lines of questioning if the expert appears too knowledgeable and it does not serve your goal
- Be in control by asking leading questions
- Know the facts of the case; the expert may know his area of expertise intimately, but you should be able to catch an expert's factual mistake and cast doubt on all of his opinions

- Financial bias questions can be used effectively, but may also backfire if the expert is eminently qualified and in high demand to receive his high hourly rate; regardless, this may be minor compares to the rest of your cross

- Plan to attack but remain respectful of the judge and jury, but you are not expected to back down from plaintiff's theory of the case
- Use language that the jury will understand, particularly when dealing with complex technical areas of expertise; plan to communicate with the least educated juror to ensure you are successful with all
- In rare circumstances, if the expert's testimony has not hurt your case, there may be no need to cross, but make sure the jury knows your reasoning at a later time

- If plaintiff was unable to prove his case with his expert, it might be accomplished through your expert, so consider not subjecting your own expert to cross examination
- Listen and be flexible so you can modify the cross to incorporate any changes to the expert's testimony that deviate from his report or prior deposition testimony
- Know when to quit when the expert has been discredited or made important concessions to end on a high note, contrarily, if the expert is doing well, know when to cut your losses