CROSS EXAMINATION - GARBAGE IN/GARBAGE OUT

PRESENTED TO THE ARKANSAS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

INTRODUCTION

The media portrays cross-examination as that part of the trial when the gifted trial attorney destroys the opponent's case by reducing a witness either into a blathering fool; having the witness confess to the crime or at a minimum admit to perjury. Many a trial attorney will regale you with war stories about the times that he or she destroyed a witness during cross-examination. The story, most often an embellishment on the truth, is easily remembered because the occasions on which something like this actually occurs is so infrequent. The reality of cross-examination, like the other components of the trial, is that you rarely destroy your opponent's case with a single line of questions. Rather than an instant annihilation, you chip away at your opponent's case eroding it little piece by little piece.

I. Pursuant to Federal Rule of Evidence 611(b) "Cross-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.

A. More appropriate definition of the scope of cross-examination set out by the Pennsylvania Supreme Court in Commonwealth v. Green, 581 A 2d 544, 558-559 (PA. 1990) as follows:

> As a general rule, it is elementary that a party is entitled on cross-examination to bring out every circumstance relating to fact which an adverse witness is called to prove. In criminal cases, the right of cross-examination extends beyond the subject testified to on direct testimony and includes the right to examine the witness on any facts tending to refute the inferences or deductions arising from matters testified to on direct-examination.

II. INVESTIGATION:

A. Before you can even think about cross-examination, it is important to have a theory of defense and investigate the case thoroughly so that you have a working understanding of the Government/State's theory of prosecution and what each of the witnesses will testify about. Thus, discovery is critical to the success of any cross-examination. Learning everything possible about the case makes your job as a cross-examiner easier. The natural tendency is to investigate the obvious and not prepare for the possibility that a prosecution witness unexpectedly testifies at trial to things which are not investigated and which could have easily been refuted had there been further investigation.

B. A consistent defense strategy must be determined prior to trial. Once the defense position is formulated, the cross-examination can be tailored in advance to this trial plan. To do this, complete working knowledge of each fact and detail including negative facts must be made by the attorney.

C. If the case involves documents, it is critical that the attorney representing the accused have a better working knowledge of the inter-relationship of these documents to the particular witness. To some extent a Government witness can be made your own if you can testify through the witness using the favorable exhibit.

D. Digest and index all discovery received from the Government.

E. Create investigative check lists, especially with regard to the discovery follow-up and scientific investigation, if relevant.

TECHNIQUES TO ASSIST EFFECTIVE CROSS-EXAMINATION
INTRODUCTION

It should go without saying that any time you appear in front of the trier of fact, be it a jury or a judge, you should be professional, courteous and appear fair. Anything less will cause the jury to either resent or distrust you. Maintaining your credibility is essential to success. Avoid offending the jurors and creating a backlash that will undermine your credibility. Remember, if the jury respects you it will find you

and your presentation more credible. A jury that believes you will find it easier to vote in your favor. This does not mean that you cannot cross-examine aggressively. Before you get too far into your cross-examination you should size up the witness and make a decision as to the style you want to use during cross-examination. Recognize that the jurors will be more sympathetic to certain types of witnesses. A confidential informant can and should be cross-examined differently than a child witness.

You should also give some thought to pacing. Do not be in such a hurry with the witness that the jury does not get the point that you are attempting to make. While you are acutely familiar with the facts of the case, the jury is not. Let your questions develop so that the answer comes in a context that makes sense to the jurors. When you know you have a witness locked into a story that will benefit your case, take your time, slowly tightening the noose. An example of when this situation arises occurs when the witness can be impeached through prior testimony.

Do not ask irrelevant questions. Irrelevant questions are those which yield answers that are immaterial to your theory of the case. We all have a limited attention span; jurors are no different. Asking irrelevant questions takes the juror's attention away from the truly relevant questions. If a juror only will remember so much of what is said, make certain that what is said is important to your case.

I. Look to make a neutral witness a defense witness by presenting favorable defense theories through this witness, either through exhibits, prior testimony, or affidavits.

II. Looping - Favorable points are re-emphasized by repeating the information to be emphasized in a follow up question.

III. It is important to recognize that the cross-examination and summation go hand in hand. The most important purpose of cross-examination is to gather material for the closing argument. Therefore, the lawyer must be critically aware of what he intends to say in closing so that he can gather the necessary information in cross-examination.

IV. Looking for facts favorable to the defense theory:

A. The attorney should utilize discovery, preliminary hearings, hearings on motions, witness interviews, etc., to find out everything favorable to the defense to which the witness will testify. This give the attorney the opportunity to ask questions about that which is favorable and discard that which is not.

V. It is important to pin the witness down. The attorney needs to have the evidence with which he intends to impeach at his fingertips in case the witness testifies differently on the witness stand. Thus, written or signed statements, testimony at preliminary or other hearings, statements heard by other individuals or documents are useful.

VI. Create inconsistences that can later be used effectively in closing argument. Attorney needs to realize that if the inconsistency is on a non-material fact it should not be emphasized while a tougher approach should be used if the inconsistency shows a calculated effort on the part of the witness to change his testimony.

PREPARATION AND CONDUCT OF INDIVIDUAL CROSS-EXAMINATION

A. Cross-examine by objective -

1) The major objective is to advance the trial plan by having favorable material come out during cross-examination which could later be used in closing argument. If the question does not advance the trial plan, then consider whether or not to ask it.

B. Each cross-examination should be tailor made to the individual witness.

1) No one witness is the same as another and each examination should be prepared technique wise for each specific situation.

C. Try to secure favorable facts which support your theory of defense. These facts should support the conclusion you are trying to convey to the jury i.e., mis-identification, forced confession, alibi, etc. Securing favorable facts from an opposing witness lends more credibility to your theory of defense.

D. Do not try to hit a home run on every cross-examination. A poorly planned cross-examination can be hazardous to your client's health and fill gaps in the prosecutions case or elicit matters which would be prejudicial to your theory. If you develop negative information then it may carry more weight with the jury in favor of the prosecution and against you.

E. Sometimes the best cross-examination is no cross-examination. If the witness doesn't hurt, and there are no favorable facts to be elicited, and the witness did not say anything to hurt your case, you may chose not to ask any questions.

F. Do not, do not, repeat what the prosecutor elicited in direct testimony. By repeating direct testimony, all you are doing is cementing in the juries minds that which the prosecution attempted to convey to the jury in the first place.

G. Don't find losing battles.

1) If the witness is liable to answer in a fashion that will harm your case, don't take him on his turf by asking questions which will permit him to expand and expound upon that which he's testified to on direct. Consider not questioning the witness on that which he said on direct, since it may attract less attention from the jury if not cross-examined by you.

2) Make sure you know what the witness is going to answer, and be very wary of the "why" question.

3) Don't argue with the witness, try to get the witness to agree with you on areas that you feel comfortable in questioning about.

4) Deal with the facts not conclusions, since the witness is not going to agree with you with regard to any conclusion that you draw, but might well agree with you regarding a fact or detail brought out on direct.

H. Know when you have over extended your welcome with the witness.

I. As soon as you get what you need from the witness for use in closing argument, you should stop while you are ahead and leave whatever emphasis you have for closing argument.

J. Control the Witness

I. The examiner needs to maintain control of the witness, particularly when the witness has prejudicial information and has a tendency to blurt out or volunteer information detrimental to your defense. Techniques to consider are as follows:

A. Short, plain, and unambiguous questions, so as not to give the witness the opportunity to expand.

B. Ask one new fact per question.

C. Ask only questions that require a yes or no answer.

D. Utilize the Court when the witness tries to expand upon a yes or a no question.

E. Don't telegraph to the witness that you are about to do him.

K. End on a high note.

1. Select an ending point prior to the examination and put it at the end of your cross-examination notes.

2. Make your examination interesting and real. To achieve this goal, short leading questions sustain momentum.

TACTICS FOR CROSS-EXAMINATION

A. Short, plain, leading questions stretch out technique.

B. What wasn't done.

1. Make a list of scientific tests and/or investigative leads should have been accomplished or followed up on but not done by the prosecution witnesses.

DEALING WITH THE UNCOOPERATIVE WITNESS

1. With this individual more than any other, make sure that you are only trying to elicit one fact per question.

2. Where an unfavorable response occurs, consider re-asking a question that proceeded this question.

3. Consider what fact contained within the question produced the unfavorable response.

4. Add only one fact per question to the original question until the fact denied is isolated.

5. Attempt to create the yes witness since social scientists tell us that jurors understand and appreciate the positive rather than the negative. Thus, the attorney should emphasize an attempt to phrase questions on cross-examination in such a way that the witness answers "yes".

IMPEACHMENT

Impeachment can be shown in a number of ways. Please see Federal Rules of Evidence Rule numbers 607, 608, 609, of the Federal Rules of Evidence.

A. Bias, prejudice, or interest.

B. Convictions.

C. Bad acts.

D. Inconsistent statements.

E. Inadequate perception or faulty memory.

F. Contradiction by other physical evidence or witness testimony.

CONCLUSION

The concepts and techniques of cross-examination are at times different to master. It is in our client's best interests that we recognize these, tools of our trade, which must be mastered so that we can do the most effective, competent job in representing the interests of the accused.