

CONTROLLING CROSS EXAMINATION

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There is a rather quaint notion that an attorney can, somehow, control a witness on cross examination. My experience in trial has been that witnesses, particularly witnesses on cross examination, are not under my control. They will do and say what they want to do and say. You cannot control them unless you have managed to plant electrodes in their brain to get a Pavlovian response to your questions. Since the judges in most jurisdiction will not let you do that so you need to give up the idea of controlling the witnesses.

You can, however, control the cross examination, which is almost as good. Controlling the cross examination requires that you be in control of every aspect of the cross examination. The process involves being in control of yourself, of the questions you ask and of your response to the answers you get to the questions you ask.

CONTROL YOURSELF

It sounds silly to say that you must be in control of yourself during cross examination. Of course we are in control. We are, after all, dedicated professionals. And yet, how many times have you found yourself wishing that you could reach over and slap the nose off the face of a witness during your cross examination? We, as prosecutors, take the entire judicial process very seriously, and it offends us at the very core of our being to be faced with a witness who is perverting the process by calmly lying on the witness stand. Our instinct is to attack, attack, attack. I have another suggestion - don't get mad and attack, get mad and get even. It is much more satisfying to see that smug look erased from the defendant's face by the foremen of the jury saying "Your honor, we find the defendant guilty as charged." than by harassing a witness during a cross exam. Controlling your cross examination will help you do just that.

1. **Control your expectations.**
 - a. If you have prepared for a cross exam by using the approach point method, you will have a good idea what you can reasonably expect a witness to admit during cross examination. You realize that you will almost certainly not reduce the witness to a blubbing idiot who will tearfully admit that their testimony on direct was a tissue of lies and that your masterful cross examination showed them the error of their ways. Still, the common perception of cross exam is that is what the process is about and anything less is, somehow, a failure. The movies and lawyer television shows reinforce this notion. Get rid of that mind set now. It is wrong. It will lead you into mistakes. Worse, it will make you ineffective. Setting your

expectations unreasonably high sets you up for failure. Trying to get too much from a witness can lead to getting nothing from the witness.

- b. Remember that the purpose of cross examination is to get concessions that will strengthen your case; to get concessions that will weaken the defense case; and perhaps, to impeach the witness. If these are your goals, and you have prepared for this cross, your expectations will be realistic. For example, if the defense is alibi don't expect the alibi witness to recant on cross. You can expect to show the witness' bias ("You're his best friend, aren't you?), or that the witness has acted unreasonably ("You never told the police about this, did you), or the alibi is improbable ("You did not ever check the time when the defendant was at your house"), or any other concessions you can create.

2. **Control your emotions.**

- a. Human beings are emotional creatures, and our actions are more often dictated by emotion than by logic. It is just the way we are. Just by becoming a prosecutor you have not insulated yourself from your emotions. You need to recognize this fact in order to be able to control your emotions during cross. It is counterproductive to act as though you have none. If you recognize that you are angry before you begin a cross you can use that to your advantage. First you can take a deep breath and remind yourself that anger clouds your judgment. Anger leads you to asking questions that, while emotionally satisfying ("Isn't it true that you are widely known as a liar and a thief?"), will probably get you into trouble with the courts. There is nothing wrong with a little righteous anger at the appropriate moment, so long as you are letting this anger leak out under your control.

3. **Control your voice**

- a. Prosecutors sometimes forget that a trial is not just an adjudicative process. It is also theater. Lawyers are also actors. Actors do, and lawyers should, use their voices as additional tools to make their points. Your voice, simply by its tone, inflection and pace can indicate doubt, disbelief, sarcasm, indignation or anger. You need to consciously use your voice as a tool during cross examination.
- b. Defendants and witnesses have seen the same movies and TV shows you have. They expect the prosecutors conduct the cross exam in an angry, sarcastic voice. They expect you to try to tear them apart. When you begin a cross exam in a normal pleasant tone of voice they will be disarmed,

which is always to your advantage. You want the witness thinking “this prosecutor seems like a nice guy, maybe his questions are OK to answer,” particularly when you are attempting to get concessions from them. Juries expect prosecutors to be fair and reasonable - an expectation not placed on defense counsel. Witnesses are more likely to respond positively to your questions when they are asked in a conversational voice. As long as they are answering truthfully, in your opinion, there is no reason to browbeat them.

- c. When the witness begins to stall, deflect, ramble or prevaricate then you can quit being a nice guy and allow some anger or frustration (or whatever seems appropriate) to creep into your voice. This is also a cue to the jury that the witness is now up to something and they should pay attention. If the witness then starts answering properly again, you can let your voice go back to normal.

4. **Control your body.**

- a. Cross examination is a package deal. It involves research, preparation, planning and execution. It involves diction, word choice, voice tone, cadence and rhythm and it involves using your body. Actually, it involves mostly not using your body. The human eye is designed to be attracted by motion. Every time something moves in the courtroom it attracts the jury’s eyes, and thus their attention. If you are shuffling your feet, playing with your pen, writing notes or just scratching your ear you are distracting the jury from the witness. If possible, just stand there when you are crossing the witness. Generally, you want the witness to be the center of attention and not yourself.
- b. If you must move, move with a purpose. During one trial I watched an attorney from our office during an extended cross examination of the defendant. Whenever the defendant was lying the attorney would tap his thumbnail with his pen. You will not be surprised to learn this happened a lot during the cross. After the trial I commented on my observation. The attorney confirmed that yes, he was doing it on purpose. The jury later told her that it was commented upon during deliberations before they convicted the defendant.

CONTROL YOUR QUESTIONS

Something you do have absolute control over during cross examination is the questions you ask. You control the timing and sequence of the questions. You control the language used in the questions. You control the form of the questions. You control everything about the questions.

With this in mind, there are some guidelines to follow:

5. **Ask short questions in simple language.**

- a. Lawyers, particularly trial lawyers, must be able to grasp and hold in their minds multiple complex ideas. We have little trouble formulating and responding to complex questions. Regrettably, most witnesses and jurors lack this capability. We can give carefully nuanced answers to difficult questions. That's the last thing we want from witnesses. Most jurors would not know a nuance if it bit them on the knee. They are, as an old time prosecutor once said, twelve folks without the sense or the stroke to get out of jury duty.
- b. Short questions are easy for the jury to grasp and understand. They have not studied your case in the detail you did. They need to be spoon-fed the case, one easy gulp at a time.
- c. Short simple questions do not give the witness any room to roam about in their answer. On cross, you do not want the witness telling her story, you want her to tell your story. Long-winded questions lend themselves to long-winded answers. The more room you give a witness in your question to swim around and evade answering your question the more room they will use to evade your question. Contrast the following

Q: "From your vantage point, as you previously testified, you were able to place the vehicle within your sphere of vision and thus observe the vehicle clearly and you reported to Officer Safris at a time very shortly after you observed the incident that the vehicle appeared to you to be blue, isn't that correct?"

As opposed to:

Q: The car was blue?

Which is easier for the jury and the witness to understand? Can an evasive witness take advantage of the first question to fend off answering? Can you remember, by the time you finally lurch to the end of the first question, what it was you were asking?

- d. An excellent primer on preparing questions for cross examination is the old reading textbook Fun With Dick and Jane. The entire book is a sequence of very simple sentences. This is Spot. See Spot run. Run Spot run. These simple declarative sentences convey just one very concrete idea each. Your cross should mimic this style: You opened the drawer? You

took out the knife? You stabbed Mary? Questions in this form cannot be misunderstood by the witness or the jury. A witness can attempt to evade answering yes or no, but the form of the question causes the evasion to stand out like a sore thumb.

e. Just as important as using short sentences is using simple words.

Q: You are corroborating the alibi?

A: Do what?

Although trial attorneys are as a rule, highly literate people with extensive vocabularies, most witnesses and jurors are not. They have no idea what corroborates, prior, proceeded, conveyance, recollection or deoxyribonucleic acid mean. They do know what back up, before, went, car and DNA means. You must pitch your questions to your audience. One of the finest speech makers in the English language was Winston Churchill. He was an exceptionally well read and literate man. Yet, one of the most famous lines in a famous speech rallying the British people to stand alone against the tyranny of Hitler's Germany did not conclude: "I have nothing to offer but sanguinary effusion, difficult and exhausting physical exertion, lachrymose exudation and moisture excreted through the pores." He offered instead blood, toil, tears and sweat. If it worked for him (the Germans lost the war) it will work for you too

6. Ask one new fact per question

a. When you ask lengthy questions you almost always end up asking a compound question - a question that actually contains more than one question.

Q: After you left home you went to the Beacon Restaurant where you ordered a bacon, lettuce and tomato sandwich and then robbed the cashier, didn't you?

A: No.

What did the witness just answer no to? If he ordered a bacon, lettuce, tomato and sprout sandwich his answer is literally true. In order for the witness to answer the question yes, every single part of the question must be true. Each time you add an additional fact you are asking about you increase exponentially the opportunity the witness has to avoid answering your question. It is much easier to paint the witness into a corner by going one fact at a time:

You left your house?

You went to the Beacon restaurant?

You ordered a sandwich?
It was a BLT sandwich?
You went to the cash register?
You pulled out a revolver?
You pointed the revolver at the cashier?
You told her to give you the bills?

If the witness answers no to any one of these questions you know immediately what is being denied and you can zero in that point. The jury knows exactly what you are asking and can immediately tell when the witness is trying to blow smoke at them. If the witness denies having a BLT, and under further questioning by you announces triumphantly it wasn't a BLT because it had sprouts on it, thank your lucky stars. This kind of weasel answer is guaranteed to alienate and infuriate the jury.

- b. If the witness answers yes to one fact, you may want to add another fact to the same question and ask it again. "You have a camera? "Yes" An Olympus camera? "Yes" "An Olympus digital camera? "Yes" "The Olympus digital camera found in your suitcase?" "Yes" Although the questions are getting more complex, only one new fact is being added each time. This is not a compound question.

7. Ask leading questions

- a. Prosecutors have learned, through bitter experience, that if you ask leading questions on direct examination the defense attorney objects, the judge sustains it and then glares at you. Unfortunately, this aversion therapy almost always spills over into cross examination and prosecutors are almost pathologically unable to ask leading questions. You need to get past this problem. Controlling cross examination is based upon your controlling the range of answers the witness can give - either yes or no. If you give up that advantage you may as well not bother cross examining at all. To repeat: **ASK LEADING QUESTIONS.**
- b. A good technique to break yourself of the bad habits that direct exam has taught you is: never ask a question on cross that begins with any of the following words: who; what; when; where; why and how. Any question with those words in them is an open invitation to the witness answer at length - and usually to your detriment. For example:

Q: You saw Spot?	Not	Q: Who did you see?
Q; You saw Spot run?	Not	Q: What did you see?
Q: Spot ran at 3:00pm?	Not	Q: When did Spot run?
Q: Spot ran in the barn?	Not	Q: Where did Spot run?

Q: Spot chased Jane? Not Q: Why did Spot run?
Q: You kicked Spot? Not: Q: How did Spot get hurt?

The exception to this rule is where you do not care what the answer might be.

- c. Begin by forming your question as a simple declaration of fact. Remember that we are using the sentence form of 'See Spot run.' In this case the statement of fact would be "You saw Spot run." Tack onto this statement of fact a qualifier such as "didn't you?", or "isn't that true?" or "isn't that correct?" "You saw Spot run, didn't you?" It works just as well leaving off the qualifier and using the tone of your voice to serve as the qualifier.
- d. **Ask leading questions.**

8. **USE THE RIGHT FORM OF QUESTION AND AN APPROPRIATE TONE**

- a. All questions are not created equal. A simple interrogatory question such as "You have a car?" asked in a conversational tone, are about the least controlling type of question you can ask on cross. It is an appropriate form of questioning to use when beginning a cross exam. Continue to use it as long as the witness is being open with you. It is leading because it assumes the witness has a car, but it leaves the witness open to respond, as one would in normal conversation, with "Yes, I drive a Honda."
- b. Adding a tag line makes the question makes it more aggressive and more controlling such as "You have a car, correct?" If the cordial relationship you thought you established with the simple interrogatory questions has now soured slightly, this form of the question is more appropriate. You know the answer and you are almost daring the witness to disagree with you.
- c. Putting a specific fact into a question makes the form of the question even more controlling. "Isn't it true you own a Ford Taurus? A green Taurus, right?" When the witness is no longer responding to less coercive questions it is time to bring out the big guns. The witness has the choice of answering yes or no or attempting to avoid answering your question. More on that later.
- d. The anticipatory question, by its form, anticipates a particular answer. It is a very effective form of a question when the jury expects one answer - yes - but you know the answer will be no, or vice versa. For example, the defense DNA expert has testified that the police forensic laboratory was so poorly run that the samples could have become contaminated. Naturally,

defense counsel told her to not prepare a report. An excellent question to ask is "Of course, Ms. Johnson, you prepared a report detailing your findings?" The jury naturally expects a scientist to prepare a report. When she says no, their attention will be focused on your cross as she tries to defend this practice. This form also works well on the defendant's alibi witness, his girlfriend, who surfaces just before trial. "Naturally, you called the police as soon as you knew Freddie had been arrested for this crime?" Jurors expect the answer to be yes, because that is what ordinary people would do. A no answer catches their attention and points out, without you needing to do more, that this witness' story is implausible because people do not act that way.

CONTROL YOUR RESPONSE TO THE ANSWERS YOU GET

No matter how carefully you control yourself or your questions there will almost always come the time when the witness does not answer your question. The witness may not understand the question. The witness may not want to answer the question. The witness may deliberately avoid answering the question.

Some common tactics are attack and avoidance. A witness attacks by not responding to the question asked "You hit the victim with the breaker bar, didn't you"? With a yes or no, but by attempting to put you on the defensive "What would you do if a guy came at you with a knife?" Your instinct is to respond "No one else even saw a knife." Do not do it unless you have decided to let the witness control the cross. The witness might respond to the same question by answering that "I barely touched him." Again, your instinct is to respond "Then explain why he has a depressed skull fracture." Not only are you playing a losing game, but the witness may have an answer you do not like, such as "After I grazed him he ran off and he was so stoned on crack that he missed the curb, stumbled, and fell into the side of the car he stole." This is not an effective cross examination.

You can become so intent on the process of cross examination, that you fail to notice that the witness did not answer your question. For example, "Dr., how many STRP DNA examinations have you performed?" "My lab has done thousands." This is a good answer to the quest "How many tests has the lab done?", but a completely lousy one to the question you actually asked. Make the witness answer the question that you asked.

Listed below are some suggested responses to the situation where the witness has failed to answer the question you asked. Not all are appropriate for every situation. You need to use your experience to gauge which is appropriate for your particular situation. The questions are to the defendant's girlfriend, who is testifying as his witness.

9. Repeat the question.

- a. This is a very good first response, it is the simplest response and often the most effective. Simply repeat the question verbatim. You asked the witness "Did you see the blue car." Her answer was " Yadda, yadda,

yadda.” Your response is “Did you see the blue car.” If the witness responds “Yadda, yadda” ask the question again. The jury now knows what is going on. If it happens a third time repeat the question very slowly, as if asking the question to a dimwit.

10. Have the witness repeat the question.

- a. Having the witness repeat the question highlights for the jury the fact that the witness heard the question and chose not to answer. “You saw the blue car?” “It was a very cloudy day” “Would you please repeat my question” It works well with the witness who (apparently) is not paying attention.
- b. If the witness asks you to repeat the question, or in some way indicates that did not hear the question gently admonish the witness to listen to your question.

11. Ask the witness if there is some part of the question they did not understand.

- a. You have controlled the form of your question so you asked the question in very simple language. Asking if the witness understood it is being apparently solicitous of the witness, but in fact points out the witness’ reluctance to answer.
- b. If the witness answers that she understood the question her failure to answer is obvious to the jury. Ask her to “Please answer the question.”
- c. If the witness says she did not understand all or part of the question, ask what part she did not understand. When she answers, explain the question in terms appropriate or a 5 year old, ask if she understands this question, and if she indicates she does, ask her to answer the question.

12. You answered this question, but I asked this question.

- a. This is a goos response to the non sequitur answer. It contrasts the answer given to the question asked and points out the witness’ refusal to answer your question. For example “Did you see him with the gun?” “He is a good man who loves our kids.” “You told me of your deep emotional attachment to the defendant [which also points out her bias to the jury], but my question was what you saw. Did you see him with the gun?”

13. Have the question read back.

- a. This is a more aggressive response, and usually not suitable for a first response. You are highlighting the failure to answer your question by

having the proceedings grind to a halt while the court reporter located the question in his notes. This usually upsets both the court reporter and the judge so it need to be saved for the occasion where you have tried to get the witness to answer but she won't. "You saw the defendant with the gun, didn't you?" "Yadda, yadda, yadda" "Would you please read back the question" Once the question is read back, ask the witness to answer the question.

14. Let the witness ramble.

- a. When the witness is truly wandering everywhere, it is sometimes a good tactic to let them go. Not only does it anger the jury (it their time the witness is wasting) but the witness may inadvertently give you more ammunition. "You saw the defendant with the gun?" "Yadda, yadda, yadda, yadda." "Anything else?" "Yadda, yadda, I don't know which gun of his you mean, yadda." "Anything else?" "No" Which of the defendant's guns did you see him with?"

15. Let me write down the question for you

- a. Most courtrooms have a blackboard or flip chart to write on. Writing down the question stops the proceedings, focuses everyone's attention, and highlights the witness' refusal to answer. "Did you see the defendant with the gun?" "Yadda, yadda." "Let me write the question down for you . . . Please answer the question I just wrote on the board "Did you see the defendant with the gun."
- b. Don't erase the question. It will remind the jury of just what kind a witness it is testifying. Erase it before the next witness testifies.

16. Is there something preventing you from answering

- a. After it is clear the witness is not answering, this is a good response. It gets rid of excuses, - I need a drink, didn't hear, didn't understand, was distracted, etc. It highlights the fact that the witness is not answering. It might also get you a lucky answer such as "His attorney said to be careful answering that question"

17. Remind the witness that the jury has as much right to the answer to your questions as the defense attorney's questions

- a. Yes, this is really a speech to the jury. It is a true statement of the law, and, if you do make this statement after it is excruciatingly clear that the witness will not answer, the court will not sustain the inevitable objection.

Who knows, it might also get the witness to answer the question.

18. Take your time

- a. When it is obvious that the witness is taking time to either fabricate an answer or knows that the answer to this question will really hurt, they will simply sit there. In this situation, silence is your friend. Let the jury watch the witness squirm. After a while, tell the witness to "Take your time." It is a wonderful passive - aggressive statement because on the surface you appear to be doing the right thing by letting the witness think over the response. In reality you are highlighting the excessive time the witness is taking to answer what should be an easy question. It puts more pressure on the witness. It will make the jury pay close attention to the answer they finally get. If the pause goes on a significant time, say two minutes, ask the witness if they need a recess.

19. Your honor, please direct the witness to answer the question.

- a. This is the very last response you make to the recalcitrant witness. If you ask the court to intervene too early in the cross it appears you are not in control. Make this request when the judge and the jury are truly tired of this witness. The judge should now brook no more evasion from the witness, and, on occasion, direct the witness to answer before you make the request. Getting the judge on your side is a good thing.