



How to maximize the impact of cross-examination

A jury consultant offers tips on cross-examination to help you persuade the jury and avoid alienating them.

BY NOELLE C. NELSON, PH.D.

Cross-examination is a delicate art, one requiring great skill and expertise. It is where your thorough grounding in the facts of the case is most valuable. Cross-examination cannot be “winged.” It must be prepared with deliberation and forethought. Here are simple rules to follow so your cross creates the most impact.

Pay attention to opposing counsel's direct examination

Much of the information you gather for cross-examination is from opposing counsel's direct examination. During opposing counsel's direct, listen not only for factual inconsistencies from the witness, but notice signs of possible weakness, anxiety or confusion. Listen for hesitations in speech, sudden changes in pitch or pace, and shifts in vocal volume. Listen for emotional undertones and for incongruity between verbal content and facial expression.

Watch the witness's body language for further clues of weakness. Notice whether the witness appears perfectly relaxed or seems to tense up at certain moments. Does the witness fidget or start to do some other subconscious action such as pick at clothing or pull a strand of hair? If so, when? Does the witness maintain good eye focus, or do the witness's eyes wander or avert at certain moments? Allow the witness's nonverbal behavior to cue you to fruitful areas to probe. Learn to take notes in a shorthand fashion, so you can observe the witness as much as possible.

Conduct your cross-examination to advance your “story”

Cross-examination gives you the opportunity to reestablish your interpretation of the facts so your story is the one that the jurors accept. Everything you do in cross must be designed with this purpose. Repeatedly work your case theme into your cross-examination to keep jurors on track. Help jurors stay with you by asking clear, focused questions that follow in logical sequence.

Empower the jurors to see the case your way

We all cooperate more willingly with decisions we've had a hand in making. Jurors in trial are no different. Ask your questions in cross-examination in a way that allow the jurors to arrive at the unmistakable, inescapable conclusion you want them to, rather than forcing the conclusion down their throats or risking a sympathetic answer from defense's witness.

The lawyer is cross-examining a lay witness at the scene of a bus-pedestrian accident. The lawyer represents the pedestrian.

Question: Ms. Smith, did you see the bus as it came towards the intersection of First and Main shortly before the accident?

Answer: Yes, I did.

Question: Could you tell us what the color of the light was for the bus as it came down First?

Answer: It was green, a green light.

Question: Really? Isn't it true that when you spoke to the police officer shortly after

the accident you said the light was red?
Answer: Oh, well, I'm sorry, I'm a little nervous. I'm sure the police officer report is right.

Well, at this point, the jurors may very well believe the witness, since she's being humble and apologetic and who isn't nervous in court? The lawyer meanwhile has lost the opportunity to show the jurors that the case isn't as cut and dried as defense would have them believe.

A more effective way to approach this might be:

Question: Could you tell us what the color the light was for the bus as it came down First?

Answer: It was green, a green light.

Question: Ms. Smith, did you talk with a police officer right there at the scene, just after the accident?

Answer: Yes, I did.

Question: And did that police officer ask you what color the light was for the bus as it came down First?

Answer: Yes, I think he did.

Rather than pounce on the witness at this point and give her the opportunity to sympathetically correct herself, the lawyer could produce the police report and show (visuals work!) the portion where Ms. Smith unequivocally said, “The light was red,” and simply end his cross on that note.

The jurors can now come to their own conclusion that Ms. Smith is, for whatever reason, being less than truthful and are now much more likely to accept the police report as stated, which was exactly what the lawyer wanted them to do.



Commentary

Another look at how to treat the witness in cross-examination

Why confrontation should be firm, but never vicious



James

By Katherine James

Dr. Nelson's article on cross-examination deserves to be highlighted and underlined by me at every turn. However, there is one aspect to cross examination that needs to be emphasized in this litigation consultant's opinion: how you treat the witness whom you are cross-examining. Dr. Nelson says: "Your basic attitude toward all witnesses – including experts – should initially be one of respect and politeness." Easy for me to underline and highlight. Easy for Dr. Nelson to advise. Not so easy for you to do. Why? Because you hate them.

You aren't crazy about the lawyers who represent them, but your attitude toward those lawyers ranges from "honest lawyer who just does a job" to "scum of the earth who must not be able to sleep at night." You rarely give a witness that kind of a break. Face it, you have hated these people since you got this case. In the case of the defendant, you loathe that negligent doctor, that careless driver, that manipulative employer. In the case of the percipient witness, you question the underhanded motives of the relative, friend, colleague of the defendant. But there is a special place in your view of hell for the expert witness – those inept, idiotic prostitutes who you have detested since either reading their names or reading their reports.

Beware of backfiring

Dr. Nelson is right about how this backfires on you, of course. Jurors relate more to witnesses than to attorneys. And although there is some leeway with experts, there is often never as much room as your snarling vicious attack dog attitude warrants. When Dr. Nelson says, "Confrontation should be firm, not vicious," she means you.

I hear over and over again from attorneys, "But jurors expect me to draw a little blood in cross-examination. They like the show."

Actually, they don't. They like facts. They like evidence. They don't like to watch you beat the living daylights out of, for example, a marine biologist. Or an economist. Or pretty much anyone who you think you have the right to verbally and emotionally punch out on the witness stand. If you are honest with yourself, you will admit that you aren't

doing it for the jurors – you are doing it because it feels good. Because it gives you some kind of satisfaction in the pit of your trial lawyer gut.

When I coach attorneys on their demeanor during cross-examination I often harken back to the theater. Why? Because actors have the same problem. My husband, Alan Blumenfeld, was working with Jerry Zaks, a brilliant Broadway director, on Neil Simon's *Laughter On The 23rd Floor*. They were rehearsing and in previews out of town before bringing the show to New York. Jerry said to Alan, "Remember when you looked at him, and bellowed that line and then looked up at the ceiling, and it felt really, really, good?"

Alan remembered, the tantalizing feeling recreated for him, and said, "Yeah."

Jerry said, "DON'T EVER DO THAT AGAIN."

So, gentle reader, I say to you, "DON'T EVER DO THAT AGAIN."

The secret weapon

How do you develop alternate skills other than skewering and lambasting people in cross-examination? Practice being nice. Start by not acting like a total jerk in deposition. Be nice instead. Not just because it gets you further with the witness – it does – but because this is a skill you need to practice for cross-examining this witness in trial. Look in the eyes of the witness you are questioning in deposition and smile. Let your voice be warm and welcoming. Let your inflections rise. "Pin down" with facts, not with your overbearing anger. But don't stop there! Practice being nice to your family. Are you married to someone who says from time to time, "For God's sake, stop cross-examining me"? Take it to heart and stop! Practice being nice to telephone sales people. You know how good it feels to come up with some really clever way of putting them down? Don't. Say, "Gosh, I am not interested but I sure as heck hope you find someone today who is. Good luck!" Why? So you can be nice in cross-examination. You, your cross-examination style, and your clients will benefit.

Katherine James is the founder of ACT of Communication and a board member of The American Society of Trial Consultants. A litigation consultant for 32 years, she has taught over 30,000 attorneys in her workshops and helped take over 1,000 cases to trial as a part of the trial team. A specialist in live communication skills, many of her articles have appeared in previous issues of Plaintiff. www.actofcommunication.com

Win jury votes with politeness

Your basic attitude toward all witnesses – including experts – should initially be one of respect and politeness. As cross-examination progresses, your atti-

tude with lay witnesses should deviate little from this stance; but with expert witnesses, you can depart from this approach considerably.

Jurors identify with lay witnesses more than they do with attorneys. If you

are polite and respectful to the lay witness, you enhance your credibility with the jurors; you are treating the witness as the jurors would like to be treated. Any aggressive unrestrained direct attack on such a witness is going to turn jurors



against you. Certainly, you can attack witnesses and their testimony, but do so respectfully and politely.

Use your “confusion” and “lack of understanding” as the springboards to your questioning. Use attempts to “clarify” as the way to expose inconsistencies. Take a courteous attitude of “trying to understand” as your basic posture. This approach will allow you to accomplish your objective in cross, and retain the jurors’ favorable evaluation of you.

Your approach to expert witnesses can be quite different. Jurors have trouble identifying with expert witnesses, especially those witnesses who testify for a living. Although you should still begin with a respectful, polite approach, allow yourself more vigorous questioning than you would with lay witnesses. Stay away from aggressive frontal attacks, however. Confrontation should be firm, not vicious. Sometimes sarcasm, disappointment, irritation or a stunned silence can be used for effect, but be aware of their import and don’t get melodramatic.

One of the most effective ways to persuade jurors when cross-examining expert witnesses is to know more than the witness does. This may at first seem impossible, but since you will be questioning the witness on a narrow range of knowledge, you can, in most cases, gain that knowledge easily. Your best source is your own expert witness. If you can draw a

medical diagram, for example, simply and accurately, and stump the opposing side’s medical expert, you score impressive points with the jury.

Maximize the impact of plaintiff’s testimony

Use cross-examination to maximize the impact of plaintiff’s testimony by restating it in the present tense (“having intense pain all these months” not “was in intense pain all these months”) even as you conduct your cross. Use descriptive language and bring home the experience to the jurors by expressing the testimony in personal terms (i.e., “Mr. Jones’ pain” not “the pain”). Reduce the impact of opposing counsel’s terms by relabeling them in more emphatic ways (i.e., substitute “crippling neck pain” for opposing counsel’s weak “neck spasm”).

Handle the evidence in a way that reinforces your interpretation of the facts. For example, counter opposing counsel’s disdain for a document by holding the document with care and respect.

End your cross-examination like a winner

Always bear in mind that your job when cross-examining a witness is to persuade the jurors of your point of view, not to convince the witness and opposing counsel of your brilliance. If you can accomplish your purpose by simply reveal-

ing an inconsistency or disconcerting the witness, leave it at that. You don’t have to convince the witness of anything, much less impress opposing counsel. Jurors and judge are the only truly important persons in the room.

Always end your cross on a favorable note – after the witness says something that advances your cause. No matter what happens during cross, look like you got what you wanted.

Under no circumstances should you seem flustered, angry, disappointed or disheartened when you finish your cross-examination. Sit down like a winner. The jurors will associate your radiant confidence and poise with the just completed testimony and assume your story is coming out on top.



Nelson

Noelle C. Nelson, Ph.D., is a trial and business consultant who provides trial/jury strategy, witness preparation and focus groups for attorneys. She is the author of the booklet, 101 Winning Tips: How to Give a

Good Deposition and Testify Well in Court. Her published books include: A Winning Case (Prentice Hall), Connecting With Your Client (American Bar Association) and The Power of Appreciation in Business (MindLab Publishing). www.dr.noellenelson.com, e-mail: nnelson@dr.noellenelson.com