

The basic approaches to cross-examination

By: F. Dennis Saylor IV and Daniel I. Small July 13, 2017

The classic image of cross-examination is of a slash-and-burn attack on a witness's credibility. In fact, some lawyers seem to have no other style or approach. But there are many different ways to conduct a cross-examination — and lots of ways in which things can go wrong.

So think carefully about what you hope to accomplish and how you plan to get there, before you ask your first question.

Usually, the hardest thing to do is to prove that someone is lying. It's normally a whole lot easier to show that someone is mistaken, or that his testimony doesn't matter, or that it's even helpful. And if you're trying to show that every single opposing witness is a liar, chances are it isn't going to work, anyway.

Let's look at the different approaches you can take on cross-examination. Of course, you're not limited to just one; most of the time, you would be using a combination of approaches.

1. Elicit favorable testimony, if any

Even hostile witnesses sometimes have helpful things to say. Don't forget to ask. Constructive cross can be surprisingly effective, because any positive testimony from the other side's witness may have added luster as an apparent "admission."

2. Sidestep the witness's testimony

Sometimes you can show that what the witness said doesn't really matter. This is a common cross-examination technique with an expert. The expert opinion may depend entirely on a factual assumption (such as "the plaintiff cannot perform physical work") that may prove to be untrue. But there are lots of other circumstances in which you can sidestep or deflect the witness's testimony, rather than attack it head on.

3. Limit the witness's testimony

Emphasize the limitations on the witness's testimony: what he or she did not see, hear or do. Maybe the witness wasn't actually at the critical meeting or didn't actually observe the accident. The witness may have said as much on direct, but you may want to emphasize it on cross to make sure that the jury gets it.

4. Ask about what did *not* happen

Often an important goal of cross-examination is to point out things that should have happened but did not. This may require some imagination. As you are preparing your cross, you may have to visualize how events should have or might have unfolded, and compare them to the available evidence.

Here's a famous example from "Silver Blaze," a Sherlock Holmes story involving the midnight disappearance of a racehorse from a stable:

[Inspector Gregory of Scotland Yard:] "Is there any point to which you would wish to draw my attention?"

"To the curious incident of the dog in the night-time."

"The dog did nothing in the night-time."

"That was the curious incident," remarked Sherlock Holmes.

It turns out that the horse was surreptitiously removed by its own trainer. As Holmes later explains:

"... a dog was kept in the stables, and yet, though some one had been in and had fetched out a horse, he had not barked enough to arouse the two lads in the loft. Obviously the midnight visitor was some one whom the dog knew well."

Like Holmes, don't limit yourself to what evidence is there; think about what evidence is not.

5. Cast doubt on the witness's ability to perceive

Show that the witness's ability to see, hear or remember should be doubted or discredited. In the movie "My Cousin Vinny," Joe Pesci's character uses a tape measure and two fingers to convince an eyewitness — and the jury — that she needs thicker glasses. But limits on perception can take many forms. Suppose a police officer testifies about seeing something from a parked automobile on a surveillance detail. Obviously defense counsel would want to consider such basic facts as the distance and the lighting. But other details might also matter, such as whether the car windows were tinted, or whether the officer had worked multiple overtime shifts and was likely fatigued.

6. Show that the witness may not remember accurately

Litigation takes a long time, and trials often take place months or years after the events in question. Memories fade and often become transformed — for example, they are subject to such things as hindsight, bias and suggestibility. What a witness genuinely believes is an accurate memory may be substantially distorted by the time of trial.

7. Show that the witness is mistaken

Show that the witness is not lying; he or she simply got it wrong. People are human, and they make mistakes. Everyone understands that. Jurors may have trouble believing that a polite and respectful law enforcement officer, or a sweet little grandmother, is deliberately lying. But you might be able to convince them that such a witness is mistaken.

8. Show that the witness is exaggerating

An exaggeration is a form of untruth, but it's usually much less deliberate. People say things like, "It rained every day on our vacation," when what really happened is that it rained for three days and part of a fourth. When they tell their friends about their vacation, they aren't "lying" in the conventional sense; they're trying to emphasize a point and tell a good story. You may need to let a little air out of the witness's story. Sometimes, witnesses will quickly concede that they aren't being as precise and careful as they ought to be.

9. Show that the witness is lying

Obviously, some witnesses lie. And if they do, and it matters, you may have to go on the attack.

We'll talk about how to conduct effective cross-examinations in future columns. But again, never simply assume that an all-out attack on a witness's credibility is the best approach. It may well be, but consider the other options first.

Previous installments of Tried & True can be found here. Judge F. Dennis Saylor IV sits on the U.S. District Court in Boston. Prior to his appointment to the bench, he was a federal prosecutor and an attorney in private practice. Daniel I. Small is a partner in the Boston and Miami offices of Holland & Knight. He is a former federal prosecutor and teaches CLE programs across the country.