

Organizing 'cross'

By: F. Dennis Saylor IV and Daniel I. Small © August 10, 2017

Cross-examination by its nature is somewhat scattershot: Instead of creating a narrative, you're usually picking one apart.

But that doesn't mean you shouldn't prepare thoroughly and make it as organized as possible. The better planned and organized it is, the more effective it will be, and the better you'll be able to handle the things you did not anticipate.

Planning a cross-examination means not only planning the substance and the questions, but also the order in which you will make your points. Remember, you're not telling a story on cross, as you are on direct, so your order of battle need not be strictly chronological. It can be more thematic or strategic.

The point is that it should have an order, not simply be a series of random topics. In the words of Aristotle, "A whole is that which has beginning, middle, and end." Let's look at each.

Beginning. Studies show that people are more likely to remember, and are most affected by, the first and last things they hear. Try to begin strong and end strong.

The moment that you stand up and begin your cross-examination has an element of drama. You have the judge and jury's attention. Try to take advantage of that opportunity. At the very least, don't undermine your cross with a weak or silly beginning.

Begin your cross not only with substance, but with confidence. Never start with, "I just have a couple of questions" or a similar semi-apologetic opening. It's almost never true, and it adds nothing to the force of your presentation.

You also risk annoying the judge and jury. Why are you wasting their time, if you don't have anything important to ask? A difficult judge may comment or even cut you off when (inevitably) you break your promise. Take a lesson from the Simpsons:

[Homer and Apu journey to visit the head of the Kwik-E-Mart company, who lives on a mountaintop in India]
Head of Kwik-E-Mart: *Approach, my sons. You may ask me three questions.*

Apu: *That's great, because all I need is one.*

Homer (interrupting): *Are you really the head of Kwik-E-Mart?*

Head of Kwik-E-Mart: *Yes.*

Homer: *Really?*

Head of Kwik-E-Mart: *Yes.*

Homer: *You?*

Head of Kwik-E-Mart: *Yes. ... I hope this has been enlightening to you.*

Apu: *But I must —*

Head of Kwik-E-Mart: *Thank you, come again.*



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Middle. Think about the best ways to sequence your points. If you can find a way to do it, try to put your cross into some sensible order.

Cross-examinations are peculiarly susceptible to having a random quality, and anything that seems disorganized or disjointed may obscure your best points. Help the jury to follow the bouncing ball. Of course, narrowing the number of topics you cover helps considerably.

Ending. You, not the witness, get to pick the order of your cross-examination. Try to choreograph your cross-examination so that you end on a high note (ideally, a moment of triumph).

Hopefully, you've accomplished something; try to make it look that way. (Be careful, though, not to ask "one question too many," or your cross examination may end in disaster.)

Don't end on a note of apparent defeat — such as a failure to elicit a responsive answer, or a sustained objection. To avoid ending on a sustained objection, plan out your last couple of questions, and make something unobjectionable.

If you are on the receiving end of a sustained objection anyway, don't just end there; think of something else to ask before sitting down.

Don't end on a weak note, either. A surprisingly high number of examinations end something like this:

[Question] [Answer]
One moment, your honor.

[Long pause as lawyer studies notepad. Lawyer consults with colleague and/or client at table; they talk for a few moments. Lawyer returns to the podium. Further pause as lawyer formulates question.] [Inconsequential question asked out of sequence] [Inconsequential answer]
Nothing further, your honor.

This is an insipid way to end any examination, but especially a cross-examination of an important witness. Don't do it.

Planning and organization are important elements of a successful cross-examination. Try to start strong, end strong, and keep a good flow and progression in between.

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.