

Effective Cross-examination Techniques:
A Prosecutor's View

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Kyle C. Reeves
Assistant District Attorney, Rackets Bureau
Kings County District Attorney's Office

I. **Introduction**

A. **Purpose of Cross**

1. Corroborate your case.

2. Undermine credibility of witness.

3. Clarify matters left unclear on direct.

B. **Practical Aspects of Cross**

1. When to cross:
 - a. First determine:
 - i. Has the witness hurt the case?
 - ii. How much?
 - iii. Can he hurt the case more?
 - b. Then determine:
 - i. How to use witness to your advantage
 - ii. How best to expose witness
 - iii. How to prevent further damage

2. Revisiting our law school years, or Irving Younger's 10 Commandments of Cross:
 - a. Be brief
 - b. Ask short questions using plain words
 - c. Ask only leading questions
 - d. Do not ask a question you do not know the answer to
 - e. Listen to the answer
 - f. Do not fight with the witness
 - g. Do not allow witness to repeat his direct testimony
 - h. Do not permit the witness to explain answers
 - i. Avoid asking one question too many
 - j. Save your explanation for summation

3. The Three Tenets of Modern Cross-examination, or an updated version of Younger's 10 Commandments:
 - a. Be in control - if you can control yourself, then you can control your questions, the subject matter the witnesses and finally, you can control the outcome of the case.
 - b. Have a workable theory of the case - your primary objective in cross is to adduce evidence to support your theory of the case. In order to do that, you must first have workable a theory of the case.
 - c. Maintain your credibility - you must enhance your credibility with the jury while undermining your adversary's credibility

4. Practical Rules for Cross:
 - a. Don't expect to win the case on cross
 - b. Don't read questions from a list
 - c. Don't ask open-ended questions
 - d. Don't ask broad and general questions which allow for a speech
 - e. Don't give the witness a chance to think about their answers
 - f. Don't have the witness repeat their direct in chronological order
 - g. Don't ask about a crucial fact which can be better addressed in summation
 - h. Don't continue on a losing line of cross - bail out and move on, as if nothing happened
 - i. Don't treat all witnesses the same way - if a witness is sympathetic and deserves respect, give it without abandoning your stance that witness is mistaken or biased (i.e., defendant's mother or priest)
 - j. Don't be predictable with questions
 - k. Don't overstay your welcome and bore the jury

5. Two important things for a successful cross:
 - a. Be prepared.
 - b. Listen to direct.

II. Identify Goals and Objectives of Your Cross-examination

A. Corroboration of Prosecution Case

1. Support your case through defense witnesses.
 - a. Get defense witnesses to agree with prosecution witnesses (i.e., lighting conditions, defendant's nickname, who else was present for crime, etc.)
2. Fill in missing pieces of your case.
 - a. Corroborate case with "inside" information that your impartial witnesses don't know but someone familiar with defendant will have from defendant

B. Undermine Credibility of Witness

1. Confront misleading statements or lies on direct
 - a. Inability to observe event
 - i. Couldn't see due to positioning
 - ii. Couldn't see due to physical defect (glasses)
2. Expose lack of recollection or recall
 - a. Inability to recall event accurately
 - i. Intoxicated/used drugs at time of event
 - ii. Mental disease or defect
3. Expose lack of preparation or attention to details
4. Expose if witness' recall is too good
5. Impeach through prior inconsistent statements
6. Expose bias or prejudice of witness in favor of defendant
 - a. Relationship to defendant
 - b. Financial motive (defendant supports household)
 - c. Who contacted witness
7. Expose witness as unworthy of belief due to:
 - a. Personal History
 - b. Criminal Record
 - i. Convictions
 - ii. Arrests which did not result in convictions - cannot ask about arrests, but can go into facts of underlying incidents
 - iii. Pending cases - invocation of 5th Amendment privilege and what can/cannot comment on
 - c. Prior Bad, Vicious or Immoral conduct

C. Clarifying Matters from Direct Examination

1. Expose lack of "real" knowledge of issues
 - a. Is witness repeating something he heard on street and adopting it as his version of the truth - separate actual experience from hearsay
 - b. Is witness filling in details based on speculation - test witness's knowledge of events if warranted
2. Expose mistakes made on direct
 - a. clear up distances - use something in courtroom instead of "about 20 feet"
 - b. pinpoint times and dates
3. Clarify any "gray" areas
 - a. Put names on the "he's" and "she's"
 - b. strip away the fudge factor and pin down witnesses
 - c. use diagrams, photographs and other physical evidence
4. Confront witness with details that you're positive of from independent sources (i.e., weather conditions from NOAA, days of week from a calendar, etc.)
5. When did witness come forward
 - a. Who found witness (defense investigator, attorney, defendant's friends/family or defendant himself)
 - b. Applies to exculpatory witnesses as well as alibi

III. Preparation for Cross-examination

A. Planning

1. What will witness testify about
 - a. Occurrence witnesses
 - b. Alibi or exculpatory witnesses
 - c. Expert witnesses
 - d. Miscellaneous witnesses
2. What can be gained from testimony
3. What can be used to undermine witness' credibility

B. Obtaining cross-examination materials

1. What will be needed to effectively cross-examine a particular witness
 - a. All prior statements of witness
 - b. Medical/psychiatric records
 - c. Employment records
 - d. Prison/jail/parole/probation records
 - e. Certified copies of convictions
 - f. Old case files/Court files
 - g. Old allocutions/plea minutes/sentencing minutes
2. Prior statements of witnesses
 - a. Statements of defense witnesses in your possession should not be provided to defense counsel as Rosario
 - i. Not Rosario if you're not calling witness
 - ii. Why make it easier for defense witness

- iii. Turn materials over after defense direct exam
 - b. Prosecution is entitled to "Reverse" Rosario materials prepared by defense attorney, paralegal or investigator
 - i. **Except** - not entitled to materials prepared from conversations with defendant himself
 - see People v. Damon, 24 N.Y.2d 256 (1969)
 - c. Ask witness on stand if spoke to defense counsel, defense investigator or any other defense associate. Ask if any of those people took notes or recorded any of the prep sessions. If yes, and no Rosario was provided, ask counsel to provide it again.
3. Prior testimony of witness
- a. Lay proper foundation for use in impeachment
 - i. Remember, impeachment is used only to challenge witness' credibility, and is not evidence in chief
 - b. If have audiotape of witness, and he denies making statement, be prepared to play tape - don't rely on transcript - make sure correct transcript before use
 - c. Ask for stipulation from counsel that read accurately from Grand Jury minutes or sworn transcripts if witness claims can't remember

IV. Execution of Cross-examination

- A. Cross should not be predictable
 - 1. Prepare an outline of areas you want to cross the witness on
 - 2. Move freely from one topic to another
- B. Using Prior Inconsistent Statements or Testimony
 - 1. Know your foundational requirements
 - 2. Oath taken, swore to tell truth just like today
- C. Set subtle traps for witness
 - 1. Use innocuous questions to set up big questions
 - 2. Witness shouldn't see questions coming so won't be able to plan answers
 - 3. Never ask a defense witness "why"
- D. Attitude during Cross
 - 1. Be polite with witness until you're given a reason to act otherwise
 - 2. Avoid big words when can make point with small words

E. Don't be afraid to ask "test" questions

1. If a witness admits to using drugs, ask him where he got the drugs - if answers a friend, press for the friend's name. Don't quit until you get an answer or you've made the point that the witness is not credible because evasive and only answers that which he wants to answer.

VI. Cross-examination of Defendants

A. Preparation

1. What will be needed to effectively cross-examine a defendant
 - a. All prior statements of defendant including transcripts of video/audio statements
 - b. Medical/psychiatric records
 - c. Employment records
 - d. Prison/jail/parole/probation records
 - e. Certified copies of convictions
 - f. Old case files/Court files
 - g. Old allocutions/plea minutes/sentencing minutes

B. Suppression hearings

1. Always litigate the voluntariness of statements made by defendant, even if do not plan to use on direct case - use of suppressed statements
 - see Harris v. New York, 401 U.S. 222 (1971)

C. Sandoval hearing

1. The obvious: prior felony convictions and underlying facts
2. The unlikely: prior immoral, vicious or bad acts
3. The obscure: aliases, YO underlying facts, etc.
 - see People v. Walker, 83 N.Y.2d 455 (1994) - trial court's discretion to permit cross of defendant about prior uses of aliases
 - see People v. Garcia, 169 A.D.2d 358 (1st Dep't 1991) - improper cross to ask defendant if, on cases where defendant later pleaded guilty, if defendant had lied to Court at arraignments when pleaded not guilty
 - see People v. McGee, 68 N.Y.2d 328 (1986) - Sandoval ruling does not bar a co-defendant from cross-examining defendant concerning prior convictions and bad acts about which prosecution was precluded

D. Crossing a defendant

1. Follow same rules as for any other witness but Sandoval
 - a. Corroboration of prosecution witnesses
 - b. Undermine credibility
 - i. only witness with interest in outcome of case
2. If self-defense case, get defendant to admit he killed victim on purpose
3. Bring out that he gained knowledge of law after his arrest (i.e., acting in concert with robbery or felony murder)

VII. Life after Cross-examination

- A. A successful cross does not have to be a lengthy cross
 1. Get in, get what you want and then get out
- B. Do not forget to integrate your cross into your summation
 1. Use corroboration for your witnesses
 2. Point out witness' bias/reasons to misrepresent facts
 3. Compare/contrast your witnesses to defense witnesses
 - a. Get Court's charge on credibility and use buzz words
- C. Comment not only on the answers given, but the witness' body language and "non-verbal communication cues"
 1. Did defense witness need time to answer and stall by:
 - a. asking you to repeat simple questions
 - b. repeating simple questions back to you
 - c. using evasive language (i.e., refusing to answer yes or no when called on to do so)
 - d. becoming argumentative
 2. Did witness look at jury when testifying or look down or away?
 3. Did witness look at defense for help or cues?
 4. Did defense witness make sense?
 5. Did witness' testimony on direct look staged and rehearsed but became unravelled on cross?
 6. Did witness' attitude go from cooperative on direct to evasive and hostile on cross?
- D. Remember, you probably won't win a case with good and effective cross-examination techniques. However, if your cross is sloppy or unprepared, you will lose cases.

KYLE C. REEVES
Kings County District Attorney's Office
350 Jay Street
17th Floor
Brooklyn, New York 11201
(718) 250-2413 (Office)
(718) 250-2407 (Fax)

Kyle Reeves has been an Assistant District Attorney in the Kings County District Attorney's Office since 1990, and currently serves as an Assistant District Attorney in the Rackets Bureau, having spent almost fourteen years as a trial attorney and supervisor in the Homicide Bureau.

After becoming a felony trial attorney in 1993, Mr. Reeves has conducted in excess of one hundred and twenty jury trials to verdict, including over ninety-five murder cases. Since 1995, Mr. Reeves has prosecuted over thirty First Degree Murder cases, including five cases in which the District Attorney of Kings County had sought the death penalty.

Of the numerous high-publicity cases in which he has been involved, the most notable cases have been the successful prosecutions of the two men responsible for 1999 robbery and murder of a young social worker in Prospect Heights, Brooklyn, often referred to as the Amy Watkins case, and the successful prosecution of four men who robbed and killed a young man named Christopher Rose in 2004, referred to as the iPod case; both cases received international media attention. In April of 2007, Mr. Reeves traveled to the eastern European country of Montenegro, where he assisted local prosecutors who, because of the lack of an extradition treaty with the United States, agreed to prosecute a Montenegrin national accused of killing his girlfriend in Brooklyn in 1990.

Mr. Reeves is a graduate of the State University of New York Maritime College and Brooklyn Law School.

Mr. Reeves is a regular speaker at the New York Prosecutor Training Institute Spring and Summer Colleges on all issues involving homicide prosecutions and capital case litigation, including expert witness issues, presentation of evidence in complex circumstantial evidence cases, and other related issues.