

Effective Cross-examination Techniques:
A Prosecutor's View

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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

