

Preparing For Your First Cross-Examination
Techniques For Effectively (And Simply) Cross-Examining Witnesses

I. Introduction 2

II. Preparing To Cross-Examine A Witness 2

 A. Get Everything You Can About The Witness 2

 B. Brainstorm Topics For Your Cross-Examination 3

 C. Create Your Cross-Examination Outline 5

 D. Get Exhibits To Use During The Cross-Examination 9

 E. Example Cross-Examination Outline Following This
 Process 10

 F. Plan Defensively 11

III. Practicing Your Cross-Examination..... 12

 A. Display Power And Authority In The Courtroom..... 12

 B. Quickly Establish Favorable Facts Then Cross 13

 C. What To Practice 13

 D. Practice Impeaching A Witness With A Deposition
 Transcript 16

 E. Controlling The Witness During Cross-Examination 17

IV. Performing Your Cross-Examination 19

 A. The Morning Of Your Cross-Examination 19

 B. Controlling The Adrenaline Rush..... 20

 C. Re-Cross and "As If" 20

V. Conclusion 20

Prepared By

William C. Wagner
Taft Stettinius & Hollister LLP
One Indiana Square, Suite 3500
Indianapolis, IN 46077
(317) 713-3500
wwagner@taftlaw.com

I. Introduction

Cross-examination is a trial lawyer's greatest tool. It allows you to tell the rest of the story immediately after your opponents have tried to cast their claims in their best light. And, it provides you with an opportunity to completely disrupt and discredit your opponent's case in the middle of their case-in-chief. During cross-examination, you testify and the witness ratifies. You must remain in control and poised, and not lose sight of your ultimate purpose.

When I learned how to drive a car, I learned skills and ability. Skills involved the classroom work, learning the rules of the road, and what the warning signs along the road meant. Ability involved actually getting behind the wheel and driving. During driver's ed, I killed the engine, ran over curbs, and whenever a light turned yellow either gunned it or braked too hard, surely exhausting the instructor. But after lots of hard work, when it came time for my driver's test, I was ready. To cross-examine a witness well, you must have both skill and ability. You must work on and polish your cross-examination outlines. And, you must practice asking your questions to an uncooperative witness. You only have one chance to cross-examine each witness.

This outline is organized into two sections; the first focuses on skills, the latter on ability.

II. Preparing To Cross-Examine A Witness

A. Get Everything You Can About The Witness

Once you've been assigned a witness to cross-examine at trial, your first job is to figure out why your opponent is calling this witness.

__ What is the witness's story?

__ How does this witness support your opponent's case-in-chief?

Once you have an understanding of the witness's role in the case, you need to gather everything you can about the witness. You do this in order to determine the strengths and weaknesses of the witness's story, the witness's credibility, and whether the jury or judge will like the witness.

__ Has this witness been deposed?

__ Did the witness give a statement?

__ Have other witnesses testified or given statements concerning this witness, the witness's testimony, events observed by this witness, or the witness's reputation for truth and honesty?

__ Do you have any exhibits that the witness prepared?

__ Do you have any exhibits that were sent to or received by the witness?

__ Do you have any exhibits the witness should have seen had the witness been diligent?

__ Can the witness help lay the foundation for any exhibits you want to enter into evidence?

__ Have you done a search on Google, Facebook, or other on-line media for this witness?

__ Has the witness been awarded medals while serving in the military, worked his or her way through school, or acted in some honorable and charitable way?

__ Did the witness quit school? Has the witness been fired from one or more jobs, filed for bankruptcy, been a party to a lawsuit, or been convicted of a felony or crime of dishonesty?

Once you know the witness's role in the case and have the universe of documents about the witness, you can begin outlining your cross-examination.

B. Brainstorm Topics For Your Cross-Examination

__ Prepare a chart showing each party's claims and defenses and the elements that must be proven to support each claim and each defense. Review the witness's story against each element that each party must prove for each claim and defense.

__ Is there is anything that you can use your opponent's witness for to help prove your case? There is no better feeling in closing argument than telling the jury how your opponent's witness actually supported your claims or defenses. Once you've determined whether you can use the witness to bolster your case, you must then brainstorm topics for the cross-examination.

You must plan with the end in mind and work backwards.

__ What points will you drive home about the witness or the witness's story in closing argument?

__ Is what you'll say about the witness in closing argument consistent with your theme of the case?

__ What is your goal with this witness? Is it to obtain helpful information, qualify the evidence given, impeach the evidence given, or impeach the

witness? For example, will you argue that the witness didn't really see what they thought they saw? Will you argue that the witness is biased and shouldn't be believed? Will you argue that the witness is simply lying for money or to avoid paying money rightfully owed?

__ What will the jury have to believe or reject for you to win your case? (Never argue a point in cross-examination that will require the jury to reject their common sense in order to accept your position.)

__ Think about cross-examining the witness from the world of no's, could've's, and should've's.

__ What did this witness do compared to what an ordinary person would have done under the same circumstances exercising reasonable care?

__ What did this witness do compared to what they could have done?

__ What did this witness do compared to what they should have done?

__ What records and exhibits can you use with this witness?

__ Is there an exhibit you can use to show this witness is mistaken or not believable?

After you brainstorm and prepare a list all the possible topics for cross-examination, you must then narrow your topics. After sifting through all of this information, pick your top 10 topics or points for cross-examination that you will want to outline into chapters.

__ Pick your battles. Don't argue a point that you'll lose or that doesn't matter. Don't waste valuable time fighting trivial matters.

__ Start strong and end strong. You will want to start your cross-examination on a strong point and end your examination on an equally strong point. Cross-examine the witness on weaker points, meaning those points that you must cross-examine the witness on, in the middle of the examination. (Normally, you never cross-examine the witness on a weak point, but sometimes you have to tackle an issue head-on or expect to hear about your failure or fear to do so in your opponent's closing argument.)

While you may outline 10 chapters for cross-examination, you may likely only use 4 to 6, if that many, for the actual cross-examination. The reason you over-prepare is because what you may think of as important before trial may become less important during trial based upon what other witnesses have said as the trial progresses. Also, an area that did not make your final cut (of

your 4 to 6 chapters) may become important during trial so you will thus be prepared to cross-examine the witness when given the opportunity.

C. Create Your Cross-Examination Outline

Follow the chapter method to create your cross-examination outline. That is, you want to organize your cross-examination like chapters in a book, dividing the case into understandable and separate parts. Once you've divided the chapters, you will then want to put them into a persuasive order. For example, if you are cross-examining plaintiff's medical expert witness who claims plaintiff's exposure to a certain chemical resulted in disease, you might organize the cross-examination chapters into: (1) the witness's lack of specialized knowledge and experience with the particular disease, (2) the witness's failure to follow accepted scientific methodology when determining whether the exposure resulted in disease, (3) the witness's failure to eliminate other causes, (4) the witness's use of cherry-picked data to support his opinions, and (5) the exclusion of the witness's testimony in other cases because the witness's use of flawed methodology and cherry-picked data.

__ Ask yourself, what is the point I want to prove with this chapter? Is my point consistent with my theory and theme of the case? Then, for each chapter, you must write down all the facts and inferences that support your point.

__ Review the facts and inferences, and see if you can chunk your facts together that help establish each point. This will narrow your questions for the cross-examination.

__ Put the facts together into a logical sequence, for example chronologically, in a format that will make sense to the jurors and tell your client's story.

__ Tell your story, or the rest of the story, by working backwards. That is, ask yourself what are 10 or 20 questions I could ask the witness that lead up to the indisputable point to be made in closing argument?

__ Show don't tell. Unbundle the facts in questions rather than giving conclusions. Jurors want to figure things out for themselves. When they figure things out for themselves, they own the idea. When jurors own an idea, your opponent's attack on those ideas will fall on deaf ears.

__ Unbundle the facts that establish your ultimate point by turning each fact into a question.

__ Draft your questions so that you testify and the witness ratifies. This means you are preparing the questions by putting words in the witness's mouth and only allowing the witness to answer your questions with a yes, no, or I don't know answer.

__ Can you prove each fact in your cross-examination outline through another witness's testimony or an exhibit?

__ Be brief. Get up, make your points, and sit down.

__ Ask only leading questions. The only time to ask a non-leading question is when you have a witness pinned down and you don't care what the answer is. This only happens in rare circumstances. Open ended questions, like why or how come, will usually result in the witness testifying for 10 minutes giving you every reason why they are right and your client is wrong. If you try to cutoff the witness, it usually ends up with an objection from your opponent, the judge saying the witness can finish his answer, and you having to just take it.

__ Ask short questions. The longer the question, the more wiggle room the witness has to evade answering the question you want answered. Long questions typically result in long answers.

__ Ask one fact per question. Build your cross-examination one fact at a time, like a mason building a house one brick at a time. When you only ask about one fact per question, there will be little room for the witness to avoid answering the question in the way you would like it answered.

__ Cut the fat. Never begin questions with the witness's name, set ups, or long tag lines. Never say "Mr. Smith, it would be true would it not, that when you saw the light, the light was red, is that correct sir? Instead ask "The light was red?"

__ Looping. Loop favorable answers into your next question to emphasize your point. For example, "Even though the light was red, Mr. Jones's car didn't slow down?"

__ Use plain words. Only use words ordinary people would understand. Avoid asking any questions with technical words or jargon. In other words, call a car a car and not a vehicle. You say the witness tried to shade the truth or lie, not that they engaged in pure sophistry?

__ If you have to use technical terms, have your expert or a good dictionary help you explain the technical terms in plain English or with analogies that the witness will have to agree with. You explain the technical terms in lay terms. Don't let the expert witness explain technical terms to you or you give up the opportunity to be seen as the trusted teacher, leader, helper, and guide.

__ Use old words. Your only purpose is to communicate in a way that jurors completely and easily understand. You want them to get the point you are making. Use old words in a way in which they are commonly used. Don't lose

jurors by using fancy words, or words outside their ordinary meaning. Trial consultants often say the average juror reads at an 8th grade level. While you must strive to be understood, however, don't fall into the opposite trap of talking down to the jurors.

__ Avoid wiggle words, like important, fast, slow, or some other characterization. Crafty witnesses will use these words to turn your questions into open-ended questions and begin spouting their views.

Some say never ask a question to which you don't know the answer. Some of my best cross-examination has come from asking questions where I wasn't sure what the answer would be, but had a gut feeling it would be a good answer. Go with your gut feeling based upon all of your preparation before asking a question in which you don't know the answer. Make sure you discuss this with your client before you ask the question so they know what is going on in case the question backfires. Sometimes, the risk is worth the reward, but often for new lawyers it is not.

__ Use headlines to transition between topics. Some lawyers don't like to use headlines because they feel it may tip the witness off to their line of examination. It may, but you don't want to be so coy that you lose the jurors in the process. A headline may be as simple as "I have finished my questions about the day of the accident, and now want to talk about the damages you are claiming. Do you understand?"

__ Do not cross-examine a witness in a way that allows the witness to answer the ultimate question.

__ Do not repeat the direct examination.

__ Cross from general to specific. Talk about how reports are generally prepared before talking about how this witness prepared this report.

__ Sequence. Prepare your cross-examination outline in a manner that makes sense sequentially. Often times, it makes sense to tell a story from beginning, to middle, to end. You never want to be seen as someone who is disorganized or trying to hide the ball. There is nothing wrong with cross-examining a witness in a manner that is not chronological, but it has to be in a manner that does not lose the jurors.

__ Perspective. Always consider whether you can use the witness's perspective to bolster your cross-examination. Can you use the witness's perspective in viewing or participating in the facts in a way to limit or expound their cross-examination.

__ Have a point. After you've outlined your cross-examination, have a colleague on the trial team or just one of your fellow lawyers read it to see if he or she gets your point. If they don't, the jurors likely won't either so consider revising the outline.

__ Have a portable point. Don't just make a point, but make one that you can use again in cross-examining another witness or in your closing. If you don't have a point, and aren't forced in the position of having to stall for the arrival of your own witness, sit down and stop asking questions.

__ Are there any limitations on your cross-examination based on the rules of evidence or pretrial rulings of the court? Never purposely ask questions that you know will violate the court's pretrial rulings.

__ Consider whether your cross-examination will be viewed as petty or stale and eliminate it.

__ Stretch your questions that discredit the witness. When you have a great set of facts to discredit a witness, stretch out your questions to emphasize why the witness's testimony is not believable. Instead of asking 10 questions, see if you can stretch it to 20 without offending the jurors or the court.

__ Tags, like ending each question with the word "true" and "right," may be helpful in training the witness how to answer questions on cross-examination. Once you have the witness trained, however, you can eliminate the tags. If your opponent claims that you are simply making statements and not asking questions, you can return to using tags to clearly make your statements into questions.

__ Tie bias to credibility. When the witness says the facts don't matter because of whatever reason, follow up their answer by exposing the bias.

A. I just know it wasn't his fault.

Q. Mr. Jones is your brother?

A. Yes.

Q. You love your brother?

A. I wouldn't lie for him.

Q. The jury will decide who to believe and why.

__ Polish your outlines. Is your theme to paint your client as the underdog? Have you asked your questions in a manner that paints your client as the underdog?

__ While rules can sometimes be broken, try to stick to these rules until your ability provides you the confidence to deviate from the rules.

D. Get Exhibits To Use In The Cross-Examination

Read every exhibit the witness read, signed, touched, should have read, and should have known about. Is there a report you can use to impeach this witness? Is there an email that undermines the witness's new story? Always think of an exhibit you can use for each witness even if you decide not to use any exhibits with the witness at trial.

Once you have your exhibits, make sure you don't fall into the most common mistake new lawyers make with exhibits on cross-examination, which is failing to build up the credibility of the exhibit at the time it was prepared before trying to hit the witness with the impeaching statement in the report.

When you intend to cross-examine a witness on a statement in a report, build up the credibility of the report before addressing the statement you want to highlight. Consider using a blank report before using the report you want to hammer the witness with during cross-examination.

When you impeach a witness with an exhibit, you must show why it was important for the witness to accurately complete the report and close all doors and escape routes that could allow the witness to wiggle out of an impeaching statement.

For example, say you want to impeach an ambulance attendant with something the attendant wrote in their report. Work from general to specific. Ask yourself why do ambulance attendants prepare reports? Do doctors at the hospital rely on statements in the ambulance attendant's report? Will doctors at the hospital rely on statements in the report in determining cause of injury when making a diagnosis? If attendants have 5 runs a day, work 5 days a week, and the accident happened 3 years ago, they probably had better memory of the events when they prepared their report than they do today. Your job is to show why it is important for the report to be filled out accurately and completely at the time the report is prepared. You must also establish that the report would include all relevant and important information before you ask the witness about a statement or omission in the report or the witness may provide an after the fact excuse to wiggle out of the statement or omission. You must close all doors and escape routes before attacking the witness with the statement. Once you have the facts, then turn them into questions.

E. Example Cross-Examination Outline Using This Process

For example, say you represent the plaintiff in a toxic tort case and want to prove the defense expert is offering an opinion outside the scope of expertise. Following the chapter method, your first draft cross-examination outline might look like the following:

Brainstorming: Chapter on witness's lack of relevant experience.

While the witness is a toxicologist, he is not an epidemiologist and he is not board certified in occupational medicine. This is important because experts in those fields specialize in determining whether certain chemical exposures (and, in particular, exposures in occupational settings) may result in people contracting disease. The witness has never diagnosed or treated a patient who has been exposed to this chemical, and (unlike our expert) has never published any literature or a risk assessment on the chemical.

First Draft Outline: Writing questions out like you would like to ask them at trial followed by a citation to the record if you need to impeach the witness.

- I. Lack of relevant experience.
 - I want to talk about your background. Do you understand?
 - You are not an epidemiologist, are you? (Dep. 14:12-14:15)
 - You are not board certified in occupational medicine? (15:2-15:18)
 - You have never been asked to diagnose a person exposed to XYZ chemical? (17:2-17:5)
 - You have never been asked to treat a person exposed to XYZ chemical? (17:6-17:9)
 - You have never published a risk assessment on any chemical, have you? (17:23-18:2)

Trial Cross-Examination Outline: Writing key words for each question so that you'll be forced to ask the question thinking on your feet, with a citation to the record if you need to impeach the witness. (Typically in 18-point type.)

- I. Lack of relevant experience.
 - Background
 - Not epidemiologist? (Dep. 14:12-14:15)
 - Not board certified - occupational medicine? (15:2-15:18)
 - Never asked to diagnose person exposed to XYZ chemical? (17:2-17:5)
 - Never asked to treat person exposed to XYZ chemical? (17:6-17:9)
 - Never published a risk assessment on any chemical? (17:23-18:2)

F. Plan Defensively

__ Are there any pretrial motions in limine you should file to limit your opponent's use of this witness at trial? What anticipated areas of the witness's direct examination should the court curtail?

__ Are there any objections you might raise when the witness is testifying at trial?

__ How should you state your objections? What are your opponent's best response to your objections? How will you reply to your opponent's responses?

__ Are there any legitimate objections you can raise during the witness's direct examination to disrupt the direct examination and allow you to score some points with the jurors?

__ Are there any objections you could raise, but won't because the testimony actually helps your case or allows you to argue a point you might not otherwise be allowed to argue?

__ Are there any areas where you have to tip-toe through to avoid opening the door to a line of questioning that you want to keep out of evidence?

Think about the record on appeal.

__ What are the most likely areas of direct where you must object to the testimony offered to preserve your arguments on appeal?

__ Do appellate courts require objections to this evidence be stated in a certain way?

__ Do you want to have a 2-page trial brief on the issue ready to hand to the judge or a copy of the key case ultimately excluding the evidence with you at trial to hand to the judge when you object with the important text highlighted in bright yellow?

Now that you are prepared to cross, its time to hone your ability and practice.

III. Practice Your Cross-Examination

A. Display Power And Authority In The Courtroom

There are two ways that experienced counsel display power and authority in the courtroom. One is to control space; the other is to appear relaxed. If you ever watch a nature show with a lion in the wild, you'll see that the lion displays power and authority by controlling the space around them and appearing relaxed. Lions walk slowly, mark their territory, and lay down completely relaxed when water buffalo are racing by them. The same thing happens in the courtroom. Experienced counsel moves with purpose. They approach a witness with intent, move toward the jury to show an exhibit, mark their territory by putting a hand or an exhibit on their opponent's table, and don't appear frazzled when a witness goes off on a tangent.

When a witness goes astray, experienced counsel may cross their arms and look away, like ignoring a disobedient child. When the witness finishes his peace, experienced counsel will then drill into the witness "Are you ready to answer my question now? My question was...."

A diminutive lawyer can increase their space by standing away from the podium and placing their hand on the podium or a flip chart, thus increasing the space they occupy in the courtroom. When you cross-examine the witness, will you cross-examine the witness with your jacket buttoned or unbuttoned? An unbuttoned jacket makes you appear relaxed as though you are in charge. Will you cross-examine the witness from behind, near, or in front of the podium? Will you lower or raise your voice for effect? Will you emphasize any words in your questions? Voice, inflection, tone, demeanor, and movement must all be planned with a purpose.

During cross-examination, you must stand a little taller and have a firmer voice. You must get from behind the wood. Try to get from behind the podium or table so there are no barriers between you, the witness, and the jurors.

Your hands are separate acts. If you're nervous, keep one hand comfortably on the podium. If you are ever in doubt, remember to touch the sides of your pants to keep your hands still.

What gestures will you use to enhance your message? If you have 5 points in a line of cross-examination, will you raise a finger on one of your hands for each point you make and keep your hand in the air for a few moments (with your fingers spread wide) to let the fact sink in with the jury?

Are there any summary exhibits you can prepare to enhance your message?

Will you use a flip chart during your cross-examination of the witness? Flip charts are often used to write down the high points of your cross-examination. In most cases, everything you write down will be written down by one or more jurors exactly as you wrote it and taken to the jury room during deliberations.

B. Quickly Establish Favorable Facts Then Cross

If you are going to use the witness to establish a point before cross-examination, make sure the jury knows what you are doing and that the real cross-examination hasn't started.

- Q: Before we start your cross-examination, I'd like to discuss the written notice, Exhibit 15. You provided the notice to the guard, right?
- A: Yes.
- Q: Ok.

Then pause, reposition yourself to baseline, and begin your cross-examination.

C. What To Practice

Everything ever written about cross-examination says you must practice, practice, and do more practice. The problem for most lawyers is that they don't know exactly what they are suppose to practice and why? The reason you must practice your cross-examination is because your mind will be racing 100 miles per hour, thinking 5 questions ahead during the examination.

__ You must practice asking the questions in your outline as written.

__ After you're comfortable reading the questions in your outline, you must draft a new outline just listing the operative facts. This new outline of just facts will force you to think on your feet and ask questions on the fly.

__ You must practice asking questions based on the new outline of just operative facts.

__ You must practice your cross-examination without your notes. A cross-examination without notes, even if you don't hit every fact or say every question correctly, is 100 times more powerful than someone simply reading questions.

__ You must practice asking your questions out loud. Your questions must be loud enough that the judge and juror farthest away from you can hear you. At first, you'll think you're screaming your questions, but in reality you will simply be asking your questions loudly to include everyone into your discussion.

__ You must practice handling exhibits. How will you handle the exhibits? Where will you stand when you display the exhibits? Will you take a chart, aerial photo, map, or blow-up over to the jury to show them the exhibit? How will you call the document up for electronic display? Will you have the jurors flip to a page in their exhibit notebooks? (Remember, never use anything bigger than a 3-inch notebook for exhibits. There is nothing worse than to see elderly or pregnant jurors upset for having to pick up and struggle with a 10-pound, 5-inch thick notebook that they have to awkwardly balance it on their lap and desperately try to find the right page).

__ You must practice responding to objections and asking to approach the bench to avoid appearing like bickering children to the jury.

Everything you do in the courtroom must be planned and practiced. In fact, everything you do when you are five miles away from the courthouse must be thought out. Don't run yellow lights. Open the door for strangers. Be polite. Never state a cross word or give a cross look to anyone because you are always on stage. Be especially nice to the court's staff, your staff, and your opponent. This is the time when you must take the high road. (Hopefully, you live your life this way anyway.)

__ Practice asking your questions to real people. Enlist your colleagues, spouse, friends, or neighbors for help. Let them know their role and practice your cross-examination on them. If your questions are too long or too confusing, you'll learn it when you're asking your questions.

__ Practice for a fight. Let the person who is pretending to be the witness know that he or she should fight you along the way by refusing to answer your questions directly. Tell them not to provide you yes or no answers. Cross-examination is not a natural skill. It is difficult for most people to put words in another person's mouth and testify for them in such a way that you either take baby steps or giant leaps to reach the point you want to accomplish.

__ Never begin your cross-examination with a friendly introduction. Never say "Mr. Smith, my name is John Doe and I represent the defendant. I am going to ask you some questions now during this part of the trial called cross-examination. Are you comfortable so that we may begin?" The jurors know who the witness is and they expect you to ask questions. Instead, get to work with a headline.

__ Use headlines to transition between topics. "I want to talk to you about the car accident you saw. Do you understand?" Using assertive language tells the jury you have power and authority, you are running the cross-examination, and to get ready.

__ Terry MacCarthy suggests starting the cross-examination with one of three phrases. “Is it fair to say...,” “We can agree...,” or “The truth is...” MacCarthy uses these phrases to put a hostile witness in a position where he must accede to the strength of your examination.

__ Don’t fence with the witness. Always maintain control. Never let the witness get the better of you.

__ Don’t let the witness explain his answers. If a witness starts to explain his answer, put up your hand like telling a child to stop and say we’ll get to that later, then decide whether you get to that topic at all.

__ Listen to answers. If the witness gives you a great answer, loop the answer into the next question.

__ Don't repeat the direct. There is nothing to be gained by retelling the story, especially as your opponent already told it. Instead, focus on telling the rest of the story.

__ Avoid asking the one question too many, meaning the ultimate conclusion. This means save the explanation for closing.

__ Watch your tone. Cross-examination is not the time to be cross.

__ Nail the witness with the contradiction at the time of their false testimony. If the witness said the light was green and you know he said the light was red in his deposition, nail him immediately with the false testimony. If you nail him later, you will lose the impact of the contradiction and lose an opportunity to train the witness that each lie will immediately be impeached.

__ Don't give up the opportunity to advocate.

__ Watch your speech. Remember - low, slow, and loud. Ask your questions in a low voice. Ask your questions slowly. Ask your questions loud enough to be heard by the jurors farthest away. You will never hear a judge say you are asking your questions too slowly. (You may have a judge tell you to speed up and make your point. Try to listen to the judge, or appear to listen to the judge, but never skip over questions that you have to ask to preserve your record on appeal.)

__ Don’t say “uh-huh,” “un-huh,” and “and.” Just be mindful of this if you use these phrases and words and try to say them less often.

__ Don’t read your notes while the witness is answering your question. Don't appear to cheat. Read when you take a drink of water. If the judge presses you, tell the judge you are cutting out questions and actually saving time.

__ Don't talk and walk at the same time. All your movement must be planned. Reset to baseline then begin asking your questions.

__ Tag lines. Start with them to train the witness, but you can eliminate them soon thereafter.

__ What gestures will you use that support your argument?

__ Will you outline key answers on a flipchart as you are cross-examining the witness? Unless you decide to not cross-examine the witness or only make a point or two with the witness, you should consider outlining some key points on a flip chart while cross-examining the witness to use later in closing argument, especially if it is a lengthy trial. Practice your penmanship so that your writing is big and clear enough to be seen by the judge and jurors.

D. Practice Impeaching The Witness With A Deposition Answer

Practice your questions on an out of control witness. Tell the person role playing the witness to fight you on every question. You need to be able to control a witness without looking to the court for help. During this practice session, make sure you fight for every answer. You can't go to a new topic until you've heard the answer you are fighting for. During this session, make sure you don't get angry, make mean faces to the witness, or lose your cool. Consider videotaping your performance. Maybe you scrunch your eyebrows unconsciously? You'll never know unless you videotape your performance or the witness gives you critical feedback.

Know the rules of evidence pertaining to cross-examination: Rules 607 (impeachment), Rule 612 (refreshing memory), and Rule 106 (the rule of completeness).

Practice impeaching a witness with a deposition transcript. Do this until it becomes as routine as knowing how to brush your teeth. There are 3 parts to impeachment: **Commit**, **credit**, and **confront**.

1. **Commit** the witness to his current position;
2. **Credit** the circumstances of the witness's prior statement; and
3. **Confront** the witness with the impeaching statement.

Commit:

- Q. You say the light was green?
A. Yes.

Credit:

- Q. Do you remember giving a deposition in this case?
- Q. The deposition was at a court reporter's office?
- Q. Your lawyer was there?
- Q. I was there?
- Q. Just like the court reporter here in court, there was a court reporter at your deposition?
- Q. The court reporter swore you in just like the bailiff swore you in here today?
- Q. You swore to tell the truth?
- Q. At the deposition, I asked you questions?
- Q. You answered those questions?
- Q. The court reporter typed the questions I asked.
- Q. The court reporter typed your answers.

Confront:

- Q. Counsel, page 45, line 3. [Looking to the witness] Read along with me and tell me if I read this right?
 - Q. What color was the light?
 - A. The light was red.
- Q. Did I read that right?

Stop! Do not ask any other questions about the impeaching statement. If the witness starts to talk, say there is no question pending. Then ask your next question in your outline. Stay in control.

E. Controlling The Witness During Cross-Examination

You can control the witness by using short questions, with plain words. There are two circumstances in which the witness will fight with you over the answer; first if they are confused by the question, or second if they want to avoid answering it.

If the witness is confused, break down the question into smaller facts.

- Q. You knew your company signed the contract?
- A. No, I'm not sure when I knew that.
- Q. Let's break that down then. You were at work on August 2, 2009 [looking at the date of the contract]?
- Q. At some point that afternoon, you were in the main conference room?
- Q. Mr. Jones was there?
- Q. Mr. Jones is your company's president?
- Q. Ms. Smith was there?

- Q. Ms. Smith is your company's vice-president?
- Q. This contract was in the room?
- Q. This contract was on the table?
- Q. During this time, when you, Mr. Jones, and Ms. Smith were in the room, you were meeting to discuss whether your company should sign the contract?
- Q. Mr. Jones signed the contract.
- Q. Ms. Smith signed the contract.
- Q. You were at that meeting where Mr. Jones and Ms. Smith signed the contract?
- A. Yes, but I didn't sign the contract?
- Q. Sorry, my question was whether you knew your company signed the contract, and the truth is you did, right?
- A. Yes.

Alternatively, use repetition to assert control over the witness.

First, repeat the question, but ask it slower and emphasize the last word.

Second, repeat the question, but begin the question with the witness's last name.

Third, reverse the question to ask it in the negative.

- Q. You knew your company signed the contract?
- Q. You knew your company signed the **contract**?
- Q. **Mr. Adams**, you knew your company signed the **contract**?
- Q. **Mr. Adams**, you're not saying you didn't know your company signed the **contract**, are you?

Consider punishing the witness for trying to make you look bad. Weave the answer you fought so hard for into your next few questions to show that the witness knew the answer all along and was being a difficult witness.

- Q. The contract you knew your company signed, was to begin effective August 1, 2008?
- Q. To prepare for the work under the contract you knew your company signed, you called a meeting?

Punish the witness unless the jury will think you are being haughty, mean, or nasty, or that the witness was confused.

Another form of this is to use shorter questions.

- Q. You knew your company signed the contract?
A. You know they did.
Q. That mean “yes”?
A. Yes.
Q. You knew you’d have to ship goods as early as August 2?
A. You could say that.
Q. That mean “yes”?
A. Yes.
Q. To get those goods ready to ship by August 2, you had to order supplies?
A. Well you have to order supplies to make the goods.
Q. Is there some reason you don’t want the jury to know you had to order supplies to ship the goods by August 2?
A. No.

When crossing on declarative statements, sometimes an opponent will object and say "counsel is not asking questions." Just add the word “right” to the end of your question and it makes your statement into a question. Have fun and ask the court reporter to read back the question, and re-ask it with the word “right” at the end and the jury will have heard it 3 times. Then look over to your opponent for being petty.

IV. Performing Your Cross-Examination

A. The Morning Before Your Cross

Dress conservatively. You want the jurors focused on the message and not the messenger. Wear loose fitting clothes so jurors don’t see your arms shake with fear. Wear a white shirt or light blue shirt. Trial is not the time to wear the olive or pink shirt your friends think looks so nice on you. Wear a tie that doesn’t scream look at me. Do not wear clothes that are too tight or too short. Skirts should be just above the knees. Wear comfortable shoes you could stand in for 10 hours on a concrete floor. Never wear clothes that are too tight or too fashionable or unfashionable. Remember, you want the jurors focused on the message.

Eat breakfast, but don’t drink too much coffee. The adrenaline rush will carry you through the day. You don’t want to be remembered as the lawyer who fainted or had a heart attack during his cross-examination. Some lawyers drink soda to keep their vocal cords lubricated. For others, water is fine. Practice talking slow, low, and loud.

The more of your face the jurors see, the more they trust you. This means push your hair back if you have long hair, shave rather than have a scraggly beard,

and consider featherweight glasses or no-frame glasses rather than big, dark frames.

B. Controlling The Adrenaline Rush

To control the adrenaline rush, walk the stairs or around the block before the cross-examination begins. During the cross-examination, consider isometric exercises, like trying to push your toes into the ground. This will control your fight or flight wiring.

C. Re-Cross And “As If”

Do you re-cross? Seldom is it necessary and it often gets better play with the jury when you pass on re-cross because it shows you are not afraid of anything your opponent said during re-direct

As if. Sometimes you will get nailed with an answer you were not expecting. Sometimes its better to act “as if” you expected that answer all along, and simply say “exactly” and move to another point.

Sometimes the witness will give you an answer so favorable and so unexpected you won’t know what to say to follow up. In those instances, simply ask “What makes you say that?” and let the witness explain. (Yes, this breaks a rule, but let the witness explain.)

Finally, if you do get tripped up or lost, act “as if” you know exactly what you’re doing. The jurors may think you simply lost your place or are thinking of your next question.

V. Conclusion

Great cross-examinations result from skill, ability, and lots of hard work. By working hard preparing to cross-examine a witness and practicing your cross-examination with a difficult witness, you will be comfortable in the courtroom. You will perform better cross-examinations, and you will turn into the “go to” person when cases are ready to be tried.