

CROSS EXAMINATION TECHNIQUES

The purpose of cross examination is to NOT to destroy the other sides' witnesses. The purpose is to show that you are the better source for information and for understanding the case. Arbitrators see cross examination as a test between information held by the witness and information held by the other side's advocate. You can win (or appear at least do better on) the test if you have information which is more believable than the witness's.

The sources of information which you have for cross examination are:

1. Witness statements which contradict the witness's testimony on direct exam.
2. Reports, studies, photographs, documents which refute the witness's version.

Another way to look at cross examination is to consider it an opportunity for the advocate to testify. On direct examination, you want the story to come out through the witness. On cross, the advocate is asking a question, but it is always in the form of a statement. The advocate is asking (demanding) the witness to agree with the statement.

Human beings, however, are not machines which will spit out machine-fed answers. Advocates must be students or astute observers of human nature. To conduct a cross-examination, the advocate must recognize that witnesses:

1. have memory lapses,
2. remember less as time passes,
3. their powers of observation are limited by their own eyesight, poor lighting, distractions, etc., and
4. they are influenced by who is involved (a relative or friend is more important than a stranger), what happened (a frequent experience is easier to recall than a new one), and where it happened (*e.g.*, the shop floor is more familiar than the personnel director's office).

It should not be surprising to learn that a witness's testimony on direct examination can be misleading, even when it is unintended. Cross-examination is critical, as it is the only way to uncover the truth that exists within a witness's testimony.

Lawyers are taught to ask cross examination questions to which they know the answers. If that is not possible, remember that the point of cross examination is to obtain facts that you can

use in your closing argument or post-hearing brief. If you are not going to get these answers, then why cross examine? (Corollary: use direct examination in your case-in-chief to win.)

Most cases have a central issue and perhaps, a number of side issues. An arbitrator is always looking for the central issue, upon which he or she can decide the case. That is why the most effective cross-examination is when it relates to the core issues. Time-consuming or relentless cross examination on the less-important issues is usually not helpful, and may be counter-productive.

Another technique employed by seasoned advocates is to announce with some disdain, "No questions." Apparently, some arbitrators will pick up on this small theatrical display of disgust, and agree with you that the witness is not worth the time it would take to cross-examine. Still, other arbitrators are too-seasoned (watched the trick one too many times), and would not pick up the signal you might be sending: that the witness said nothing on direct or that the witness lies and is irredeemable. In short, your decision on whether to cross-examine must be part of your overall strategy, all slated to persuade the arbitrator.

Advocates have a due process right to cross-examine a witness. Here is a checklist before embarking on a cross-examination:

1. After the witness's direct examination, are there any areas that damaged your case-in-chief? If not, consider skipping cross.
2. How important was the witness to the other side? The same percentage usually applies to your side.
3. Does the arbitrator expect you to cross examine?
4. Is opposing counsel trying to lure you into asking questions that will be helpful to them?
5. Will cross examination yield any information that is helpful to your side?
6. Is this witness peculiarly difficult? Some witnesses will cause you more grief than they can possibly assist your case.

Finally, the job of an advocate is to prepare his or her own witnesses. As stated above, all witnesses fear cross-examination

because it is unknown and dangerous territory. To set your witness's mind at ease, tell them:

1. The cross examiner will try to be your friend. He will look straight at you, wait (what seems like forever) for you to say more, and may even try to charm you. This is not a time to strike up new friendships.
2. Answer each question with a "yes", "no", or "I do not know." Do not volunteer information. If you have more to say, I can ask the appropriate question later.
3. If you don't know, do not guess. If you weren't there, say "I don't know." If you did not see it, say "I don't know."
4. You do not have to agree with the premise of the cross examiner's question or the words chosen by the cross examiner.
5. You should not help out the other side.
6. The cross examiner's job is to obtain information that is damaging. Do not try to outfox or deceive him/her.
7. Testify to the best of your recollection. That is all the oath requires of you.
8. You do not have to win the case alone. Our case is built on the testimony of all witnesses.
9. Here are the questions I expect you will be asked on cross examination: [then walk through the questions you expect your witness to be asked]