

CROSS EXAMINATION

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I. *Introduction*

Cross-examination is perhaps one of the most fundamental components of an accused's rights at trial. Through cross examination the accused is able to challenge the evidence and assertions against him. Through cross-examination, lies can be exposed and the truth advanced. Effective and meaningful cross-examination can vindicate the innocent. Despite the intrinsic value of this constitutional right to ensure justice, numerous people accused of crimes are denied effective cross examination in their cases – some are denied this tool of justice because of the courts... others because of their advocates.

Cross-examination is one of the most difficult trial skills to master. Few attorneys have the raw talent to conduct an effective, impromptu cross-examination. Most lawyers struggle with cross-examination. But besides talent; there are numerous factors that impact counsel's conduct of cross-examination including training, experience, preparation, organization and creativity. To an extent, courts have restricted cross-examination in some cases.

It is my hope that through this paper, you will be presented with an effective tool to enable you to conduct an effect cross-examination regardless of your level of skill or expertise. It is also the goal that the experienced practitioner will be presented with a tool to enable him or her to sharpen their skill as a cross-examiner.

II. *Cross-examination as a Right Worthy of Protecting*

The Sixth Amendment's Confrontation Clause provides that, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The United States Supreme Court has held that this bedrock procedural guarantee applies to both federal and state prosecutions. *Pointer v. Texas*, 380 U.S. 400, 406, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965).

And in *Crawford v. Washington*, 541 U.S. 36, 42-52 (U.S. 2004), the Supreme Court expanded an accused's right to cross examine.

The Supreme Court has observed that the right to confront one's accusers is a concept that dates back to Roman times. *See Coy v. Iowa*, 487 U.S. 1012, 1015, 101 L. Ed. 2d 857, 108 S. Ct. 2798 (1988); *Herrmann & Speer, Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 Va. J. Int'l L. 481 (1994). The framers of the Constitution would get this concept from the common law. English common law has long differed from continental civil law in regard to the manner in which witnesses gave testimony in criminal trials. The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers. *See* 3 W. Blackstone, *Commentaries on the Laws of England* 373-374 (1768). Specifically, in *Crawford* the Supreme Court observed that history supports two inferences about the meaning of the Sixth Amendment:

First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh's; that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind. Accordingly, we once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon "the law of Evidence for the time being." 3 Wigmore § 1397, at 101; *accord, Dutton v. Evans*, 400 U.S. 74, 94, 27 L. Ed. 2d 213, 91 S. Ct. 210 (1970) (Harlan, J., concurring in result). Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices. Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court.

This focus also suggests that not all hearsay implicates the Sixth Amendment's core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. On the other hand, ex parte examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.

The text of the Confrontation Clause reflects this focus. It applies to "witnesses" against the accused--in other words, those who "bear testimony." 2 N. Webster, *An American Dictionary of the English Language* (1828). "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

Crawford, 541 U.S. at 42-52. Through *Crawford*, an accused has the right to examine the maker of any testimonial statements against him. The Supreme Court through the most unlikely source, Justice Scalia, affirmed that the Constitution ensures that every testimonial assertion against the accused should be challenged.

Legendary trial lawyer Gerry Spence says that

Basic cross-examination is nothing more than a true-or-false test administered to the witness, in the course of which our story, as it concerns that witness, is told, question by question, to the witness. It makes little difference whether the witness answers yes or no. Question by question, our story is being told. It's for the jury to determine whether the witness is telling the truth when he denies the statements contained in our questions. If we took each statement out of our cross-examination and joined them, we would have presented our story for that witness. . . . Only the deluded or naïve believe that somehow the taking of an oath prevents witnesses, even honest witnesses, from lying where they must. . . . Every witness is sworn to tell the whole truth and nothing but the truth. But few do. If they did there would be no cause for cross-examination. But the human mind does not grasp whole truths. It grasps only those truths that serve it.

Gerry Spence, *Win Your Case*, at 170, 218-219. Without Cross-examination, the accused is left with his life and liberty being decided by lies, untruths and examination in private by judicial officers. There is great value in meaningful cross examination.

III. *Restrictions on the Scope of Cross-Examination*

Courts and the rules of evidence provide some limitation on cross examination. Indiana Rule of Evidence 611 provides,

- a) **Control by the Court; Purposes.** The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:
 - (1) make those procedures effective for determining the truth;
 - (2) avoid wasting time; and
 - (3) protect witnesses from harassment or undue embarrassment.
- (b) **Scope of Cross-Examination.** Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination.
- (c) **Leading Questions.** Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:
 - (1) on cross-examination; and
 - (2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

IV. *Conducting Meaningful Cross-Examination*

A. Preparation. Effective and meaningful cross-examination starts with thorough and active preparation. Know your client's story, the facts and evidence against him. Investigate the facts (people, places and alleged occurrences). Investigate the alleged scene. Analyze the scene against the facts. Investigate people to find out about their backgrounds and their reputations. Investigate their experience and their educational background. Be prepared to challenge the testimony in light of the "big picture."

Once you have a good working knowledge of the facts, try to anticipate the testimony of every witness prior to trial. Prepare for each witness. Consider what each witness offers that can advance your client's story. And prepare to blunt the effect of adverse testimony you anticipate will be offered against your client. Do not be afraid of avoiding cross-examining a witness.

Consider writing out every question in advance. But do not be married to your questions because the testimony might vary from what you anticipate it will be. With experience, one can become more flexible and use an outline or use a list of subjects about which to cross examine. Formulate some questions from known sources of information that you can readily access (police

reports, prior testimony, medical records, prior statements, etc.). Formulate some questions that fit the theory of your case.

B. Conducting the Examination. One of the keys to effective cross-examination is to listen. *Listen* to the answers to questions asked on direct examination and take good notes. Listen for inconsistencies in the evidence as you know it. Listen for illogical answers and answers that are inconsistent with the state's theme and state's witnesses. Listen for inconsistencies with common experiences.

Testify. Use cross-examination to tell the jury your client's story. This is one of the few times the advocate has to opportunity to challenge the assertions of the witness and to advance the client's position. Take advantage of the opportunity to talk with the jury. Do not just repeat direct examination, unless you do so to discredit it.

Primarily use leading questions, but do not be afraid to ask non-leading questions when appropriate. Use tools of impeachment - prior statements, prior recorded statements, etc. Use extrinsic evidence or testimony of other witnesses who can contradict the first witness' untruthful statement. Or use cross-examination to show bias or motive to demonstrate to the jury the witness' reason for lying. If the witness has not been consistent in his or her statements, impeach the witness with prior inconsistent statements – video, audio, pre-trial witness interviews, or with statements made to other people. Remember to start and end on a strong note.

C. Types of Cross-Examinations:

The *Soft Cross-examination* is a type of cross-examination where in the lawyer modifies the style and/or the content of the cross examination to appropriate the emotions of the case. Instead of being “in your face and aggressive,” the lawyer is aware of the effect of the mode of questioning on the jury. For example, a jury might become upset at a lawyer who aggressively questions a young child. So a lawyer might speak to a child witness gently, as if he were speaking to a child. Additionally, some jurors might see some fact witnesses (like nurses or medical personnel) as simply doing their jobs. They might react adversely to a lawyer who attacked a witness they perceived as merely doing their job. During the soft cross, the lawyer modifies the style of the cross-examination to take into account how a jury might react to the lawyer (seeking to avoid a negative reaction).

The soft cross-examination also involves a modification of the content of the cross-examination. Instead of attacking the witness head on, the lawyer seeks to peel back emotional layers to reveal bias or other elements. For example, in attacking a snitch/cooperating witness a lawyer engaged in a soft cross might focus on the collateral emotional losses that the witness is facing instead of focusing merely on the punishment the witness faces. A typical cross of a snitch might look like this:

Lawyer: Mam, you have agreed to testify against my client in this case, right?

Snitch: Yes.

Lawyer: You are charged in a conspiracy case, true?

Snitch: Yes.

Lawyer: You are facing twenty years in the pen, true?

Snitch: Yes.

Lawyer: You are saying whatever you can to avoid doing that time, true?

Snitch: I am telling the truth.

Lawyer: But a different truth wouldn't get your time off, would it?

The content of the Soft cross might look like:

Lawyer: Mam, you are a mother of three, true?

Snitch: True.

Lawyer: You are in jail now?

Snitch: Yes.

Lawyer: You aren't able to see your kids while you are lock up, are you?

Snitch: No.

Lawyer: You can't take them to school?

Snitch: No.

Lawyer: You can't talk to their teachers to find out what's going on with them can you?

Snitch: No.

Lawyer: You aren't at home to greet them when they come home from school, are you?

Snitch: No.

Lawyer: The longer you are incarcerated, the less you will be able to do this are you?

Snitch: Yes.

The soft-cross attempts to pull back emotional layers to develop bias, interest or motive. Many lawyers who use this method also employ psychodrama to further develop their cross examinations. They urge that psychodrama gives them insight into the emotional layers of the witness by helping them "get into the skin of the witness."

The *Story-Telling Cross-examination* is another form of cross-examination. A story-telling cross merely tries to tell the story of the witness, of the case, of a theory or of an object through cross-examination. With the story-telling cross an advocate is trying to communicate with and persuade jurors. During the story-telling cross, the advocate is trying to have a conversation with her neighbor over the fence as she is working in her yard. Or the advocate takes the approach that she is having a conversation in the lobby after church. Speak in plain English. (Talk as if you are talking with everyday people, otherwise known as potential jurors.) Put away lawyer language like "calling your attention to the date on which the occurrence in question took place" and references to "exiting vehicles." Real people get out of cars, they do not exit vehicles. So instead of calling the witness's attention to the date in question in which the occurrence took place, instead simply state "Let's talk about what you did on April 4, 1968, before you left the Lorraine Hotel after Dr. King was shot."

Try to use short declarative statements during the story-telling cross-examination. While much of the traditional cross-examination requires control of the witness, it is not necessary to use

the “prefixes” and “suffixes” of the leading question format -the prefixes “Is it a fact that . . . ?” “Isn’t it true that . . . ?” or the suffixes “. . . , correct?” or “. . . , isn’t that true?” or “... , am I correct?” You can use these leading question techniques, but you can obtain the information without using them. And they have a tendency to break up the story. For example, “You are James Earl Ray.” You do not need to say “Isn’t it a fact that you are James Earl Ray?” or “You’re James Earl Ray, correct?” Just state the fact and have the witness affirm it or deny it. Generally, during the story-telling cross most of the answers to questions should be “Yes.” That is because you are using the cross-examination to tell your story and enhance your credibility. It is also a fast, efficient way to provide the jury with information. It also allows the cross-examiner to tell a story and to state the facts. The only role the witness plays is to affirm the trial lawyer’s statements.

A good way to employ the story-telling cross-examination is to first write the story you want to tell through the witness as a narrative. Simply write out a paragraph (using short, declarative sentences) telling the story you want to tell. For example,

Martin Luther King, Jr., was a prominent American leader of the African-American civil rights movement. Dr. King won the Nobel Peace Prize. He was assassinated at the Lorraine Motel in Memphis, Tennessee, on April 4, 1968. He was 39 years old when he was assassinated. On June 10, 1968, James Earl Ray was arrested in London at Heathrow Airport. Ray was a fugitive from the Missouri State Penitentiary. He was later extradited to the United States, and charged with the crime. On March 10, 1969, Ray entered a plea of guilty. He was sentenced to 99 years in the Tennessee state penitentiary. Ray later made many attempts to withdraw his guilty plea. He was unsuccessful. He died in prison on April 23, 1998.

The question and answer might look like this,

Q. Martin Luther King, Jr., was a famous?

A. Yes.

Q. He was a leader of the civil rights movement in the 60s?

A. Yes.

Q. The Civil Rights Movement was a National Movement?

A. Yes.

Q. It ended Jim Crow?

A. Yes.

Q. It ended the forced separation of people by race in our nation?

A. Yes.

Q. Dr. King won the Nobel Peace Prize?

A. Yes.

Q. The Nobel peace prize was an international award?

A. Yes.

Q. He was one of the youngest winners of the prize ever?

A. Yes.

Q. He was assassinated?

A. Yes.

Q. He was assassinated at the Lorraine Motel in Memphis, Tennessee?

A. Yes.

Q. He was killed on April 4, 1968?

A. Yes.

Q. He was only 39 years old when he died?

A. Yes.

Q. On June 10, 1968, James Earl Ray was arrested in London at Heathrow Airport?

A. Yes.

Q. Ray was a fugitive from the Missouri State Penitentiary?

A. Yes.

Q. He was later extradited to the United States?

A. Yes.

Q. He was charged with killing Dr. King.

A. Yes.

Q. On March 10, 1969, Ray pled guilty to killing King.

A. Yes.

Q. He was sentenced to 99 years in the Tennessee state penitentiary.

A. Yes.

The *Traditional Cross-examination* generally serves two primary purposes and they manifest themselves in either a Destructive Cross or a Supportive Cross. The goal of a destructive cross is to discredit the testifying witness or another witness. This type of cross is designed to reduce the credibility of the witness or the persuasive value of the opposition's evidence. The use of impeachment material is a key to destructive cross, as it is the ability to attack and discredit the bases for the witnesses' statements or opinions. The questioner's goal is to establish control of the witness. The goal of the supportive cross is to bolster the questioner's own theory of the case and tell the defense story. It should develop favorable aspects of the case not developed on direct examination or expand on these aspects. This testimony may support your witnesses or help to impeach other witnesses.

Control is the key to the traditional cross examination. The lawyer never asks a question to which he does not know the answer (or what the answer will be). The lawyer always asks leading questions with a suffix or prefix. The lawyer never relinquishes control.

V. *Impeachment*

Raising prior inconsistent statements is the most frequently used impeachment method at trial. More than any other impeachment method, however, impeaching with prior inconsistent

statements requires a precise technique to be effective before a jury. Rule of evidence 613, requires that the witness have an opportunity to admit, deny or explain making the inconsistent statement. Prior inconsistent statements can be either collateral or non-collateral. If it is non-collateral, and the witness does not admit making it, you must prove it up with extrinsic evidence.

The basic structure of the impeachment technique involves three steps: recommit, build up, and contrast. First, recommit the witness to the fact he asserted on direct, the one you plan to impeach. Try to do this in a way that does not arouse the witness' suspicions. Use the witness' actual answer on direct when you recommit him because he is most likely to agree with his own statements. (You could also challenge the witness to admit the facts he stated in a prior inconsistent statement and get a denial of them).

Second, build up the importance of the impeaching statement. Direct the witness to the date, time, place and circumstances of the prior inconsistent statement, whether oral or written. Show that the statement was made when the witnesses recollection was fresher or under circumstances that the witness would be likely to tell the truth (under oath, closer in time to an event, made to assist in an investigation, etc.).

Third, read the prior inconsistent statement to the witness and ask him to admit having made that. Use the actual words of the impeaching statement. And project your attitude to signal to the jury what its attitude should be during the impeachment. If your attitude is that the witness was lying, confused, or forgetful; then broadcast it with your tone, facial expressions, cadence, demeanor, etc.¹

Besides prior inconsistent statements witness can be impeached many different ways on cross-examination. Witness can be impeached by showing bias, interest and motive; through the use of prior convictions; through the use of prior bad acts; through other witnesses; through contradictory facts; through reputation and opinion testimony.

VI. Observations

¹ See Thomas A. Mauet, *Fundamentals of Trial Techniques*, p. 242-43.

Consider this blog post by Bobby G. Frederick from the internet blog *Trial Theory*.²

The Boy Who Cried Wolf

July 22, 2011

“Nobody believes a liar...even when he is telling the truth!” My son is four years old now, soon to be five. He’s gotten into the habit of coming in while I’m working on the computer and telling me “daddy, dinner’s ready!” After a few times of walking into the kitchen to see dinner still cooking on the stove, I’m thinking I need some independent confirmation before I believe that dinner is ready. I ask him, “are you telling the truth?” and of course he responds “yes!”

Last night I was reading *The Boy Who Cried Wolf* to him before bed, and it occurred to me that this story contains a most basic explanation of how to demonstrate the un-truthfulness of a witness’ testimony. Not that this is always the goal of cross-examination, but when a witness is not being truthful about something critical to the case it becomes an important part of the cross-examination.

How do you prove that a witness is lying? In some cases it can be proven by extrinsic evidence or testimony of other witnesses who can contradict the first witness’ untruthful statement. Or we can show bias or motive – demonstrate to the jury the witness’ reason for lying. If the witness has not been consistent in his or her statements we can impeach the witness with prior inconsistent statements – video, audio, witness interviews pre-trial, or statements they have made to other people.

But if these tools are not available, or in addition to these tools, can we show that the witness is simply someone who lies – even if we are unable to prove the witness is lying about the most important fact, what if we are able to show that the witness is lying about other facts? If the witness has lied about other facts, has given inconsistent statements on other subjects, and can be impeached on other statements that he has made to the jury, why should the jury believe anything that the witness says?

The Old Man’s advice to the young shepherd boy, as he laments the loss of his sheep to the wolf, and wonders why the village-folk did not come to help him, is as valuable a lesson for cross-examination as it is for my son: “Nobody believes a liar...even when he is telling

² <http://trialtheory.com>

the truth!” If you are not a consistently honest person, how can we know that you are telling the truth?