# Cross-Examination Strategies in Civil Litigation



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# Cross-Examination Strategies in Civil Litigation

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# Presenter

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## 1. Introduction

Cross-examination is a weapon, an effective weapon if handled correctly and a dangerous weapon if not. It can be your best friend or your worst enemy if handled incorrectly. Like a weapon, it must be treated with respect and understanding.

In this lecture, I will be discussing the uses and abuses of cross-examination in the context of civil litigation, specifically, personal injury litigation and criminal defense, which represents my main areas of expertise. For the sake of efficiency, I will assume in this lecture that the participants have had some courtroom experience and are familiar with the main elements and features of a trial.

We will begin with a discussion of the purposes of cross examination and cross examination in relation to other elements of the trial. I will then discuss the relationship between cross examination and case theory examining exactly what case theory is. I'll then go into specific techniques of cross examination and some of their foundational elements under the Federal Rules of Evidence. We will discuss motions *in limine* regarding the infirmities of evidence *per se*, the jury's response to cross- examination, building your witness' credibility and protecting her from effective cross-examination by your opponent, as well as special cases in the field of cross-examination including the talkative and angry witness.

Cross-examination, like any other element of litigation, does not exist in a vacuum. Cross-examination impacts and influences client preparation, case theory development, opening and final argument, pretrial motions and when relevant I will explore how these areas overlap.

Now, as we no doubt learned in law school cross-examination is probably the best tool we have to ferret out the truth in a trial. "Truth", meaning at least in terms of how far we can give credence to a person and her testimony as well as the credibility of other types of evidence. Understand that any piece of evidence could be subject to cross-examination. Have no fear of that. The question of the art of cross- examination arises when we decide how we will apply the paint to the canvas, in what quantity, and what proportion, and if at all.

## 2. What are the purposes of cross examination?

Cross-examination has five basic aims: to discredit the witness and thereby his theory, to discredit the witness's theory and thereby the witness, to enhance your theory of the case, to attack the credibility of the evidence *per se* and fifth, to broadcast your theory of the case to the fact finder. I will go into the details of these goals later on. Remember that *ultimately* you're aiming for a compelling closing statement, a reiteration of your theory which explains the facts better than your opponents'. In this vein, I'll be talking about one key point throughout this lecture, what is called "saving it for closing". I'll discuss some special cases related to cross as well as some dos and don'ts.

As far as attacking evidence *per se,* this does not strictly fall into the category of cross examination. But be on the lookout for hearsay, privilege, chain of custody issues, relevance, authentication, best evidence issues and the like and try to dispose of it or get it admitted in a motion *in limine* or in a suppression hearing.

Cross-examination is scrutiny, a close scrutiny of the reliability of the witness, and the reliability of the evidence to which he is testifying. It is at the heart of a trial and functions to test the reliability and quality of evidence, much as a scientist tests his theories in a lab by trying to falsify his results. A trial is not unlike a scientific experiment testing a scientist's theory.

Scientific method gathers as much evidence as it can in order to prove, or disprove, a proposition. It does this through experimentation designed to falsify the theory. At trial, attorneys are doing essentially the same thing, except we are testing opposing case theories, subjecting them to methods of falsification called cross examination and opposing argument. If the theory survives this process, we can at least hold the theory as provisionally true, depending on the burden of proof, and take appropriate action in the name of equity and fairness. Of course, the burden of proof is lower in law than in science, for better or worse.

Now, you cannot divorce cross-examination from the other aspects of the trial. A trial is a holistic enterprise. Each part depends upon the other part, symbiotically dependent on the other constituent parts.

Because of its centrality, learning to effectively cross-examine witnesses will help your overall trial technique immensely. For instance, a poor cross examination may strengthen your opponent's closing argument. A strong cross examination may enhance the credibility of another witness. And so on.

Done right, cross-examination should fit in neatly and bolster your theory of the case. Information elicited during cross always must have as its objective the strengthening of your case, not information for information's sake – another key difference between legal aims and scientific aims.

Moreover, dismiss from your mind reaching any ***a ha*** moments during cross, where you "make your case" by having a key witness breakdown on the stand. Surprisingly, that does happen, but rarely, as does the fact that a strong witness in your case in chief can simply annihilate your opponent's case.

**In general, it is the small points you make during trial, an accretion of equities in your favor that helps you convince a jury to see evidence in your and your client's interpretation.**

### 3. The Personal Case and Case Theory

Let's dive right in to a personal injury case for the moment to begin illustrating the development of a coherent case theory and some points about preparing for cross and protecting your witness from cross.

Assume you have a client injured in a car wreck. Proximate causation is a common issue. The plaintiffs' attorney must have a thorough medical history of his client. During the intake make sure you get the names of all the claimants' prior physicians going back at least 20 years if possible. Use your power of subpoena to procure as many records as you can.

When ordering the records make sure you limit the subject matter of your demand to your theory of injury, otherwise, you will receive a mountain of records regarding your clients' conditions unrelated to your case. On the other hand you must be cognizant of chronic conditions which could have caused or aggravated your client's injury. And remember these records are expensive to order.

When you have a thorough and exhaustive medical history of your claimant meet with her to review it. Do not assume your client knows her own medical history. For that matter don't assume your client knows for a certainty the facts of her own case. Never take on face value anything your client says. It's always wise to corroborate it. This sounds harsh. But believe me it's necessary.

After you have received the records create a medical record digest. Employ the following fields and formatted in a spreadsheet form. The digest should flow as follows: date of visit, providers name, symptoms presented, tests conducted and the results, diagnosis, plan of treatment, medications prescribed along with dosage, and impairment ratings, if available.

After creating the medical digest give your client a copy and ask her to study it. Refresh her memory on points in her medical history that she's forgotten. Especially focus on the body part that is at issue, its symptoms, and whatever treatment she has undergone in the past and present. During the deposition opposing counsel will ask your client to enumerate her visits and her having a good idea of her medical history will be an important key toward establishing her credibility. A strong, well-prepared client reflects well on her and her attorney and provides you with leverage early in the game.

**In personal injury law, or any other type practice for that matter, unless the claimant or plaintiff is prepared properly by his or her attorney prior to her deposition she can be a rich source of cross examination material for opposing counsel.**

As noted, never assume that your client knows her own medical history. The number one tactic of defense attorneys is to ferret out **prior existing conditions**. A prior existing condition challenges your theory of causation as well as your etiological theory. After your investigation, if you discover a prior injury to the body part you are claiming was injured by the negligence of the defendan,t you may have to change your etiological theory from traumatic to aggravated.

**Always have a viable and integrated theory before you begin your process.** Each time you modify your theory as a result of discovered evidence, you weaken your case and your credibility. Proper and thorough investigation before you file is the key to the game.

Now let's take a moment to discuss case theory and a little more depth. You can define case theory ***as a constellation of facts and circumstances, established by evidence, which taken*** **in toto** ***fits a legal framework that in a civil context provides a remedy for the plaintiff or extinguishes or ameliorates the liability of the defendant.*** The lawyers job is to provide evidence to establish those facts and circumstances favorable to the aims of his case and ultimately for the welfare of his client. Remember, evidence does not equal facts. Only a fact finder after sifting the quantity and quality evidence can determine a fact.

The glue that holds your case together is your theory of the case. This can be divided into three constituent parts. One, your legal theory, two, your factual theory, and three your theme. Working without a case theory is like an architect who begins to build a structure without plans. Each part needs to be constructed so as to fit neatly into the overall design and aim of the structure.

The legal theory of the case may be further subdivided. For instance, in a negligence case, you must have a theory of liability, proximate causation and damages. This is in turn divisible. For instance, damages may be further divided into property damages, permanent impairment, pain-and-suffering, out of pocket expenses and so forth. Causation may be divided into proximate causation and but for causation. Liability may be divided into the liability of the tortfeasor as well as any contributory negligence of the plaintiff or joint tortfeasor.

So, when I talk about case theory I am referring to a multitude of things --legal theory and all that encompasses as well as factual theory which supports the elements of your legal theory. Cross examination is preceded by a careful development of your case theory. Once your case theory in all its parts is firmly implanted in your mind cross-examination will flow easily. You will know what points you want to bring out.

Reverse engineer your evidentiary presentation. What does this mean? Obtain a copy of the complaint and next to each element of the legal theory jot down the evidence you plan to introduce to prove the element. For each element I may have multiple witnesses or other types of evidence. For instance, on the issue of vocational impairment I may have the plaintiff testify as well as a doctor and a vocational expert.

Afterwards I gather the evidence and chart what will be testified to and who will shepherd in the evidence, e.g., who will testify. I rate each witness on a scale of one to ten for credibility, and if I absolutely have to have the witness this shows me if need to work more with the witness during preparation.

Then I sit down and actually draft a closing argument including every piece of evidence that supports my theory of the case, why my witnesses are credible and why the defense theory does not make sense. It is important to write it out so as not to miss critical details. And of course all of this presupposes that you and your staff have conducted a thorough investigation before any of this.

And of course, during trial your closing will be modified. But drafting a closing argument will go a long way in establishing a case theory and exhaust consideration of positive and negative evidence as well as helping you plot the introduction of your evidence and the structure of your cross examination.

It is then an easy matter to construct a direct examination and then prepare you witnesses for cross-examination. I do the same thing with the defense case theory obviously focusing in on the weaknesses of their evidence and witnesses creating the points I want to make during cross.

Once you have established these the points you wish to elicit from an adverse witness cross should fall easily line. Before cross-examination, write down your points you want to make off each adverse witness. Prior to trial try memorize them. You don't want to be reading off a check list as you conduct your cross. Moreover, if you're just reading a list you're not really listening to the witness, and you may miss a rich vein of material for cross that the witnesses just uttered. Moreover, no cross goes exactly as expected. New information at trial always crops up. Knowing your case, and knowing your opponent's case will help you deal with these little surprises and help you decide whether to ignore an attack or use the "surprise evidence. “

At its core, cross- examination is a contest between your credibility and the witness'. The key is to control the witness and know the context of your case and your opponent’s case better

than the witness does, hopefully better than your opponent does.

Some lawyers say they never prepare for cross because it is so unpredictable. This is foolhardy. Always prepare for cross. Anticipate what the adverse witness will testify to. Plot the points you want to make on cross-examination consistent with your theory of the case and how you will make them. Again, do not list a set of questions. List a *set of points* you wish to elicit through questioning. You'll be surprised how prescient you actually were. Moreover you can easily prepare for sensible crosses such as a prior criminal record if you prepare ahead of time. Do not forget to jot down the foundational requirements for what you're trying to do.

Now, back to illustrations. The adverse witness has just finished testifying in court. All eyes turn to you as the judge says "counsel your witness". Your adrenaline is flowing. And you feel you must do something. Many lawyers at this juncture will cross-examine the adverse witness in order to appear *to do something*. This is a mistake. **The cardinal rule here to remember is: if an adverse witness has not harmed your theory of the case then waive cross examination**. Questioning a witness any further runs the grave risk of eliciting information detrimental to your case. You must have the fortitude to waive cross-examination if the situation calls or it.

Before I begin with the techniques of cross-examination a word about **enhancing your case**. Many times the witness will testify to facts that are helpful to your theory of the case. Do not miss the opportunity to have the witness commit himself to this evidence during cross. Eliciting favorable facts up front in your cross also has the added advantage of putting the witness at ease before you "go on the attack". Moreover, your image to the jury is enhanced when you begin your cross-examination in a nonthreatening manner. The jury is put at ease and you come off more likable.

When you close, reiterate those facts which are not in dispute. Having an adverse witness enhance your case is very effective. Remember, every witness is a two edged sword; just as your own witness can say something that hurts your theory of the case an adverse witness can say something that helps.

Now, the techniques I will be discussing are just that – techniques. There is no one magic bullet, no one formula to a successful cross-examination. No rule is absolute. Moreover,

there is no one way to cross.

With enough practice you will begin to develop your own style. Instinct and being able to think on your feet will help you win the credibility contest between you and the adverse witnesses and between you and opposing counsel.

## **4**. **Cross-Examination Techniques**

Concentrate your attack on the weakest points. The weakest points of what? Remember, most evidence is a story told by a person. Therefore there exists two points of attack. Attack the credibility of the witness and attack the credibility of the story. Don't forget to lay the proper foundation for your questioning beforehand. Because of limited space and time I will not be able to going to all these foundations. However you will find a treatise on foundations in *Imwinkleried Evidentiary Foundations.*

**Attacking the credibility of the witness**. This is what can be called a **direct attack.** You are attacking the witness' status as a truth teller. You are in essence attacking the witness himself. This type of attack can itself be divided into two parts. Attacking the witness' motive to lie and attacking the witness' reputation.

In a **direct attack** you are not attacking the story but the person. The theory behind this tactic is that the witness is either intentionally or unintentionally lying or putting a false or misleading spin on their story -- usually out of personal gain or habit. Many people grow up lying. They know no other way even lying when telling the truth would benefit them. Of course the extreme manifestation of this condition is the pathological liar. These type of witnesses are easy to spot because their stories are usually very elaborate and the stories keep changing.

As far as attacking motive is concerned, this includes challenging a witness' bias, prejudice, interest, greed, love, hate or jealousy. Get in touch with your understanding of human nature to touch the nerve why would this might be lying.

**The reputation attack**. Attacking reputation means that you introduce extrinsic evidence of a person's reputation. The proper foundation for introducing the witness' criminal record, bad acts, and bad reputation for truth. You might be able to save yourself an embarrassing

objection if you can get the judge in a motion in limine to include the evidence pretrial. However it has been my experience that judges would rather see how how the trial is going and reserve their judgment on admissibility until the proper point.

**Bad acts**. These may bear on a person's credibility. An example may be lying on a job application. The act must be one of untruthfulness and it's probative value must outweigh its prejudicial value. In some jurisdictions you have to take the answer as given. If the witness denies the act, you're stuck with it. It is for this reason that I have rarely if ever use this technique.

**Prior convictions**. This is an old chestnut. Well before trial run a fresh rap sheet. If the rap sheet is a lengthy one it may take weeks before you receive it. Make sure you get a certified copy so that it is self authenticating. Prior convictions are limited by time usually 10 years, and by whether the crime reflects on the witness' credibility. Moreover, it may be excluded if it's prejudicial effect outweighs its probative value.

***Untruthfulness.*** This is when you ask a witness to testify to the truthful or untruthful reputation of another witness. The witness may also testify to his or her opinion as to the truthfulness or untruthfulness of the person. Make sure your witness is clear . Remember the adage though that every witness is a two edged sword.

***Perception***. We get our knowledge through our senses -- at least the type of personal knowledge record is interested in. Witnesses testify to what they see and hear, so obviously find out if the witness wears glasses or hearing aid, What type of glasses? For myopia? Astigmatism? Farsightedness? Some other pathology? If so, was he wearing the glasses at the time of the identification? Was it anything impeding their view? And so on.

***Memory.*** I like to think of a witness as an imperfect tape recorder or video recorder. Very imperfect. Think about it: for instance, what did you have for dinner two Wednesdays ago? I bet none of you can recall, but you were there.

But you retort is: people usually remember particulars which make an impression on them at the time. This is true. But as time goes on, our minds tend to fabricate missing parts of the

memory. We only view an object from our perspective and of course our memories are charged with bias. Psychological studies have shown that the human mind is not a blank slate. Rather we bring our biases and prejudices that what we see and hear. We filter reality in order to deal with it. We see what we want to see and hear what we want to hear in order to satisfy various psychological needs.

Combine this action with physical infirmities and first-hand information becomes very suspect. This is why identification has come under so much attack in recent years. What began as probably the best evidence we had -- first-hand information -- has devolved into possibly the worst. All this supplies a trial attorney with fertile soil for cross-examination and great material for closing.

***Coherence***. This means the witness possesses good narrative ability and is a good historian. To make compelling testimony, a witness has to relate a series of observations and ideas in a logical concise and coherent fashion. If the opposing counsel has done his homework the witness will follow these precepts.

But even the best prepared witness can fall short of this and make a hash of his testimony. Point this opposing witness's failure to narrate a coherent theory at closing. Argue that the witness' datesare wrong, the who what where and why of his facts are muddled or nonexistent. . How can you believe a thing he says?

This cuts both ways. Review the facts with your witness. Especially dates and distances. These tend to give witnesses the most trouble. . Teach your witness to be a good historian and to tell a story in straightforward, logical and coherent way. Most importantly, aim for concision. This will probably be your biggest challenge.

**I cannot overstress the importance of witness preparation. Even so witness's even well prepped witnesses say the weirdest thing sometimes. There is nothing quite as unpredictable as human beings**.

Now I move on prior inconsistent statements and prior inconsistent acts. These are the bread and butter of cross-examination.

***Prior and Post Inconsistent Acts***. Allow me the cliché ”actions speak louder than words". Study the witness’s acts rues. If you speak volumes in the beauty of this technique lies in the fact that the witness usually has not reviewed his past actions. Let's go back to the shoulder injury case I mentioned before. Remember John Doe was complaining of a shoulder injury incurred after lifting a patient. The objective evidence of the MRI was largely negative except for some arthritis. The claimant was in his late 40s and is not uncommon for people to suffer arthritis of this stage of life. His clinical picture was consistent. He complained over course of about six months to the providers of pain in the range of 5 to 6. He took his medications per prescriptions and appeared as an articulate witness who presented himself well.

Remember the glitch however. It came out during deposition that John had vacationed shortly after the date of the alleged injury and went parasailing. This act was inconsistent with his theory of the case that he hurt that shoulder. Inconsistent statements are easy to wiggle out of. It is much harder to wiggle out of inconsistent acts. A person with a 5 to 6 pain scale certainly would not have parasailed.

Coming from personal experience, parasailing puts a lot of strain on your arms and shoulders. Look at his lates medical records, employment records, and any other you can find where the witness's acts differ with the theory of the case.

***Prior and post inconsistent statements***. This is truly the most often used technique and cross-examination. It is fairly self-explanatory but because of the centrality of I will review the elements. The lawyer seeking to cross- examine the witness about a prior inconsistent statement should lay the following foundation: one the lawyer should get the witness committed to the testimony he gave on direct examination. Two: the witness made an earlier statement at a certain place. Three: the witness made a statement at a certain time : certain persons were present. Five: statement was of a certain tenor. Six: the statement is more likely to be reliable than the present testimony. And then sit-down. There is no need to rub it in to the client with further examination. Further examination also risks eliciting information negative to your case. Bring up the prior inconsistent statement in your closing argument. I.e. saving for closing.

***Basis of knowledge***. This is often overlooked. But it is basic. A witness can only testify from personal knowledge. How does the witness know what is talking about? Did he see it? Is it hearsay? Is it admissible hearsay? This tactic is closely related to perception.

***Attacking the story***. The second major avenue of attacking the witness's credibility is when you attack his story. Discrediting the witness's story is tantamount to discrediting the witness. In this tactic, you're not trying to attack the witness per se. Instead you're attacking the story. This is a favorite attack of mine. Why? Because if you attack a person's credibility directly there's always a danger that the jury will resent you. The jury is initially sympathetic to a witness. It's your job to overcome the big bad lawyer image.

By attacking the story you are saying to the jury let's be fair. I am not slinging mud here, it's just that his story does not make sense. The idea is to be a lady and gentleman with the witness. Control your emotions at all times. Show yourself to be the knowledgeable, the polite, the credible one in this contest between lawyer and witness. If the witness gives you an answer that particularly hurts your case act like it actually helps your case. Never bleed in front of a jury.

***Internal inconsistencies.*** This tactic is fairly self explanatory. Does the story hang together in and of itself. Have the witness commit himself to the inconsistency and then save it for closing. Also, there may be multiple inconsistencies. That is why the attorney must carefully listen to the witness and "live in the moment" instead of anticipating what you will do after the witness testifies.

***External inconsistencies.*** This tactic pits what the witness is testifying to and common sense notions of what we know about the world. For instance, if the witness claims that the incident happened at 8:30 p.m. and that it was still light, you can easily argue that it could not be light because at that time of year and that particular day the sun set at 7:30 p.m. Or that it took 39 minutes for the ambulance to get to the hospital from the accident scene when you can argue that even without traffic or lights, the ambulance would have to be travelling 130 miles per hour to make it in that time.

You may have to call a witness or introduce extrinsic or documentary evidence to verify your point, but remember, you are not admitting the extrinsic evidence into the record, merely using it for cross.

***Improbable theory***. I have mentioned this elsewhere but it's important. The tactic here is to keep in mind the big picture of the case. A lay witness usually will not do this. He won't automatically think: does this jibe with other things that I have said or done or other witness' testimony or actions?

This gives you a built-in advantage because unlike most witnesses you do or should have an overall picture of the case. If the inconsistencies are glaring you can even ask the ultimate question. There's nothing like a witness understand simply unable to answer you because his story violates the rules of simple logic.

***Reductio ad absurdum***. Basically you are arguing that if what witness says is the truth, the consequences of the assertion are absurd. Get the witness to commit the propositional fact and then argue in closing that if the testimony is true it leads to ridiculous consequences and therefore the propositional statement cannot be true.

**Omissions**. Use this technique when the witness has left out several important details. Make sure the details help your case or at least does no harm to your case. When a witness omits a fact which helps your case you're bringing it up on cross will make the witness look like he's hiding something. Make sure the details are firmly established through prior especially adverse witness testimony. Set the stage for the answer by corralling the witness.

**5. The Angry Witness.**

The angry witness may present a lawyer with an opportunity. First of all an angry witness will tell you something about the competency of opposing counsel. Anger rarely helps witness' ability to think clearly. It cloud of witness's judgment and counsel should have warned to curb his anger during cross-examination.

If you have successfully set the stage of your attitude with the jury, that the trial process is not about vendettas, humiliation or wanton assassination of character. Rather that it is a process

of discovering the truth or least probability of truth. If you have kept your emotions check the angry witness rather than you will come off badly to the jury.

On the other hand an angry witness may not be as pliable as other witnesses. He may have more of a tendency to stonewall you. If you generate a nonthreatening even friendly attitude toward the witness and put him at ease this will go a long way to alleviating his anger. The witness should mirror your relaxed friendly attitude and let down his guard. The old cliché a soft answer turns away wrath is applicable in the situation. And if I may be permitted another chestnut at this point: you can catch more flies with honey than with vinegar.

One thing you must not do is fall prey to the witness's anger. That is instead of his mirroring your attitude you mirror his hostile attitude. You're breaking one of the cardinal rules – a trial is not personal but a dispassionate disinterest to search for the truth. Your credibility will be damaged if you become angry and your judgment will be adversely affected.

Sun Tzu in the *Art of War* advises that if your opponent is of choleric temper irritative is probably not good advice in the context of a trial. Irritating a witness in order to make him angry or will in all likelihood rebound to your disadvantage. The jury will feel as if you're badgering the witness and sympathy will flow to the witness.

**6. The Talkative Witness**

The talkative witness can be a two edge sword. The old adage give him enough room and he will hang himself certainly applies in this instance. Chances are that the witness has not thought through a consistent theory of her case and may blurt out something that damages her credibility and the opponent's case as well. In some instances it may behoove you to let the witness ramble.

On the other hand, you don't want to lose control of the witness and risk your credibility with the jury. Or risk confusing the jury. Here's what I mean. The witness may throw up all sorts of irrelevant information designed to cloud the issues of the case. You do not want your points being lost in a miasma of testimony that functions merely as a cover-up. Remember the truth

is very simple whereas a liar will introduce all sorts of information in the hope of derailing you to a non-issue.

Again the attorney must use his own good judgment to decide whether or not to allow the witness to ramble. Context is everything. What I am setting forth are guidelines, not absolute rules.

One particular instance of a witness who is out of control is the one who starts to ask you questions. Unless it is a question asking you to clarify or rephrase your question gently remind the witness that it is not his role to ask questions but rather to answer them. If the witness persists, seek an instruction from the judge that the witness cease asking counsel questions.

**7. Jury Response to Cross**

I believe that most jurors want to do a good job and take the role seriously. They want to hear all the information they can and will get angered if they are asked to leave the court or are not privy to judge and lawyer conferences. Cross-examination is an excellent opportunity to include the jury in the process and get the judge on your side in the case which usually results in the jury being on your side. But like anything else it is not what you do but how you do it.

Realize that the lawyer is usually at the disadvantage at the beginning of cross-examination. Most jurors' image of lawyers derives from media portrayal which if we are frank about it is not positive or perhaps a bad experience with their own lawyer. Lawyers have to overcome for lack of a better word the big bad lawyer image.

Jurys sense when a witness in uncomfortable. The courtroom is *terra incognito* for most witnesses while the attorney has a home field advantage. Jurors sence there is an uneven distribution of bargaining power between the witnesses and the attorney. Moreover jurors empathize with and feel compassion for her -- all other things being equal. Jurors can feel embarrassed for the witness who are made to look bad by what they considered to be verbal trickery of the lawyer.

This is where the attorney needs tread carefully. Always be polite to the witness without lapsing into of obsequience. If the jury feels you are merely trying to get to the bottom of things this will dispel their initial negative feelings toward you. Be businesslike. But don't be afraid to get to the heart of the matter. Keep it simple. Each question should be discreet and small building to the question which finally cast doubt on the credibility of the witness or his story.

Don't display any anger or vindictiveness or become argumentative with the witness. This will only result in the loss of your credibility with the jury and judge. Don't talk over the witness. You'll notice sometimes as you cross you start to get your dander up, especially if the witness is evasive or being intentionally obtuse. This is a normal reaction to the adrenaline that is coursing through your body. You are experiencing the fight or flight instinct.

One of the most difficult challenges attorneys face in trials is keeping your cool. When I feel threatened during trial I tend to turn white. Some attorneys get angry. Some attorneys turn red. Sometimes a physiological response you have is beyond your control.

The ability to control your emotions during cross or any stage of the trial process is the mark of a good attorney. Breathing deeply and regularly will even out the effect. Pause a moment. Take but a sip of water is another. Breathe deeply and slowly .The bottom line is to remain cool and businesslike and the jury will most likely follow you.

And remember most jurors want to know the truth or what is probably the truth catching a witness in a blatant lie will help you with your case. Jurors need to be lied to like most people. So feel confident in yourself if you're prepared and you know that you can discredit the witness. Preparation leads to confidence and confidence is a great antidote to the fear that you may feel at trial.

Now in a lot of cases you won't have a smoking gun or a big lie. You might have some prior convictions you are able to impeach the witness with but if they are old you may not be able to get them in and they may not have too much impact with the jury if the convictions are relatively inconsequential they may even be seen as a cheap shot.

In most instances cross-examination is a gradual process that results in an incremental gain. We are all sophisticated enough at this point to know that very rarely is the witness devastated by cross-examination as we see in movies and television. But this incrementalism usually adds up to significant gains by the end of the trial and your closing argument. So the watchword is patience.

Now a word about the last word. It is sometimes beneficial to lead the jury to the water and let them drink it. That is, say ask enough questions to make your point without explicitly bringing it out. Let the jury make the final conclusion at trial and then you yourself at the point during closing. The jury will feel as if it came to this conclusion independently and that you are corroborating their thinking. You are now on the same page of music as your jury without arguing them there. Cross-examination is a great chance to do this.

### 8. When Not to Cross-Examine

The central purpose of cross-examination is to cast doubt on the personal credibility of the witness or his version of the facts and thereby his personal credibility.

It is always essential that the attorney knows the elements in the theory of its case as noted. Inexperienced attorneys of a fuzzy idea the case may not recognize the witness's testimony is helpful, harmful, or neutral to the credibility and persuasiveness of their theory. Therefore, such attorney we usually feel compelled across a witness after she's testify because that's what attorneys are supposed to do and from a fear that the jury will not respect her as a fighter. What the lawyer is usually doing you know we thought is just reiterating what the witnesses testify to. While this may not harm you case asserted is no good it may serve to merely confuse the jury.

In the witness has not harmed your case where cross-examination. This will not affect the credibility with the judge or jury. This is especially true of the witness who is helped your case and corroborating a theory. Crossing the witness may only give her the chance to retract the favorable information or equivocate. The basic rule of thumb applies **– quit while you're ahead.**

## 9. Protecting Your Client From Cross Examination

Usually, the first recorded statement a claimant or plaintiff makes is a deposition. In the hands of a skilled attorney, a deposition can be devastating to your case and to your client's credibility. Inform your client that the opposing counsel is not your client's friend even though a good opposing counsel will initially disarm the deponent with pleasant manners and insure that he is not there to embarrass or trick him and that the entire process is routine.

Ninety five percent of my clients are ramblers. Why is this? First the deponent is under the impression that the deposition is a trial and that when he testifies he must say everything he can in his imagination to prove his case. He will talk and talk without the opposing counsel uttering a word. The opposing counsel is more than willing to let the claimant talk. After all, this is more grist for his mill. Remember the old adage, give a person enough rope and sooner or later he will hang himself.

Moreover, in injury cases the claimant has undergone physical and mental trauma and pain for weeks, if not months. Medical providers, the first authority figures they encounter, are obliged to see dozens of patients a day and usually limit their direct contact with the client to 5 to 10 minutes at the most and usually address chief medical problems exclusively. Spouses and friends are an outlet, but they're not in a position of authority.

At the beginning of the case, claimants feel ignored and have a great need to verbalize their problems to those they feel capable of eliminating or alleviating them. The bottom line is to impress upon your client not to volunteer information. Keep answers short, sweet and to the point. Do not try to anticipate opposing counsel's line of questioning. Make the opposing counsel work for it.

Now, deponents lie for a variety of reasons. One of the most common occurrences happens when a claimant knowingly tells an untruth because "it will help his case". I refer to this as a client "practicing law". Chances are the truth would not have injured his case at all, but now the horse is out of the barn and the case has just become more difficult for you.

The second reason a claimant lies is because she is simply making a mistake. People have a natural aversion to admitting that they do not know an answer. She would rather stretch or guess an answer rather than saying "I don't know". This aversion to feeling foolish is

magnified when facing persons in authority. I tell my clients that if she does not have a clear and distinct idea as to what an answer to a question is simply admit she does not know. Admitting ignorance is an important step toward knowledge. It's crucial to be truthful in your testimony; however, it is even more critical to be accurate in your answers.

If the deponent cannot remember or does not know an answer to a question tell him or her to admit it. This is especially true if the opposing counsel asks your client to list any convictions she may have. Chances are if your client has several convictions she has many. And chances are if she has many convictions he will admit to or remember all of them.

Tell your client that when opposing counsel asks about former convictions to list the ones she can remember and then say that's all I can remember. Otherwise you run the risk of opposing counsel cross examining her on omissions during trial.

Another pitfall deponent's encounter is testifying to the level of their pain. Everyone has a different threshold for pain. In personal injury cases, claimants think it strengthens their case if they claim great pain. "Excruciating" is a favorite phrase. Rather than describe the quality of the pain ask the claimant to rate the intensity of the pain from a scale of 0 to 10 with 10 being the highest pain imaginable i.e. being on fire.

This usually puts it in perspective for them. The problem with overrating pain lies in the fact that the claimant may not have been prescribed strong pain medication by a physician, setting the client up for an inconsistency later during cross.

Now if we designate Q1 as a quantity of pain – on a scale of 0-10 and use Q2 as a quality. Q2 pain scale is as follows: sharp pain, dull, burning pain, needles, tingling, tingling and numbness – – use your common sense and your own experience. Do not forget radiculopathy, that is, pain radiating to the upper or lower spine to the upper or lower extremities.

Another twist to the pain equation is "antalgic" pain. For instance, if the claimant suffers a foot injury she will favor that foot when she walks placing strain on the opposite foot often creating its own pathology. In those cases you may find it necessary to add the other limb as a body part to your complaint. The claimant should discuss all of her pain. Testifying to only

chief complaints and then trying to add a pain symptom will set the client up for cross on an omission or a charge of “snowballing” her pain.

When preparing a deponent for a deposition you're essentially preparing her for cross examination. She needs to be familiar with her own case and her own medical history as much as possible. She should be familiar with your medical digest post-accident as well as her medical history especially as it relates to the body parts or body parts under consideration. She needs to be familiar with “post accident” accident accidents or injuries which could sever the chain of causation. When she answers a question ask her to add "as far as I can remember” to leave herself an out.

Run your clients criminal history. You'd be amazed at how much your client has forgotten about her criminal history. Give her a copy before the deposition to study. Have her testify to charges as well as convictions, not just her convictions. Include DUI and other traffic offenses. Make it clear to the client that most of these convictions are irrelevant except for crimes of dishonesty or moral turpitude. The only become relevant if she lies about it. Also, check your intake. I would wager that she denied any criminal history at all. This will tell you what kind of client you are dealing with.

If your client has made any prior recorded statements order them as soon as possible. Sometimes it takes a while to procure these items. Give a copy to the deponent several days before the deposition so she will be familiar with them and will not contradict herself. On the topic of pre deposition recorded statements, I usually advise my clients not to make them as they will usually just cause trouble and create one more statement the client needs to be synchronized with.

***Surveillance.*** Damning surveillance leads o cross of inconsistent actions. I have found that men especially are susceptible to surveillance due to the fact that they love to mow the yard even though the doctor has proscribed such exertions. Men out of work and collecting temporary disability also moonlight. Warn the deponent in no uncertain terms to refrain from this and all other activities. Women also like to work in the yard. During their period

of convalescence ask them to stay indoors avoid physical activity unless prescribed by the doctor.

As far as doctors' orders, impress upon your clients the importance of taking their medication as prescribed, no more, no less. This includes work restrictions, modified or not. If she lies that she has complied with doctors' orders she has opened herself up to impeachment. If she tells the truth that she has not complied with doctors' orders she has opened herself up to a charge of noncompliance.

Advise your client not to get angry with opposing counsel. He is just there to do his job. Besides an angry man is quick to anger more and angry people tend to make mistakes.

Remind your client that the reporter is taking down everything she says so do not nod or shake your head or shrug your shoulders. The reporter is not trained to interpret body language. Tell her she has to speak clearly and verbalize her responses.

Find out if the client has been on any vacations since the accident. Many clients find post accident as a perfect time to vacation. In workers compensation cases money's coming in from temporary disability and they have no place to go for work.

A brief a war story will suffice to illustrate this point. A former client of mine damaged his shoulder lifting a patient – quite severely – requiring shoulder arthroplasty. He worked as a male nurse for a doctor and authorized physician placed him completely out of work until he reached maximum medical improvement.

During the deposition the opposing counsel asked my client if he had gone on any vacations since his accident. A relatively honest man, he stated in the affirmative. The attorney asked for details, and it came out that my client had gone parasailing while on break. Now, if anyone has ever gone parasailing, as I have, I can attest it's hard on your shoulders.

Needless to say this admission severely compromised the value of his case. It not only showed that my client was not as harmed as he claimed, but that any impairment post vacation was exacerbated causing or at least increasing his impairment and need for complete shoulder replacement.

As this anecdote illustrates, when my client admitted under cross at the hearing that he had been parasailing, his credibility was not challenged he was not revealed as a liar per se but charged with noncompliance with his doctor's orders. Therefore, tell your clients not to take vacations until after the case is closed and to always follow doctor's directions. If the client is not happy with those directions the remedy is to seek a second opinion, not to modify them himself.

Another problem area which can be solved pre-deposition is ability to perform lifestyle activities. Many clients believe their case is stronger if they testify they can no longer perform everyday activities which, unless you're totally simple, a fact finder finds it difficult to believe and seeking pity or simply exaggerating.

It is much more effective if the claimant states that she can perform her daily routines, hobbies, husband and wife the duties but that is much more difficult to perform these. This has the added effect of vividly portraying in the jury's minds to quality and quantity of claimants pain and disability. And remember, unless the injured party is a championship level basketball player or fisherman the plaintiff's lifestyle loss will not be as well compensated as his loss of every day earning capacity. Focusing on the dynamics of his job and how it is difficult for him or her to perform those dynamics.

As for my asking questions during the deposition of my claimant, I assiduously try to avoid it unless absolutely necessary and I try never to ask a question unless I am sure of the answer. This also applies during cross- examination. I will repeat never ask a question unless you're sure of the answer. Client sometimes complain that I do not ask questions as if I'm not doing my job.

Resist the impulse ask questions unless you know the answer and that you have a very good reason to ask them. But after I explained my tactics for not answering questions the client usually understands.

When I do ask a question it generally involves the body parts involved in the injury. Often times we will spend 45 minutes or so reviewing the body parts affected only to have the claimant forget half of them at the deposition. In some cases clients try to "snowball" their

injuries i.e. they think if they have more body parts injured then they'll be compensated more. This is a fallacy and of the body part is not legitimately injured claiming so can severely weaken your case. To rehabilitate the record I will gently remind my client through questioning the body parts involved.

Make it a point in your checklist to not forget psychological overlay, that is, if the client has a history of depression anxiety or sleeplessness and because of the accident the clients dosage has changed to a more powerful prescription or his dosage has increased or both or he has increased his meetings with his therapist.

If you have tried to rehabilitate the record and utilize still not as thoroughly enumerated all the body parts affected primarily and secondarily at least you have tried. Remember the remedy to this and all similar problems is a thorough preparation for deposition as to the facts before the deposition.

## 10. Dos and Don'ts

A. Never let them see you bleed. The jury is looking at you all the time for signals. You will greatly reduce the impact of unfavorable testimony if you act like it's no big thing if you suffer a setback.

B. Never rehash the direct. This is the mistaken last resort of an underprepared litigator. If you must do this keep it short and have a purpose at the end was will pay off for your case.

C. Never ask a question you don't know the answer to. Cross is a very controlled exercise. This is not a time to be a cowboy. With cross, less is usually more.

D. Never belittle your witness. Remember you are the big bad lawyer. You need to walk a thin line this twain seemly unsure of your position and browbeating the witness. You don't want the jury to resent you... Just be polite and cordial in your demeanor but be confident. The content of your questions will get through. Besides you will have a chance at closing to reiterate the point you made on cross. Reiteration, cogent argument, and memorable

presentation are the keys to making an impact on the jury not bravado or unbridled aggression.

E. Never ask a witness a why question unless you have cut off all avenues of escape. Asking why would this does or says something is giving him a license to testify again. The witness is your mouthpiece not your opponents.

F. In general, never asked the ultimate question -- save it for your closing. The beauty of cross is that you can always stop before you ask a question that will harm you. Ask every question to make your point except for the direct one. Never say never but an average witness will never give you the ultimate answer you want on the ultimate question and unless absolutely has no choice.

G. Never conduct across totally extemporaneously. Know what point you're trying to make with the cross. You need to know the evidence opposing counsel will attempt to introduce will and imagine a cross of his witnesses based on the information you do have. The more information or intelligence you have about your adversaries case the better you will prepare. Therefore intelligence is key. And intelligence is based on investigation – the foundation of all legal cases. Know where the other guy is going before he does. Know when the fight is going to be. And get there first with the most evidence. As Nathan Bedord Forrest remarked on how to win battles: “Get there firstest with the mostest.”

H. Listen to the witnesses answer. Don't get so worked up in getting through your cross-examination that you fail the hear a response that may be fertile ground cross-examination. A witness will sometimes say something incredibly stupid because he is not fully cognizant of the legal and factual theory of his case. Always be prepared for cross. But also remember that cross is an art form. If you're inflexible and rigid you won't be open to new ideas. I once worked with a lawyer who had his cross written out *verbatim***.** As he crossed the witness he would follow a prepared script to the letter, missing golden opportunities which presented themselves.

I. Don't necessarily accept the answer. If your case is solid then sooner or later they will look unreasonable. Don't feel that because you get a bad answer you should give up. Dig. You'd be

surprised how many times a witness finally realized you know your stuff and you're not going to put up with any of their BS.

J. Don't always feel like you need to cross a witness.

K. Clear implication can be effective. I am of the opinion that you pretty much have to spell everything out for jury. The best place to do this is on opening and closing statements. Cross is a not good place to be perfectly direct.

L. Imply a point. You do this by not asking the ultimate question and saving it for closing. You can also do this by what I call the technique of not caring what the witnesses answer is. It happens when you really don't have any more left to attack with but you feel like you have an opportunity to get your theory before the fact finder to questions.

The technique is simple. Just ask a short series of questions telegraphing to the jury your theory of the case. You know already for the witness will disagree with you but you don't care. Basically you are arguing to the jury with questions.

M. Assume what the witness is saying is true. This sounds strange but here's how it works. An adverse witness will have his version of the facts which is different from yours. However if your theory is solid, your version will hang together well.

The analysis is as follows: facts ABCD have been established. There is no dispute. Witness gets up and testifies to E. Now as noted the witness will not have considered the whole picture. It is up to you to get the witness commit himself to ABCD and then in your closing argue that if ABCD are true, as opposing witness has corroborated then E logicalllycannot be true. Do not argue with the witness his assertion that E is true.

The key to this tactic is to keep the big picture of the case in mind at all times and remember the facts that are not in dispute. Seen from another perspective, by assuming what the witnesses saying is true your assuming that e is true and therefore ABCD are not true, but you have established that ABCD have to be true therefore E cannot be true. The jury will not believe the witness's story.

N. Do not assume that the witness is intentionally lying. The witness is often lying unintentionally. But many times the witness is mistaken or he or she wants to believe the story. Score points with the jury by arguing the witness is just mistaken.

O. Let the witness tell his lie. Again the old saying: give him enough rope and he will hang himself applies across. Don't feel that every adverse witness's word is just one more nail in your coffin and you have to cut him off as soon as possible. As mentioned sometimes a witness gets going and will say all sorts of stuff that is fertile ground for cross. Let him go. You understand that less is more cross. But some witnesses don't. I like talkative witnesses who suddenly find themselves the center of attention. Foster that feeling. They eventually put their foot in their mouth. But never let the witness control of the cross.

There is something that happens to a person when he or she takes a stand. What was once an average urban dull-witted person in metamorphic eyes into a formidable intellectual combatant? They get a surge of adrenaline or something. So you have to be careful with every witness. Treat them as your intellectual equals.

P. Have an objective to your questioning. Remember jot down five points you want to make with your cross-examination. These points I later pick up in my closing argument. Again you are aiming for good closing argument based on the evidence and there is nothing better than an adverse witness that you have destroyed in the stand as evidence. I try to keep my points to a minimum. Five rather than 10 points. Remember the attention span of juries is short. If you had 10 points pick out the best 5 to 7 points to concentrate on.

Q. Develop a series of questions that will get you to that point. Once you know what point you have to make the next challenge facing you is getting the witness to make your point to the answers to a series of carefully laid questions. This is where the nest comes in. First do not telegraph where you're going with your questioning. Figure out a style that is best for you to a competent this. Build the corral. What does this mean? It means sealing off all avenues of escape to the witness. Ask questions where they can only be one answer, your answer, or the witness loses credibility.

Begin by asking innocent questions in order to get the witness to let his guard down. As your questions become more pointed I physically get closer and closer to the witness.

This helps you because what you are doing is slowly invading the witnesses personal space gradually intimidating him into giving me the answers I want without his really knowing it because I'm so gradual and because I've made it a point to put the witness at ease in the first crucial seconds of the examination so his guard is down.

Finally keep the question short sweet and simple.

R. Ask questions that are anchored to other established evidence in your case. Do not ask generalized questions that allows the witness to pontificate. Do not ask why unless you are certain the answer will fit into your strategy and theory.

S. Finally have fun. A trial is a serious thing. But is no sin to have fun at trial. And cross to be the best part. Trial work is your job. You should enjoy it. I used to get tense about trial especially cross because it really is a hard thing to do, even for the most experienced trial lawyer. You have to keep a lot of balls in the air. I would end up psyching myself out about it.

But the tension lessons with good preparation and experience. With time, you will create your own techniques, style and checklists.

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