



# WINNING STRATEGIES SEMINAR

## Cross-Examination

Cynthia Roseberry, Executive  
Director, Federal Defender of the  
Middle District of Georgia, Inc.



You Can't Always Get What You Want, But If You Try Sometimes, You Just Might  
Find You'll Get What You Need<sup>1</sup>:  
A Few Tips on Cross-Examination

By Andrea D. Lyon

We've all seen the movie or play; the erudite and aggressive (but charming) attorney looks the witness in the eye after a particularly tough set of questions, and the witness breaks down and either confesses to the crime, or confesses to being a liar and that all of his or her testimony was fabricated. Maybe that has really happened somewhere, but it seems unlikely.

Cross examination is not where you win the case. It is one place you get the tools you need to win the case.

The first "tip" is to set realistic, attainable and helpful goals for yourself. So, you want to start at the end and work backwards to develop the cross-examination. Figure out the law and instructions that apply to your case. Then develop a theory of the case which gets you to the win, whatever the win is for you in the particular case. Now think about what you want to be able to say in closing argument generally, and specifically about that witness. Use those statements as the outline for your cross-examination.

Before talking about specifics, though, it is important to understand that cross-examination takes good information which in turn requires good

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<sup>1</sup> Lyrics from the Rolling Stones' song by Keith Richards and Mick Jagger, which appeared first on the "Let It Bleed" album.

investigation. That doesn't mean just reading reports, it means leaving your office and going to see things for yourself. There is a huge difference between reading about something, or even seeing a photograph and going there yourself. You get a different sense of what happened by speaking with a witness instead of relying on what a police officer (or even a court reporter) wrote.

You also need to have knowledge of the area covered by the testimony because one cannot cross-examine in a vacuum. If the witness is an identification witness a psychiatrist or a detective, a knowledge of identification, psychiatry or criminal investigation techniques helps ground the cross. You can't become an expert in all areas, but you need to at least understand the language of the area you are examining about to be effective.

You want to know every fact possible, but also those facts which might be termed latent or atmospheric that you have to discover for yourself. For example, many cross-examinations rely on what was not done. The fact that the detective completed three investigation procedures if fact there are seven others which should have been completed but were not are latent facts which can lead to a very effective cross-examination.

Okay, so that is a short introduction to how to get the information, but how do you decide what to use, and then how do you use it?

This is all about your theory of the case. As tempting as it is to come up

with a theory first, you should try to avoid it until your investigation is as close to finished as possible. Then, and only then, can you reconcile the facts beyond change with those subject to interpretation, and come up with a viable answer to the jury's inevitable question. For example, that question in a confession case might be "why would a person confess to a crime they didn't do?". If you cannot satisfactorily answer that question, you can't win the case. You next have to sift through the facts that you have learned about this particular witness and figure out what you can ask that furthers your theory. What can you ask him or her that allows you to add a few more sentences in your closing argument? Then take those sentences and use them as chapter headings, or Roman numerals in your outline, or whatever method suits you best. When you get those headings, you then know what you need to ask to get there. At the end of this article is a worksheet that should help you do this in an organized fashion.

And to get there, you have to have control. This means asking questions that are formed as simple expository statements with which the witness can only fairly agree, disagree or say they don't know. If your question seems unfair, the jury will sympathize with the witness and dislike you for asking it.

There can only be one new thought per question. And the question truly has to be leading. For example, if you were going to question an evidence technician about the fact that he or she did not dust a surface for fingerprints,

you might think this is a leading question:

“Did you fail to dust the counter for fingerprints?”

Now it’s close, because it contains the answer you are looking for. But it is not quite leading because it asks “did you”. And that little opening may give the witness permission to explain the answer. A better question might be:

“You did not dust the counter for prints?”

You can add the tag “did you?” or “isn’t that correct?” (Or many others), but you want to avoid doing that too much because it sounds too accusatory and after a while the jury may only hear the punctuation of the tag.

After you have gained control, you want to move, step by step, from the specific to the conclusion, but do not ask the concluding question, the ubiquitous “one question too many”.

There is a lot more to say about cross examination, and I strongly recommend that you look to other more thorough treatments of the subject. A list of these follows the worksheet.

One final “tip”. Most cross-examinations are not confrontational, nor should they be. They give you the building blocks to get you to the closing argument. However, for that one in twenty cross-examination that is in fact confrontational, you really have to wait until the witness earns it in front of the jury to go after him or her. Just because you know this particular police officer, have caught him or her in the past, and wouldn’t trust anything he or

she says doesn't mean the jury knows or feels that. You have to get there with them, which often means being patient. Allow the witness to evade you (on safe and relatively unimportant questions); just keep asking the question until either you get an answer, or the fact the witness won't answer does its own damage. Allow the witness to patronize you; this will turn the jury's natural sympathies with the witness towards you instead. Let the witness feel that he or she is winning; you have the goods but wait to use them until the jury is ready. Then roll up your sleeves and have at it.

You can gain a lot of ground in cross-examination as long as you 1) always advance your theory of the case 2) pay attention to the emotional dynamics in the courtroom, and 3) don't get too greedy. Because, while you can't always get what you want, if you do the work and try - well sometimes you'll get what you and your client need.

## CROSS EXAMINATION WORKSHEET

Case name: \_\_\_\_\_

Witness name: \_\_\_\_\_

My theory of the case is: \_\_\_\_\_

This witness will advance my opponent's theory by: \_\_\_\_\_

\_\_\_\_\_

I am worried about this witness because: \_\_\_\_\_

The bias/motivation of this witness is: \_\_\_\_\_

I can advance my theory through this witness by: \_\_\_\_\_

This witness's credibility can be challenged by: \_\_\_\_\_

The documents, reports, transcripts or physical evidence I will need to  
effectively cross-examine this witness are: \_\_\_\_\_

Here are some of my one-new-thought-per-question leading questions I will  
ask: \_\_\_\_\_

When I have finished cross-examining this witness this is what I want the jury  
to feel about him/her: \_\_\_\_\_

In my closing argument, my cross-examination of this witness will allow me to \_\_\_\_\_

say:

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#### Other Sources

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6. Strong, John W., McCormick on Evidence, Fifth Edition, Chapter 4
7. Wellman, Francis, The Art of Cross-Examination
8. 3 Handbook of Fed. Evid. §§ 804.1 (5th ed.)
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