

BB. CROSS-EXAMINATION

OVERVIEW:

Cross-examination is “[t]he examination of a witness . . . by the party opposed to the one who produced him, upon his evidence given in chief, to test its truth, to further develop it, or for other purposes.” Black’s Law Dictionary 376 (6th ed. 1990).

OBJECTIVE:

To provide guidance on whether to cross-examine a witness; the purposes of cross-examination; elements of cross-examination; rules for cross-examination; techniques of cross-examination; methods to test credibility; and a checklist for cross-examination.

1. WHEN TO CROSS-EXAMINE A WITNESS:

There is no requirement to cross-examine a witness, and at times, it is best not to question a witness at all. Nevertheless, it is relatively rare to pass a witness without asking any questions. The key to a successful cross-examination is the same as a successful direct examination--proper preparation. Listen carefully to the witness’s testimony on direct and pay particular attention to those areas that you expect to be in dispute (based on pre-trial preparation). After the direct examination is completed ask yourself the following questions:

- a. *Has the witness hurt your case?*

Not every witness’s testimony has the same impact. Some witnesses merely set forth corroborating evidence or refer to matters that are not in dispute. If this is the case, it may not be necessary to cross-examine the witness.

b. *Is the witness important?*

Not all witnesses's testimony is equally important. If a witness is not central to a case, or the testimony of a witness is not crucial, it may not be necessary to cross-examine the witness.

c. *Was the witness's testimony credible?*

If a witness's testimony is not credible, it may be better to leave well enough alone and not cross-examine. You do not want to provide the witness with an opportunity to rehabilitate himself/herself.

d. *Did the witness give less than expected?*

Sometimes a witness leaves something out that is important or opposing counsel forgets to ask an important question or to clarify a matter. If you cross-examine the witness, you will provide the witness and opposing counsel with an opportunity to rectify the error. It is important to remember that testimony unfavorable to your position that is elicited on cross-examination can be particularly damaging.

e. *What are your realistic expectations on cross?*

Do you have any valid points that need to be made and, more importantly, are you able to make them effectively? ULP cases are tried before an ALJ, not a jury. Therefore, if the witness was credible and there is no way to impeach the witness's credibility, e.g., prior inconsistent statement, it may be better to pass on cross-examining the witness.

f. *What risks do you need to take?*

If the trial has progressed as expected, and you are satisfied with the presentation of the GC's case, do not take any undue risks. On the other hand, if things have not gone well and the case is turning into a probable loser, it may be appropriate to conduct a risky cross-examination and hope for a breakthrough.

2. TWO PURPOSES OF CROSS-EXAMINATION:

a. *Eliciting favorable testimony (first purpose):*

Too often an attorney is overwhelmed by the idea of destroying a witness's credibility and overlooks an opportunity to have the witness agree to facts that support his/her case or the theory of the case. This can usually be done with little risk and can be extremely effective or even outcome determinative.

b. *Destructive cross-examination (second purpose):*

The objective of a destructive cross-examination is to ask questions that will discredit the witness.

c. *Interplay between the two types of cross-examination:*

Even though a Trial Attorney can elicit favorable testimony and conduct a destructive cross-examination during the same examination, it is preferable to elicit favorable testimony first since a witness's credibility will usually be at its highest level at the conclusion of direct. Also, eliciting favorable facts after a destructive cross can prove more difficult because the witness is less likely to be in a cooperative frame of mind. In addition, you may elicit so much favorable testimony that a destructive cross is unnecessary.

3. ELEMENTS OF CROSS-EXAMINATION:

A successful cross-examination follows a planned structure that gives the examination a logical and persuasive order. That structure is based on the following considerations:

a. *Establish a few basic points:*

It is always best to establish a few good points. If you try to accomplish too much, you could end up accomplishing nothing.

b. *Make strongest points at the start and at the end:*

The first and last points made during cross-examination are the most important. A point made at the start will set the mood and tone for the entire examination and the point made at the end can be the most remembered.

c. *Vary the order of your subject matter:*

Varying the order of cross-examination will make it difficult for the witness to anticipate where you are going with a particular line of questioning. It can help you make a point before a witness can adjust.

d. *Do not repeat direct examination:*

Too often, an attorney asks a witness to repeat what was already stated on direct. The reality of this approach is that it allows the witness a second opportunity to tell the same story. Only where the witness's testimony appears memorized or where major parts of the direct examination support your theory can this approach be beneficial.

4. RULES OF CONDUCTING CROSS-EXAMINATION:

There are no "hard and fast" rules for cross-examination. Nevertheless, certain rules have withstood the test of time and following them is usually the safest course.

a. *Start and end quickly:*

Do not beat around the bush. Make a point and move on. You do not want the witness to be able to relax or become complacent. In addition, you want to keep the ALJ interested in the case.

b. *Know the probable answers to questions:*

If you have prepared properly, you will have a good idea what the witness will say in response to your questions. You do not want to explore unknown matters. While you may not know the precise answer to a question, you only want to ask a question that will evoke a response that is not unexpected. The more you deviate from this point, the greater the risk.

c. *Listen to the witness's answers:*

Frequently, the best ideas for an effective cross-examination flow from the witness's direct exam. Listen carefully to everything that is said as well as the way it is said. If a witness has trouble responding to a particular line of questioning, that may be indicative of the fact that the witness has no real memory of what happened or that the witness is not telling the truth.

d. *Do not argue with the witness:*

Absolutely nothing is gained by arguing with a witness. No matter how frustrated you become with a witness, it is important to maintain composure at all times.

e. *Do not ask the witness to explain:*

Be as specific as possible; questions that ask "what", "where", or "why" are too general and may elicit unwanted testimony. In rare instances, however, a witness can be placed in a situation where there is no explanation. In that case, it might be worth the risk to ask the witness for an explanation.

f. *Restrict the witness's answers:*

The less room provided to a witness during cross-examination, the greater the control. Questions designed to evoke simple "yes" or "no" responses work well. In addition, use of leading questions keeps the witness under control.

g. *Do not ask one more question than is necessary:*

One question too many may result in a bad response or an unexpected response that will hurt your case. Always remember, you do not want to give the witness or the opposing counsel an opportunity to recover.

h. *Stop when finished:*

One of the toughest calls is to know when to stop. If things are going well, you may have a tendency to want to keep going. If things are going badly, you may try to make something out of nothing. This may confuse the

record and create undue risks. Once you have covered the points you intend to cover, stop.

5. TECHNIQUES OF CROSS-EXAMINATION:

Cross-examination is different from direct examination. During direct examination the focus is on the witness. During cross-examination, because of the unrehearsed spontaneity involved, the focus is equally on the attorney asking the questions. The following techniques facilitate effective cross-examination:

a. *Use leading questions:*

A leading question is one that suggests the answer. Proper use of leading questions facilitates a Trial Attorney's ability to control a witness and the tempo of the case. Train yourself to routinely ask leading questions on cross-examination so that they flow naturally.

b. *Make statements of fact and ask for agreement:*

It is preferable to make statements and ask the witness to agree or disagree. The objective is to prevent the witness from having the opportunity to give a long self-serving answer.

c. *Use short, clear questions:*

Short, clear questions are the safest and most effective to use in cross-examination. If you combine questions, you will provide the witness an opportunity to say more than what is necessary.

d. *Project a confident attitude:*

On cross-examination, you are the focal point. Project confidence and knowledge of the case.

e. *Be natural:*

Utilize a style that you feel is natural. If you try to be something you are not, you will create an extra burden. Remember, there is no correct or incorrect style that is suitable for everyone.

6. METHODS TO TEST CREDIBILITY:

a. *Memory:*

Exploring aspects of memory may be the basis of an effective cross-examination because a witness is usually testifying about something that occurred in the past. A witness's testimony can be too good since a normal person would not remember certain things with precision because of the passage of time.

b. *Perception:*

A witness often testifies about something that was seen. What you see, however, can be impacted by a number of things that can be explored. Does the witness wear glasses? What was the weather if the event took place outside? Was it nighttime? How close was the witness to the event? Was the witness involved or a bystander?

c. *Competency:*

Whenever a witness expresses an opinion, the competency of that witness is subject to cross-examination. Does the witness have the proper training or background to support the opinion?

d. *Bias:*

A witness may have a stake in the matter. Is the witness a personal friend of a stakeholder? a relative? a fellow member of management?

7. CHECKLIST FOR CROSS-EXAMINATION:

a. *Do I need to cross-examine the witness?*

- Has the witness hurt my case?
- Is the witness important?
- What are my reasonable expectations?
- What, risks, if any, should I take?

b. *What favorable testimony can I elicit?*

- What parts of direct helped me?
- What parts of my case can be corroborated?
- What must the witness admit?
- What should the witness admit?

c. *What testimony can I discredit or impeach?*

- Can I discredit testimony? (Perception, memory, competency, bias)
- Can I discredit conduct?

Q [Part 2, Chapter CC](#) concerning Impeachment of Respondent's Witness.