

Focus: **EVIDENCE MATTERS**

Cross-Examination: A Simple ‘Yes’ or ‘Correct’ Will Do

by Robert J. Rodriguez

Cross-examination is, and should be, the most enjoyable part of any trial lawyer’s life. If it’s not, you may want to consider another path in life since you can’t be a successful trial attorney if you don’t love and look forward to the challenge of a good cross-examination. It is by far the most dramatic portion of the “show.” Unlike TV shows, you rarely get a confession in the middle of your cross, but sometimes you do!

If by now you don’t understand the level of my enthusiasm about something as simple as a cross-examination, then you’ve probably never met me or listened to my ramblings about how I literally look forward to every opportunity.

Cross-examination is designed for “control freaks.” If you’re not a control freak, you might prefer direct examination. As a full-fledged, card-carrying control freak, I would take cross over direct any day of the week. But what is the difference?

In its simplest form, direct examination consists of asking questions to simply open the door, and then the deponent tells his story. The direct examiner, by asking questions, allows the story to flow and tries to keep the deponent on target. This requires preparation, practice, and the old “don’t ask a question unless you know the answer.” Since it’s the deponent’s story that is being elicited, the questions themselves cannot provide the answer, nor can those questions overtly lead to the answer. The answers from the deponent need to provide the story on their own.

I’ve always been impressed with good direct examiners. Their level of preparation must be superb to properly guide the deponent. After all, the examiner can’t control every word that comes out of the deponent’s mouth. The direct examiner has to make sure every question has a viable response based on what the examiner knows and can prove. On direct examination, the examiner purely hopes that the deponent does not start to freelance, ad-lib, or provide answers beyond what would be beneficial

to the examiner’s position. The direct examiner can hope to avoid an uncontrolled witness by conducting pre-testimony preparation and rehearsing the questions and the answers.

Direct examination can also be used to “steal the thunder” of the opponent by bringing up disadvantageous facts before they are revealed on cross. In other words, the direct examiner can let the cat out of the bag early so that it’s not used in a dynamic fashion later on by the opponent to crush the examiner’s case.

Frankly, allowing someone else to tell the story is nerve racking. You never know if there will be that “extra” one word that slips out from the deponent. This anxiety is where control freaks fall short, causing them to gravitate toward cross-exam rather than direct. Why? Because you tell the story! You control the pace! You decide the ebb and flow! Yes, it really becomes all about you—the cross-examiner.

In cross-examination, the goal is the opposite of direct. You are the storyteller. There should be more words coming out of your mouth than the witness’s. Your questions should all lead to simple answers such as “yes,” “no,” and “correct”; if a witness’s answers go beyond this set of limited responses, you’re not being as effective as possible or phrasing the question in the right way. In other words, you are not using the tool of cross-examination to its fullest.

Cross-examination requires you to ask questions that provide the answer within the question. Your questions must always be leading the deponent. The ultimate goal is to have the deponent—someone whose sole job is to argue with your statements and is mentally ready to argue—simply agree with the correctness of your question. In order to do that, preparation is key. Let me say it again: preparation is key.

You need to create the narrative based on identifiable or stipulated facts so that you leave the deponent with

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no option other than agreeing or disagreeing with your statement. This requires documentation, transcripts, medical records, and other material, which you can point to as you ask your leading questions, making the witness look less credible by deviating from his predesigned story described on direct. Your question must be perfect; there can be no wiggle room for any response other than “yes” or “no.” If you get any other answer, either your question is not crafted well enough or you have a witness who won’t properly answer because he knows the answer will be devastating to his case. In other words, the deponent wants you to engage in direct examination so that he, the deponent, will be able to say what he wants and not necessarily answer the question you’re asking. You need to hold him to an answer or ask the presiding judge to order the witness to answer your question. After all, the witness will have the chance to elaborate or explain later, during redirect examination.

So, how do you hone your skill in both direct and cross-examinations? Practice. For example, this is what I do to prepare for direct or cross-exam. My office has ceiling-to-floor windows. To me, this is the perfect place to map out my strategy and write (using erasable, multicolor highlighters—yes, I have the pictures to prove it) “my story.” I determine what evidence, documents, and testimony will support each and every one of the main points I want to make prior to crafting any question.

After completing this as a direct examination, sit down with your witnesses. Ask those same questions and see how they respond—what they say and what they don’t say that they should. Ask questions that will allow the deponent to address every part of your perfect story. Questions such as “how did you feel after that” or “tell us in your own words how you injured yourself” are wide-open questions, which allow almost any testimony.

As a cross-examiner, start telling your story using *short and simple* questions. Get the deponent to understand how it’s going to work. Let the deponent get into a rhythm of answering in short “yes” or “no” answers. Incrementally build questions on the previous answers. Think “concentric circles,” then ask those close-ended, leading questions and don’t let the deponent do anything other than answer the specific question before him. Those close-ended questions will end with “... correct?” and then the only answer the deponent can give is to say, “Yes, it’s correct.” Practice this with your spouse, significant other, kids, and friends (who won’t stick around long if you continue with this obnoxious approach, especially teenagers, who will try to get out of answering any direct question you ask). If you can use a set of facts you’ve created and have your deponents answer “yes” and “correct,” you’re achieving your goals as a cross-examiner, or as I see it—taming the beast. That’s the life and beauty of being a “bull fighter,” so to speak.

I hope my enthusiasm as a skilled questioner rubs off and encourages you to properly implement these tools. Once you see the beauty and usefulness, your legal life will forever change.



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