

Cross-Examination by the Numbers

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Introduction

This article affirms the critical role of cross-examination, but refutes the claim that it is a mysterious art form reserved only to those who have acquired some mystical sixth sense for divining human deceit.² Instead of glorifying a skill expertly wielded by a select few, it lays out a step-by-step approach to prepare and execute effective cross-examination.

Oversold as the advocate's one big chance to unmask a liar, cross-examination is simply another way to communicate with the jury. At its core, cross-examination is a marvelous opportunity to communicate a portion of counsel's closing argument during the opposition's case-in-chief. Superior cross-examination is the result of hard work, but this work can be broken down into manageable pretrial tasks. When facts are uncovered, evaluated, organized, and selectively presented, using a streamlined presentation technique that enhances credibility, the results are amazing.

The best cross-examinations successfully bring together three elements: control, content, and tone.³ Control is achieved through the use of tightly worded leading questions that place the advocate at center stage.⁴ Short, single idea statements intended to provoke "yes" answers from the witness, ensure maximum control.⁵ Content, always tied to the counsel's theme and theory of the case, has some flexibility but never wanders off into uncharted territory.⁶ The key is to organize the cross-examination into "attack points" which are "concise statements that characterize a significant element of the argument" to be made about the witness during closing argument.⁷ Finally, the tone of the examination should be confident, polite and non-threatening.⁸

"S+S=C" and Cross-Examination

To be able to deliver a portion of closing argument during cross-examination, an advocate must exercise extraordinary control over the witness. The proven way to accomplish this is by using leading questions. Leading questions should always be short, single idea statements designed to elicit a "yes" response. Mr. Terrance MacCarthy, a federal public defender from Chicago who lectured at the Judge Advocate General's School, used the mathematical formula of S+S=C to communicate this idea.⁹ This formula represents, "short statements equal control."¹⁰ Using Mr. MacCarthy's system, counsel should not use any excess words that dilute meaning or surrender control.¹¹

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² Young lawyers often stand in awe before the sacred alter of cross-examination. New counsel are instructed, "no substitute has ever been found for cross-examination as a means of separating truth from falsehood, and of reducing exaggerated statements to their true dimensions." FRANCES L. WELLMAN, *THE ART OF CROSS EXAMINATION* 7 (Collier Books 4th ed. 1936). According to one legal dictionary cross-examination is "[t]he most effective art of the skilled trial lawyer; the interrogation of a witness for the opposing party by questions framed to test the accuracy and truthfulness of his testimony." BALLENTINE'S *LAW DICTIONARY* (Lexis Law Publishing 1969).

³ In addition to some direct citations in this article, I would like to acknowledge all of the advocacy lessons that I have repeatedly learned from all of my supervisors, colleagues and opponents in the courtroom. With regard to my control, content and tone trilogy, I have primarily relied on three sources: for control, Mr. Terrance MacCarthy's lecture to the 14th Criminal Law Advocacy Course (Sept. 12, 2000) (on file with The Judge Advocate General's Legal Center and School, U.S. Army, Audio Visual Department) [hereinafter MacCarthy Lecture]; for organization, Major Martin Sitler, USMC, *The Art of Trial Advocacy, An Approach to Cross-Examination "It's a Commando Raid, not the Invasion of Europe"*, *ARMY LAW.*, July 1998, at 80; and for tone, GERRY SPENCE, *HOW TO ARGUE AND WIN EVERY TIME* (St. Martin's Griffin 1995).

⁴ *MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 611* (2005) [hereinafter MCM].

⁵ MacCarthy Lecture, *supra* note 3.

⁶ Sitler, *supra* note 3, at 80.

⁷ *Id.*

⁸ SPENCE, *supra* note 3, at 44.

⁹ MacCarthy Lecture, *supra* note 3.

Below is an example of a cross-examination of a duck. The duck is a hostile witness, so it will never admit that it is a duck, but in closing argument the case will turn on the fact that the duck is indeed a duck. To set the stage for closing argument, the examination proceeds:

Q: I want to ask you some questions about how you get around, you understand?
A: Yes.
Q: On land you walk?
A: Yes.
Q: In water you swim?
A: Yes.
Q: You also fly?
A: Yes.
Q: I want to ask you about your feet, you understand?
A: Yes.
Q: They are orange in color?
A: Yes.
Q: They have three toes?
A: Yes.
Q: They are webbed?
A: Yes.
Q: You are a good swimmer?
A: Yes.
Q: You swim in all weather?
A: Yes.
Q: You swim in the rain?
A: Yes.
Q: When it rains, the water just rolls off of your back?
A: Yes.
Q: You have feathers?
A: Yes.
Q: But your mouth, or bill, is featherless?
A: Yes.
Q: It is orange in color, just like your webbed feet?
A: Yes.

The disconnect between Mr. MacCarthy's mandate to use short statements versus the question mark at the end of each of counsel's questions demands attention. How can counsel make statements when using leading questions to conduct a cross-examination? First, notice that there was no use of *isn't it true*, *isn't it fair to say*, or *isn't that correct?* Using the S+S=C system, there simply is no need or room for excess language. The key, however, is the proper use of inflection and modulation to communicate the need for only a yes or no answer. Inflection is the change in pitch or loudness of the voice.¹² Modulation is the use of inflection to communicate meaning.¹³ When asking leading questions, inflection must fall at the end of each question. If inflection rises, it appears that the questioner does not know the answer and is inviting an open ended answer or explanation. By using inflection and modulation, counsel can clearly present each single idea statement as a leading question. This approach guarantees control.¹⁴

¹⁰ *Id.*

¹¹ *Id.*

¹² WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 620 (1990).

¹³ *Id.* at 762.

¹⁴ Professor Rose spells out:

Two "styles" of phraseology are normally used when performing cross examination. The first is a leading question with a 'tag' on the end of it. An example would be, "You own a baseball bat, don't you?" The "tag" is "don't you?" and takes many forms (e.g., didn't you?, isn't it true?, etc.). The other style is to drop the tag entirely. A leading question can still be asked with identical language without the tag. When you do this properly, there is a much greater emphasis on voice inflection. For example, "You own a baseball bat." Make this a declarative sentence a leading question by placing the inflection on the word "bat." Because leading questions are not truly inquisitive, voice inflection makes the critical difference. This is especially true with non-tag, leading questions. If the

While counsel can effectively control the questioning by using short statements, the jury will need a framework in order to best understand the importance of the testimony. This framework is built upon the foundation of a well organized cross-examination.

Organizing Cross-Examination

Before working on the content of any individual cross-examination, the counsel must first master the relevant facts of the case. At a minimum:

- read the entire case file
- visit the alleged crime scene
- interview all relevant witnesses
- know each witness's reputation and duty performance

At this point, counsel should have begun to develop a theory of the case.¹⁵ The theory of the case, "is the basic underlying idea that explains not only the legal theory and factual background, but also ties as much of the evidence as possible into a credible whole."¹⁶ The theory of the case helps decide which witnesses to call. The order witnesses are called, and the order questions are asked, should help explain the theory of the case. This is true both on direct and cross-examination. Through the lens of a credible theory of the case, counsel can begin to visualize individual cross-examinations. Counsel must keep in mind some of the basic goals of cross-examination:

- elicit favorable testimony¹⁷
- elicit foundation
- develop conflicting testimony
- attack the credibility of direct testimony¹⁸
- attack the credibility of testifying witnesses¹⁹

Counsel must now go back and review the file on each individual witness who appears on the opposition's witness list. In his article, *An Approach to Cross-Examination*, Major Sitler, USMC, outlines three important steps:

- conceptualize the entire case and ask yourself what argument you will make about a specific witness²⁰
- determine specific factors, or "attack points" that support each argument²¹
- draft leading questions that support each attack point²²

inflection drops when saying "bat," it is leading. . . . If, however, your inflection rises on "bat," it demonstrates the questioner is uncertain or at least inviting an explanation. . . . The absence of taglines allows you to state the issue as though it is a fact that merely requires agreement or disagreement. . . . Finally, the choice of whether or not to use taglines is one of style and demeanor. Make certain you experiment with both and then choose one that works for you.

CHARLES H. ROSE III, *FUNDAMENTAL TRIAL ADVOCACY* ch. 6, at 122-23 (Thompson-West American Casebook Series (2007)).

¹⁵ As Professor Charlie Rose observes, "If you don't take the time to properly analyze the legal issues and facts that support them in light of your case theme and theory you are guaranteeing an ineffective and possibly self-destructive cross examination. You cannot arrive at a destination if you have not chosen one." *Id.* ch. 6, at 117.

¹⁶ JAMES W. MCELHANEY, *MCELHANEY'S TRIAL NOTEBOOK* 78 (ABA 3d ed. 1994).

¹⁷ *See, e.g.*, Lieutenant Colonel Kenneth H. Clevenger, *Cross-Examination for Trial Defense Counsel*, *ARMY LAW.*, Jan. 1992, at 3, 5.

¹⁸ *See, e.g.*, Major Christopher W. Behan, *The Art of Trial Advocacy: The Thrill and Excitement of Impeachment by Contradiction*, *ARMY LAW.*, Oct. 2004, at 10.

¹⁹ *See, e.g.*, Lieutenant Colonel Stephen R. Henley, *The Art of Trial Advocacy: Impeachment by Prior Inconsistent Statement*, *ARMY LAW.*, Feb. 1998, at 35.

²⁰ Sitler, *supra* note 3, at 80.

²¹ *Id.* at 81.

²² *Id.*

Appendix A of this article depicts Major Sitler's approach in a simple, one page format.²³ Due to the worksheet's utility in helping counsel tie each examination to the theme and theory of the case, this sample page can be a useful aid for drafting both direct and cross-examinations.²⁴ In meeting MRE 401, 402, and 403 (logical and legal relevance) objections, Major Sitler's worksheet is extremely helpful. At the top it explicitly lists what counsel intends to argue about that particular witness.²⁵ Each attack point and each question should be designed to further that argument.

If the counsel plans to refer to a witness during closing argument, then the first step is to draft a one or two sentence theme or argument for that witness.²⁶ The next step is to brainstorm for factors or "attack points" that support this specific witness argument.²⁷ These attack points are analogous to the single sheet of standard typing paper with an indented introductory paragraph followed by italicized, centered sub-titles. For example, let's look at Little Red Riding Hood and the Big Bad Wolf who allegedly murdered Grandma. The prosecutor might argue that, "Mr. Wolf killed and ate Grandma to feed his hunger, and then he fled." To support this conclusion, attack points could include, "Mr. Wolf had the means to kill," "Mr. Wolf had the opportunity to kill," "Mr. Wolf had the motive to kill," and "Mr. Wolf's guilt is proven by his flight from Grandma's house." For means, the prosecutor would focus the jury's attention on Mr. Wolf's ability to kill. For opportunity, the prosecutor would focus on the Mr. Wolf's access to Grandma in her home. For motive, the prosecutor would drive home Mr. Wolf's need to eat meat. Finally for flight, the prosecutor would highlight Mr. Wolf's flight from Little Red Riding Hood and the Woodsman.²⁸

In the same case, the defense might argue that, "Ms. Hood doesn't even know if her Grandmother is dead, and Mr. Wolf's flight was innocent." To support this conclusion, attack points could include, "Mr. Wolf is Grandma's friend not her killer," "Ms. Hood doesn't have facts, she only assumes the worst," "there is no proof of a murder, let alone proof about who did it," "Mr. Wolf was Grandma's house sitter," and "Mr. Wolf ran because Mr. Woodcutter had an ax."²⁹

After coming up with attack points, craft leading, single fact questions that advance each attack point.³⁰ As far as organizing the attack points, watch for internal consistency. For example, counsel should not attack a witness's memory of some events if there is a need to rely on the same witness's memory of other events. Counsel should also bear in mind that the plan must be flexible enough to pursue occasional flashes of insight. Counsel is free to go "off the page" as long as the new line of questions falls within the specific argument listed for that particular witness. Some stock orders for attack points include:

- begin and end with the most important topics (primacy/recency)
- elicit favorable information before impeaching unfavorable information
- chronologically cover the main points as "snap shots" while avoiding a complete review of the direct testimony
- organize by senses

After drafting each cross-examination, the counsel should re-interview each witness. This re-interview should not be a practice cross-examination. It should be a polite, professional session where the counsel confirms the answers to the cross-examination questions by using non-leading, open ended questions.

²³ *Id.* at 82.

²⁴ *Id.*

²⁵ It is beyond the scope of this article to discuss the relevant evidentiary and professional responsibility rules that govern cross-examination. In his book *Fundamental Trial Advocacy*, Professor Rose of Stetson University College of Law, presents an excellent overview of cross-examination and the relevant evidentiary and professional responsibility rules. See ROSE, *supra* note 14, ch. 6.

²⁶ If counsel does not plan to mention the witness in closing, counsel should consider waiving a cross-examination of that witness. Sitler, *supra* note 3, at 80.

²⁷ *Id.* at 81.

²⁸ See example at App. B.

²⁹ See example at App. C.

³⁰ *Id.*

If the counsel does not plan to refer to a witness during closing argument, the counsel should forgo cross-examination. Rising to conduct cross-examination acknowledges that the witness's testimony was important, and by initiating cross-examination, counsel has implicitly promised to dramatically reveal some weakness or hidden truth in the opponent's case. When there is no weakness or hidden truth to expose, the best choice is to waive cross-examination.

The Tone of Cross-Examination at Trial

Communication with the jury begins before counsel presents the first leading question to the witness. Before speaking, counsel should take center stage in the middle of the courtroom. Ideally, the advocate should move to a comfortable position in front of the jury that forces the witness to turn and face away from the jury to answer the leading questions. Counsel should avoid the temptation of repeating portions of the direct examination, because the opposing counsel has just finished asking questions favorable to their case. Since cross-examination should avoid reinforcing the opponent's case, it is best for counsel to stick to their "attack points" and cross-examine with a goal of setting the stage for closing argument.

Major Sitler's "attack point" approach ties in perfectly with the chapter method of presenting cross-examination at trial. The best way to think about the chapter method is visually. Imagine a single sheet of standard typing paper with a solid block of text starting at the top left and going all the way to the bottom right corner. Now imagine the same sheet of paper with a bold type title centered at the top of the page. Below is an indented introductory paragraph followed by italicized, centered chapter titles. Each of counsel's attack points is a chapter title in this visual example. Which paper would you prefer to read? Which paper would you be more likely to understand? By properly organizing cross-examination, and using verbal transitions to signal the next chapter, the counsel can explicitly communicate the narrative as the examination progresses.³¹ For example, with the earlier examination of the Duck, counsel transitioned to a new attack point by simply asking, "I want to ask you about your feet, you understand?"

Cross-examination should very rarely be cross. Newcomers to cross-examination "frequently misapprehend *leading question* as referring to a question showing hostility or posed for the purpose of embarrassing or taking unfair advantage. Actually, as litigators well know, a *leading question* is one that suggests the answer to the person being interrogated."³² Famous trial attorney and author Gerry Spence advises, "Power is like a pistol with barrels that point in both directions. When one with power pulls the trigger against someone with lesser power, one barrel fires in the direction of the intended victim while the other fires into the person who pulled the trigger."³³ Mr. Spence describes how, as a young advocate, his overly aggressive cross-examinations were self defeating:

When I was a young lawyer feeling my power, my strategy in a certain case was to attack and destroy every witness the other side put against me. I took on the witnesses, old men with watery eyes who I knew were but company sycophants trying to keep their jobs. I took on the experts, scholarly actors who I knew were but paid witnesses attempting to earn their fees rather than reveal the truth. Cut them up, shredded them, pulverized them. The jury was out only fifteen minutes before it returned a verdict against my client. I was devastated. Hadn't I won every battle? Hadn't I destroyed the witnesses? Hadn't my power on cross-examination been overwhelming? . . . Then one day I realized that not only had I destroyed the witnesses, I had mocked them, held them up to the jury in scorn and derision. I had been angry with the sweet old company men who had spent their lives smiling – smiling at their bosses and their customers all the while knowing the machine they sold was defective. I hated the hypocrisy. I hated the injustice. And I had attacked. I attacked everyone in sight. . . . In the merciless barrage that I leveled in the courtroom, I inadvertently attacked even the jury, for my cruelty forced them to the side of the defense. I had unleashed all of my power, and in doing so I had defeated myself.³⁴

As Mr. Spence's example vividly describes, counsel should treat almost all witnesses with respect. Counsel should never argue with a witness; not only is it objectionable, but the jury members will identify with the witness and hold it against the counsel. Further, counsel must remember that cross-examination is really an opportunity to communicate to the

³¹ Sitler, *supra* note 3.

³² A DICTIONARY OF MODERN LEGAL USAGE (Bryan A. Garner, Oxford University Press, 1990) (emphasis added).

³³ SPENCE, *supra* note 3, at 44.

³⁴ *Id.* at 44-45.

jury. The use of technical language or trick questions will backfire. The use of simple, direct language communicated in a conversational tone, will minimize witness confusion, but more importantly, will assist the jury in understanding the testimony.

Conclusion

Cross-examination is a critical skill for all advocates. Like other areas of trial work, it can be mastered. Getting past the mystique and focusing on simple, solid pretrial preparation is the first step.

As champion of the case, counsel should take full advantage of the opportunity to present argument during the adversary's case in chief. The only catch is that a witness, called to the stand by opposing counsel, must affirm each statement of fact. When done well, this can change the outcome of a case. The best technique to gain maximum control is to use short, single-idea statements intended to provoke a "yes" from the witness.³⁵ The content should never go into uncharted territory, and should always be tied to the counsel's theme and theory of the case.³⁶

What appears to be magic flows from streamlined technique, systematic preparation, and confident delivery of questions designed to communicate a portion of closing argument to the jury. Thoroughly prepared and persuasively presented, effective cross-examination is much more than high drama. Effective cross-examination wins cases.

³⁵ MacCarthy Lecture, *supra* note 3.

³⁶ Sitler, *supra* note 3, at 80.

Appendix A

Witness _____

Argument _____

Attack Points:

1. _____

2. _____

3. _____

4. _____

5. _____

Appendix B

Mr. Big B. Wolf (prosecution cross-examination)

Witness _____

Mr. Wolf killed and ate Grandma to feed his hunger; then he fled.

Argument _____

Attack Points:

Means . . . "I want to talk about you, you understand?"

1. _____

- you have big eyes
- the better to see
- you have big ears
- the better to hear
- you have big muscles
- the better to run
- you have big paws
- the better to catch
- you have big teeth
- the better to eat

Opportunity . . . "I want to talk about Grandma, you understand?"

2. _____

- you knew Grandma
- Grandma was old
- She's was about 70
- She wasn't 5 feet tall
- Grandma had a bad leg
- She walked with a cane
- Grandma had bad eyes
- She worn glasses
- Grandma was nearly deaf
- She wore a hearing aid

Location . . . "I want to talk about you going in to Grandma's house, you understand?"

3. _____

- you live next door to Grandma
- you are her neighbor
- you've been neighbors 10 years
- you've house sat for Grandma
- you watered her plants
- you had a key
- the key under her door mat
- Grandma lived alone
- you knew she lived alone
- you also live alone

Motive . . . "I want to talk about your hunger for meat, you understand?"

4. _____

- everyone needs to eat
- you need to eat
- you are a carnivore
- you eat meat
- you don't have a job
- you don't have money
- you can't buy meat
- you hunt
- you hunt for meat
- another word for meat is muscle
- everyone has muscle
- Grandma had muscle

Flight . . . "I want to talk about your arrest, you understand?"

5. _____

- you know Ms. Hood
- she found you at Grandma's
- in Grandma's bed
- in Grandma's clothing
- they were bloody
- a woodsman came in
- he tried to stop you
- you ran away
- you didn't go home
- you went to Chicago
- you were living on the street
- you were arrested there

Appendix C

Ms. Red R. Hood (defense cross-examination)

Witness _____

Hood doesn't know if her Grandmother is dead, and Wolf's flight was innocent.

Argument _____

Attack Points:

Mr. Wolf an unlikely killer . . . "I want to talk about Mr. Wolf, you understand?"

1. _____

- you know Mr. Wolf
- he is Grandma's neighbor
- he's been her neighbor for years
- you've had dinner with him
- at Grandma's house
- they're friends
- they have never had problems
- your Grandma took vacations
- she would ask Mr. Wolf to house sit
- she never asked you to house sit
- Mr. Wolf was her house sitter

Red only assumes the worst . . . "I want to ask you about Grandma's trips, you understand?"

2. _____

- Grandma likes to travel
- she travels every few months
- she takes short trips
- she takes long trips
- she has been to Hawaii
- she's been to France
- she has been hot air ballooning
- last year she went scuba diving
- you've traveled with her
- but, she also travels alone

Wolf in Grandma's OK . . . "I want to go back to Mr. Wolf's house sitting, you understand?"

3. _____

- Grandma had Wolf house sit
- when she took her vacations
- Mr. Wolf was her house sitter
- To get in, you need a key
- Mr. Wolf watered plants
- To water, he had to get in
- He had to have a key
- Grandma's key
- you knew he had a key
- a key to Grandma's house
- Grandma gave him the key

Of course Wolf ran . . . "I want to turn to Mr. Woodsman, you understand?"

4. _____

- you went to Grandma's
- you were looking for her
- you found Mr. Wolf instead
- you didn't expect him
- you were surprised
- you shouted out
- he shouted too
- Mr. Woodsman heard
- Mr. Woodsman came in with an ax
- He ran at Mr. Wolf
- Mr. Wolf ran away
- He ran from the Woodsman with an ax

Red doesn't know much . . . "I want to ask you about facts in this case, you understand?"

5. _____

- facts are certain
- facts are beyond dispute
- facts are important
- it is a fact that Wolf house sat
- it is a fact that Grandma traveled
- she could be hurt on a trip
- she might even be lost
- she might have died
- you can't be certain
- you just don't know for sure