



APRIL 2013



To cross or not to cross?

A former prosecutor offers advice on how to structure the cross-exam for maximum impact

BY MICHAEL GATTO

As a former prosecutor, I tried over 200 trials and cross-examined hundreds of witnesses in court before taking a deposition. Through this experience, I developed some techniques you may wish to incorporate in your practice. As civil litigators, we have fewer opportunities to cross-examine witnesses at trial and the circumstances are typically quite different. We have the benefit of depositions. Cross-examining witnesses without an impeachment vehicle hones your skills.

This article assumes the reader has proficiency with standard cross-

examinations: asking a series of three to five or maybe seven-word statements followed by “correct,” “true” or my favorite – “yes.” Indeed, this was my initial format. Later, I tried additional techniques with varying degrees of success. In this article, I make suggestions for cross-examinations both at deposition and trial.

Why cross-examine a witness?

Cross-examination allows you to gather evidence to advance plaintiff’s case as to liability, causation and damages. You may undermine the defense’s case. Finally, you can undermine or bolster the credibility of other witnesses. Consideration should be given to each of

these topics when deciding whether and how to cross-examine a witness.

Occasionally, you may wish to forgo cross-examination entirely. You probably will not have many occasions when you choose not to cross-examine a witness. If a witness has said nothing to hurt your case or you are certain you cannot get any favorable information, this may be a reasonable choice.

Cross-examination at deposition

Explore any and all topics in great detail. The downside is extra time and marginal increased cost of the transcript. The benefits include potential additional points you would not otherwise obtain.



From preparation, you will have points you will want to cross-examine the witness about. Request production of documents the witness likely possesses to discover additional topics for exam. Consider using extensive open-ended questioning before doing any cross. Ask the witness to explain, probe why the witness chose a certain course of conduct, and ask follow up on the answers provided. This process may uncover additional admissions or points for follow up in your cross. Once you begin cross-examining the witness, the volunteering and detailed answers usually slow.

Examine the deponent about established or anticipated testimony of others. One will then know whether the witness will contradict or support others on these issues. Determine who the deponent has spoken with about topics covered in the deposition. Identify his friends and the people he has spent the most time with recently. These people become possible impeachment witnesses should they contradict him. You may also learn potential witnesses your adversary will call at trial.

I recommend aggressive cross-examination, rarely withholding “great impeachment.” First, 90 to 95 percent of cases resolve at mediation. If you forgo powerful cross, 90 to 95 percent of the time, you waste the opportunity to achieve a greater settlement by forcing the defense to confront this evidence at mediation. Second, you will likely discover additional points to be made on cross with the respective witness and still surprise the witness or opposing counsel if the matter does not settle.

Videotaping depositions of defendants allows one to create excerpts to play at mediation. Defense counsel should advise the adjuster of the state of the evidence for mediation. Playing the excerpts during your mediation presentation forces the adjuster to confront this evidence. You can also demonstrate the poor impression the defendant will make as a trial witness. In cases with multiple defendants, juxtapose conflicting testimony in your mediation presentation to establish

the defendants will have to “point the finger” at one another at trial. If the matter does not settle, you have these excerpts for opening statement and use throughout trial.

Cross-examination at trial

• Preparation

Preparation of a trial cross-examination requires painstaking detail. Identify each admission made by each witness with reference to page line. This allows immediate impeachment if the witness contradicts his deposition testimony. Once this process has been completed, you can identify all admissions you can establish at trial and any existing contradictions for impeachment. These preliminary steps will then allow you to make informed decisions about ordering witnesses to cross-examine in your case in chief, if any. Thereafter, you can turn to preparing each individual cross-examination.

For each witness, organize the admissions by examination topic. Order the admissions to build to the point or points you want to make under each topic. Then, you can identify gaps in the existing evidence. Spend time formulating questions to fill these gaps to force the witness to make additional concessions. Review admissions from defendant’s testimony which can be read to the jury to fill in gaps. Once you have determined the points you want to make, one can determine the order of the exam.

Once you decided which points you want to establish, determine the significance of each point, the probability you will be able to establish it and the amount of time to do so. Ensure the optimal cross by eliminating weaker points and those that take too long to establish. One can now begin ordering the exam.

• Structure of the exam

Structure the cross-examination to maximize the impression upon the jury. Recognize Primacy and Recency. Get easy admissions before “going after” the witness. Marshal and selectively use impeachment evidence. Use headings for the jury when transitioning to new topics.

Consider the high risk – high reward of open-ended questions. Finally, start and end your trial cross with strong points.

Numerous studies show jurors are most attentive at the beginning of your examination. Likewise, studies show people tend to recall things they hear first and last. So, try to identify points you feel have great value; can be established quickly; and will not likely draw any objections. Doing so allows you to set the tone for the balance of the cross and end on a high point.

Virtually every witness will make some concessions that will somehow advance your case or harm your adversary. The witness is likely to make such minor concessions without much of a fight. You will have a greater likelihood of getting the maximum number and greatest concessions by establishing these minor points before going after the witness, if that is necessary. Consider ordering the exam by increasing the significance of the admissions sought.

If you have ammunition to impeach the witness, I recommend beginning use when the witness begins to resist making desired admission. Successful impeachment through deposition contradiction or other means will put the witness on the defensive. Identify testimony which you believe you will be able to immediately impeach. This can be through prior deposition testimony of the witness or of any defendant or even a defendant’s discovery response. You can then immediately read the contradictory deposition testimony of the witness or of the defendant’s testimony or discovery response under Code of Civil Procedure section 2025.620. Strive to identify as many possible points where you can do this and string them together. Due to the powerful nature of such immediate impeachment, the witness will likely want to avoid repetition. Later in the examination, the witness may make concessions he would not otherwise make out of fear of being impeached yet again.

Studies show jurors, and indeed all of us, lose focus when listening to people



APRIL 2013

speak. In recognition, utilize headings to orient jurors to new topics. Announce, “I want to talk about X” or “Let’s discuss your testimony regarding Y.” This will alert jurors to the upcoming portion of the cross. Also, consider using demonstrative exhibits during cross to rouse jurors’ attention.

Savvy trial counsel will use one witness to impeach another. They will also seek to have witnesses corroborate their other witnesses to boost their credibility. Often, it is difficult to get direct impeachment of a defendant. Extensive discovery increases the likelihood you can obtain impeachment material. Forcing defense witnesses to agree with your witnesses narrows subjects in dispute and bolsters their credibility.

• **Pay close attention to the answers**

Whether examining a witness under Evidence Code 776 or listening to a defense direct examination, listen carefully to the answers provided. Flustered witnesses often will make admissions or provide fruitful ground for follow up. Invariably, the witness will provide testimony you did not anticipate. When this occurs, you need to be prepared to address it quickly. A mastery of the case file and ability to search quickly through deposition testimony will allow you to handle this situation. Co-counsel can assist by hunting for any possible impeachment of the witness during your examination when unanticipated answers are provided.

• **Consider the impression on the jury**

Be mindful of the dynamic between you and the witness as well as the jurors’ perception of the witness. Have your client or co-counsel provide an assessment of the jurors’ response to your exam while you are conducting it. This feedback allows you to determine whether to

back off or perhaps even be more aggressive in your approach. Also, acknowledge diminishing returns and curtail your examination accordingly.

• **Consider open-ended questions on cross**

Open-ended questions on cross-examination are a potential high risk – high reward tactic. In civil cases, we have the luxury of depositions which allow us to learn in advance of trial the witness’s explanation. Thus, you likely have a good idea what the answer will be. When counsel prepares their witness for cross-examination at trial, they are unlikely to prepare the witness to answer an open-ended question. This failure may provide fertile opportunity to capitalize. The explanation may be so preposterous as to be unworthy of belief on its face. More often, you will merely have the opportunity to expose their explanation as a fabrication. If employing leading questions, consider doing so in the middle of the examination. If it does not go well, hopefully, the jurors’ attention is at an ebb. Also, you can still establish additional points afterwards and still end your cross on a high note.

• **Cross-examining without a deposition**

When confronting a trial witness you have not deposed, the simple rule of short leading questions is very safe. Your level of preparation and familiarity with the evidence will dictate your comfort level seeking more than very simple admissions. One can likely identify minor points on which the witness agrees. As the examination proceeds, you can assess the likelihood of getting more significant admissions. Before trying to do so, save some points you can finish with which you are confident will get additional admissions. This will allow you to end on a high note.

Conclusion

Cross-examination is a tremendous opportunity to establish powerful evidence. Effective cross-examination demonstrates your command of the facts and enhances your credibility for closing argument. Detailed discovery; thorough preparation; starting and ending on high points; timely impeachment; calculated risk taking; and having a thorough command of the evidence and being able to capitalize on unanticipated testimony will make your future cross-examinations more compelling.



Gatto

Michael Gatto is a trial attorney at The Veen Firm, P.C. San Francisco. He has tried over 100 jury trials and for the past 12 years, has specialized in catastrophic personal injury and medical malpractice matters. He is admitted to practice in both California and Arizona. For more information, please visit www.veenfirm.com to view his personal profile.



Veen

William Veen founded The Veen Firm, P.C. as a sole practitioner in 1975, gradually developing it into a firm of talented attorneys and staff who represent severely injured workers and consumers. He is a member of the American Board of Trial Advocates and was honored as the Trial Lawyer of the Year by the San Francisco Trial Lawyers Association in 2003. www.veenfirm.com

