

New York Law Journal

Cross-Examination: Comparison of Different Approaches

By **Ben Rubinowitz and Evan Torgan**

The dream cross of every trial lawyer has to be a T.V.-type Perry Mason examination of the witness in which he not only breaks down, but confesses to things he hasn't even done. While that might be the reality of a 30-minute television show, it is rarely reality in the courtroom. If conducted properly, though, cross-examination can, and will, serve two important goals: It will highlight favorable testimony and discredit unfavorable testimony. Put another way, cross can enhance helpful testimony and discredit unreliable or untrustworthy testimony.

To secure these goals, however, the trial lawyer should start preparation for the cross in reverse trial order. The first thing that must be done is to carefully review the jury charge. Knowledge of the requisite elements of the charge will lay the groundwork for a compelling summation. Clearly, thought must be given to the summation before witness examination ever takes place. All of the witnesses are examined for one purpose: to create a clear, compelling and winning argument for summation.

Untrustworthy Witness

While many lawyers feel that a short, sweet cross-examination is the most effective way to discredit a witness, this is not always the case. At times, it is far better to slowly and carefully review the events to ensure that the jurors recognize what is happening, appreciate the dissection of the witness that is taking place before their eyes and know with certainty that the witness is unworthy of belief.

Imagine the scenario in which a man is charged with a crime and will take the stand on his own behalf. For purposes of this example, the underlying crime is unimportant. What is important though, is that in the past, this man had been arrested twice before and convicted for other crimes. When asked his name by the police officer in those other two instances, he offered false names. While many lawyers might see this as an opportunity to move in for an immediate kill, this strategy might not be the most effective approach:

Q: Sir, in the past you lied to police officers, true?

Q: You gave them false names, right?

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Q: On two separate occasions?

Q: Each time you knew your name, true?

Q: But you provided false information, correct?

To some, this might seem like an effective cross. However, to the experienced trial advocate, a golden opportunity was missed—an opportunity that had the potential to leave the witness not just bloody, but dead.

To approach this particular cross, thought must be given to the summation.

Specifically, the words the lawyer wants to use on summation to describe the defendant's prior conduct must be given careful consideration before ever cross-examining this witness. A list of powerful words for summation should be created before the cross starts. Of course, these words can be used during the cross examination itself. That word list might include:

1. Deceit/deception
2. Telling less than the truth
3. Hiding
4. Falsifying
5. Misleading

Recognition of the manner in which the man lied, the motive for the lie and the way in which the events unfolded during those occasions can serve to enhance the destruction of the witness. To start, lock the witness into a known fact. Commitment is essential.

Q: Your name is Michael Ruby, true?

Q: It's always been Michael Ruby, right?

Q: At no time did you change your name?

Next, move on to the events as if the jurors are watching a slow-motion movie of what took place on each of those prior occasions.

Q: In 2005, a police officer approached you, true?

Q: One of the first things he did was ask you your name?

Q: You understood that he was looking for a truthful answer, correct?

As with all lies, consideration had to have been given to the lie before the words were spoken.

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That fact can serve as a powerful springboard for cross.

Q: But before you answered, you had a choice to make, true?

Q: You could either be honest or you could deceive?

Q: You could either be straightforward or you could tell less than the truth?

Q: You made a choice, right?

Q: You chose to provide false information, true?

Here, the convincing manner in which the witness answered the officer is equally important.

Q: You looked the officer right in the eyes, true?

Q: While looking him in the eyes you provided a name?

Q: The name you provided was Pat McCloskey, true?

Q: It was a false name, right?

Q: At no time did you correct this "error," true?

Next bring out the motive for the lie.

Q: You certainly didn't want to provide your own name?

Q: You were trying to hide your true identity?

Q: You were trying to be convincing?

Q: To help one person?

Q: And that one person was not the officer?

Q: It was you, correct?

To highlight the nature of the conduct, go through the second event with equal tenacity.

Q: But this wasn't the only time you've spoken with an officer, true?

Q: In 2009 another officer approached you?

Q: Once again you were asked your name?

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Q: Once again you had a choice to make?

Q: Once again you could level with the officer or you could practice deception?

Q: So what you did was you looked the officer in the eyes?

Q: You knew you were going to mislead?

Q: And that's exactly what you did?

Q: You said my name is Frank Lanzo?

Q: That was completely false, right?

Q: But again you were trying to protect that one person you care most about, true?

To finish off this cross, the point must be brought home. Clearly, eye contact becomes an important point for summation.

Q. Sir, each time you told less than the truth you looked at an officer, true?

Q. You looked them right in their eyes?

Q. And while looking right in their eyes you mislead?

Q. You mislead in an effort to help yourself?

Q. Today, before this jury you would once again like to help yourself, true?

Q. Once again you would like to get yourself out of trouble?

Take a look at this jury and show them how you looked at the police officer.

Needless to say, a more powerful argument for summation has been created by expanding the original cross to include conduct and motive. It is the ability to think through the best argument for summation before the cross ever takes place that allows for a more compelling argument on summation.

Enhancing Helpful Testimony

Often, the witness to be cross examined is not a bald-faced liar but one who simply does not have a strong factual basis for his testimony. With this type of witness, the cross examiner is not looking to dissect or discredit the witness but merely looking to point out facts that offer support for argument on summation. With this type of cross a friendly, conversant tone can yield significantly more mileage during the examination.

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Imagine the scenario in which a witness describes an accident scene involving two cars. You know through investigation that this witness arrived at the scene five minutes after the accident took place. Rather than "screaming" at such a witness, a low-key reasoned approach on cross can enhance helpful testimony.

Q: You would agree that you have provided information concerning this accident, true?

Q: You are trying to provide honest, forthright information, right?

Q: You have no axe to grind one way or another?

Q: You would agree you arrived at the scene five minutes after the accident, true?

Here, working with the "negative" can enhance argument for summation.

The focus should be on what the witness did not see and does not know.

Q: You never saw the accident take place, true?

Q: You don't know, of personal knowledge and observation, how it occurred?

Q: You don't know if the vehicles were moved after impact?

Q: You don't know through personal observation, the speeds of the vehicles prior to impact?

Q: You don't know the traffic conditions immediately before impact?

Q: You don't know if evasive maneuvers were taken by either driver?

Q: You don't know if horns were honked?

In the execution of this type of cross-examination, there should be a palpable difference in the tone and demeanor of the questioner as compared to the approach when one is questioning a "lying witness." In that instance, everything is being done for the purpose of convincing the jury that the witness is simply unworthy of belief. Where, however, the witness appears to be mistaken (although honest) or limited in his ability to shed light on relevant events, a show of overt hostility toward the witness will likely turn off the jury. Rather, polite but firm and effective questioning can still serve to limit the negative impact of the witness' testimony.

Conclusion

While cross-examination stands as the most powerful tool to diminish the testimony of the lying or exaggerating witness, in order to gain maximum impact, the questioner must

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carefully consider the theory of the cross before undertaking it. Where a witness is lying, the questions and the manner in which they are presented should be crafted to slowly demonstrate the improbability of the witness' story, leaving the jury little doubt that it should reject the witness as untrustworthy. Where a witness is mistaken or overreaching, however, questioning should respectfully focus on the points which undermine the testimony, without the questioner taking on the burden of convincing the jury that the witness is generally lying.

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