

Teaching Cross-Examination

By Frank Ramos

Cross-examination is a crucial skill and one that can be learned, taught, and mastered through various means.

The best trial lawyers are masters at cross-examination. We can call ourselves many things—lawyers, counselors, strategists, thought leaders—but let’s not dare call ourselves trial lawyers if we cannot make a witness say what

we want him or her to say on cross. The ability to play the ventriloquist and have the witness play your dummy, saying the words that you put in his or her mouth, is a skill that sets trial lawyers apart. In depositions, I can separate out the trial lawyers from the litigators, the ones testifying through the witness, scoring one admission after another, and those who fail to appreciate the opportunity that effective cross-examination offers. The best compliment paid to me was by a plaintiff’s lawyer after I deposed a co-defendant’s corporate representative. The lawyer told me, “I don’t want to go to trial against you. You’re a real trial lawyer.” Real trial lawyers win their cases through cross-examination.

We can all learn and teach effective cross-examination. We can learn to eviscerate the opposing party or opposing expert through cross-examination, and we can teach our firm’s lawyers to do so,

too. Based on what my two senior partners, Bud Clarke and Spencer Silverglate, have taught me, based on my observations of them and other master cross-examiners, and based on teaching young lawyers cross-exam skills in numerous deposition boot camps, I want to share both how to improve your own cross-exam skills and how to teach those skills to others. Through a series of tips and exercises, you will help yourself and others make the most of cross-examination.

Identify the Purpose and Significance

To improve our cross-examination skills, we must first ask ourselves the purpose of cross-examination. Without starting with the goal, we won’t know which skills we need to achieve it. The goal of cross-examination is to ask questions that secure admissions that help you win. To put it crassly, the goal is to put your words in the deponent’s mouth. The deponent is not testifying. You are. The deponent is not expressing his or her views, opinions, thoughts, or ideas. You are. The deponent is a mere conduit, a marionette, a puppet, or as referenced earlier, a dummy in the hands of a master ventriloquist. Cross-examination isn’t used to gather facts, explore opinions, or learn the other



■ Frank Ramos is a partner of Clarke Silverglate PA in Miami, where he handles a variety of litigation matters in the state and federal courts throughout Florida. His litigation practice includes complex commercial disputes, employment, product liability, medical malpractice, and general personal injury. He is also certified by the Florida Supreme Court as a circuit and county court mediator.

side's perspective. Every question is akin to every move on a chessboard. Every move is part of a larger strategy, and the endgame? Taking the king.

Many attorneys don't appreciate this. Many attorneys don't appreciate the purpose, power, and effect of cross-examination. They don't appreciate how an effective cross-exam can forever alter the trajectory of a case. Cross-examination wins or loses cases. Cross-examination raises or lowers settlement values. Cross-examination builds or tears down reputations and confidence. The first thing to teach about cross-examination is just how important it is. Overlook or downplay it at your own risk.

Explain the Rules and Why You Follow Them

Once you teach others the significance of cross-exams, explain what an effective one looks and sounds like. Everyone seems to have their tips, rules, and commandments of cross-examination. These are mine:

1. Ask only leading questions.
2. Conversely, never ask a question that invites an explanation.
3. Have most answers be "yes," a few "noes," and the occasional "I don't know." These are the only appropriate answers to your questions. If there is another answer, you're asking the wrong question.
4. Do not end questions with "correct" or another tag. Make a statement and use an inflection so that it comes across as a question, requiring an affirmative response from the witness.
5. Ask one fact per question.
6. Each fact should be irreducible, like an atom. If it's "molecule" size, reduce it to atom size. This allows you to stretch out cross-examination with one favorable response after another, after another.
7. Have each fact build on the last fact and lead into the next fact.
8. Ask every favorable fact on the topic.
9. There is no fact too basic or too rudimentary.
10. You want witnesses to agree with you and make admissions. You're equally satisfied when they disagree with rudimentary common sense facts. Other than being impeached, dis-

agreeing with a fact that every juror would accept is the fastest way to lose credibility.

11. Keep your sentences short.
12. Avoid words that your average juror won't understand.
13. Start with general topics and questions and funnel to specific topics and questions.
14. Explore an issue or topic in its entirety and then proceed to the next topic or issue.
15. Start each cross-examination addressing bias.
16. Start with your strongest issue and end with your second strongest issue. In short, start and end strong.
17. Impeach only on significant issues, not minor issues.
18. Ask ultimate questions during the deposition, not trial.
19. Ask questions that reinforce your case themes and undermine the opposing party's trial themes.
20. When you get an admission, move on. Don't try to get the perfect answer at the expense of the witness explaining away his or her admission.
21. Witnesses will agree with your facts, not your conclusions. Ask questions about facts, not conclusions, opinions, or feelings.
22. Ask questions about what the witness did not observe, hear, or do. This limits what the witness will know, his or her role, and his or her effect.
23. If you have evidence that you believe will force a witness to tell a truth that he or she is unwilling to admit, commit him or her to the lie and then confront him or her with the evidence forcing him or her to change the testimony.
24. Secure all admissions by the witness, whether in prior statements, prior depositions, incident or accident reports, medical records, videos, social media, or elsewhere, and have him or her confirm those admissions.
25. If you're arguing with the witness, if the witness is explaining his or her answers, or if the witness is testifying instead of you, you're losing.

These are my 25 rules of cross-examination. You, too, may have your own rules for cross-examination. You

may agree with some or all of my suggestions. You may disagree with some of them. You likely have additional rules you rely on. What matters when teaching cross-examination is to write a full set of rules (whether mine, yours, someone else's, or a combination of these) and use these rules as the springboard for teaching cross-exam skills. These are the rules

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of the road. To master them, you must first know them. Create your list of rules for cross-examination and provide them to your lawyers so that they can learn them and commit them to memory.

Don't simply share your rules. Explain what happens when they're followed. When followed, you secure a seamless set of questions and answers, which reads like an excerpt from a legal thriller or comes across like the pivotal scene of a courtroom drama. Jurors want drama. They crave it. They watch it on their favorite lawyer serials, hear it discussed by legal commentators, and read it in their novels. They expect you to win your case in cross-examination because they see that on television and in movies. They want conflict, clash, strife, and combat leading to a climax and then to the denouement, where you emerge victorious. You're putting on a show through your cross-examination. You're the screenwriter, writing questions for the greatest effect on the viewer—the fact finder. The rules of cross-examination result in a production worthy of *The Verdict*, *A Civil Action*, *Law & Order*, *L.A. Law*, or *The Practice* because that's what jurors expect. That's what you're going for

and that's what you achieve when you follow the rules.

Teach How to Implement the Rules

The rules are self-explanatory, yet so many of us struggle with implementing them. It's easy to tell someone to ask leading questions. It's harder to teach someone how. It's easy to keep your questions to

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one fact per question, using 10 or fewer words. It's harder to teach someone to ask those questions. I've struggled with developing methods and exercises to teach these skills.

An obvious one is to share excerpts from effective cross-examinations at depositions and trials and discuss their structure and why they work. This is a tried-and-true method and is included in most manuals and texts on cross-examination. It's one thing to know the rules. It's quite another to read an actual cross-examination that applies those rules. Go through yours and others' deposition and trial transcripts at your firm, select the best examples of cross-examination, share them with the attorneys at your firm and have one or more lunch and learns to discuss them. Seeing the rules come to life and applied in real-life situations will show both that they work and how they work.

Just as importantly, show less-than-effective cross-examination examples and some during which the cross completely went off the rails. For every effective cross-examination that I've witnessed at deposition or trial, I've witnessed several that missed the mark—some by a little, some by

a lot. I have observed what those individuals tried to do. I appreciated what they were attempting, and I understood why it didn't work; why it was a mere shadow and imitation of the real thing. Share examples with the other lawyers at your firm. They can be examples from other lawyers from other firms. And if you can swallow your pride, they can be examples from your cross-examinations that did not go as planned. You can explain what you tried to do, what you actually did, and what you would do differently if given a second chance. We learn more from failures than successes.

Run Through Exercises

Beyond examples from transcripts, there are exercises that you can run through with your lawyers to develop their interrogation skills. This give and take of exercises hones skills and serves as teachable moments in real time. Here are a few exercises that you may find useful.

What Am I Wearing?

Stand in front of your colleagues and have them ask you leading questions about what you're wearing. Each attorney takes a turn asking a question, followed by the next attorney asking another question. Each question should be leading, addressing only one fact and lead from the last question and into the next potential question. Correct the attorneys each time they don't follow these rules. The exercise would go this way:

- You're wearing a dress shirt.
- It's white.
- It has a collar.
- Button down.
- It has long sleeves.
- With cufflinks.
- With an emblem on them.
- From your alma mater.
- And it has a pocket.
- On the right side.

Encourage the attorneys to ask as many questions as they can conceive for each article of clothing, stretching out the cross-examination, while asking only leading questions and avoiding ending leading questions with tags such as "correct." Have them work on their inflection to turn statements into questions, and encourage them to use as few words as possible for each question.

Now, will an attorney ever ask a witness what the witness is wearing during cross-examination? No. But the exercise allows you to witness and correct other lawyers applying the rules of cross-examination.

Who Am I?

Have your attorneys read your firm bio and ask you questions about you. The goal is to ask only leading questions, include one fact per question, secure "yes" answers, have each question lead from the last into the next, and have the questions be short. Instead of having each attorney ask only one question per turn, have each attorney cover one topic during his or her turn, such as your education, training, experience, publications, or leadership. Each attorney will draw out his or her topic as much as possible while applying as many of the other cross-exam rules. You'll step in as needed and provide friendly critiques on specific questions and offer "better" questions to ask.

What's for Dinner?

The "what's for dinner" exercise is slightly different from the previous two. You'll have attorneys ask you questions about what you ate last night. They don't know what you ate, so they'll have to do their best to use leading questions to secure answers they don't already know. For trials, we're taught not to ask questions that we don't already know the answers to. For depositions, different rules apply. You're exploring what a witness knows and what he or she will say while trying to put words in his or her mouth.

Be a Jerk

In this exercise, the roles are reversed. Have your attorneys take turns being witnesses and ask them about topics that they know well. It could be history, sports, music—whatever topic the attorney enjoys and knows a lot about. Give them one instruction: do their best not to answer your questions. They should only answer your questions when they have no choice but to capitulate to them. This exercise serves two purposes. First, it shows them how you deal with an obstructive witness and pin him or her down. Second, it provides them with the perspective of the witness and how many different ways

there are not to respond to a question with “yes.”

When I think through cross-examination questions, I play devil’s advocate and think about every way that the witness can avoid giving the answer that I want. By having a lawyer play the role of recalcitrant witness, he or she learns to test his or her future cross-exam questions.

A Case Study

Create a case study for an expert who you depose by providing to your attorneys the materials (C.V., articles, social media posts, prior depositions) that you relied on to cross-examine the expert. Afford them time to review the materials and craft their interrogations. Play the role of the expert and have your attorneys mock cross-examine you. After they’re done, share with them a copy of your cross-examination and explain why you asked the questions that you asked in the order that you asked them. This simulation provides virtually the same experience that attorneys would encounter in a deposition or trial. It doesn’t require much work from you because your deposition materials should be readily available, and having already prepared for the deposition, you’re equipped to channel the expert and pretend to be him or her. From the trainee’s end, the trainee sees what materials he or she needs to secure to prepare for depositions or trial testimony and how to use them to interrogate an expert.

Body Language

At trial, your body language conveys to the jury that you’re in charge and you’re testifying, not the witness. From where you stand, to how you use your body, to the tone of your voice, you’re sending a clear message: it’s about me, not the witness. Listen to me, not the witness. Work with your attorneys on their body language. Set up a podium or table in your conference room and teach your attorneys where to stand, how to stand, what to do with their hands, which facial expressions to use, and which inflections and tones of voice to rely on. How you ask your questions is as important as what you ask.

Pair Off

Have your attorneys pair off, have each assume the role of a famous person that

is widely known, and have each cross-examine the other. For example, one attorney can be George Washington and the other attorney can ask him leading questions about the Revolutionary War. After 15 minutes, the questioner assumes the role of a famous person, let’s say Martin Luther King, and the other attorney asks him or her questions about the Civil Rights Movement. Have each attorney critique the other and offer additional questions that each one could have asked.

One Question Too Many

It’s tempting. You’re in a groove. You’re getting one favorable answer after the next, and then you ask the one question too many. You try to get a witness to repeat the same answer for added dramatic effect, and he or she changes the answer. You go from several fact questions to an opinion question and invite a soliloquy, or you ask an ultimate question with which no witness would ever agree. Like Icarus flying too close to the sun, you tempted fate and fate won.

Review examples of one question too many and how to avoid that mistake, and then have your attorneys role play by asking questions that take them right up to the edge of asking too many questions without crossing that line. Great trial lawyers flirt with that line but don’t cross it.

Other Teaching and Learning Opportunities

In addition to participating in these exercises, recommend to your lawyers that they do the following:

1. Rewatch their favorite legal thrillers and study why the cross-examination scenes work.
2. Watch their favorite television journalists and study how they get guests to answer their tough questions.
3. Read one or more leading texts on cross-examination. I won’t provide any by name because we all have our own favorites.
4. Read classic novels with courtroom scenes, such as *To Kill a Mockingbird*, and study the cross-examination scenes.

In short, you want to encourage your lawyers to seek out interrogations in television shows, movies, and books and study how they’re done and why they work. This is something that they can

do with a spouse, child, or friend that will give them insight on the rules of cross-examination.

Conclusion

I hope that this article provides some thoughts on how to improve your cross-examination skills and teach others how to improve theirs. Effective cross-examiners

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get noticed by juries, judges, opposing counsel, and clients. They make a favorable impression, cast an image of confidence, and control and direct the trajectory of the case. It is a crucial skill and one that can be learned, taught, and mastered. Getting a witness to agree with you, question after question, doesn’t occur by happenstance. It requires practice, preparation, and hard work. But if you put in the time and effort, you, too, will ask the questions that secure admissions and win your cases. We’re all capable of this, and we’re all capable of being effective and victorious trial lawyers. I wish you the best of luck during your next cross-examination, whether it be at deposition, at trial or asking your teenager why he broke curfew. 