The Importance of Cross Examination

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The Confrontation Clause provides that, “[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him.” The United States Supreme Court has concluded this about the Clause:

Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence, much less to amorphous notions of “reliability.” Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point

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on which there could be little dissent), but about how reliability can best be determined.

_Crawford v. Washington_, 541 U.S. 36, 61-62 (2004) (internal citations omitted). In other words, our Constitution requires that the reliability of evidence be tested through the “crucible of cross-examination.” In the immortal words of famed New York City trial lawyer Francis L. Wellman from his classic book, “The Art of Cross-Examination”:

> The issue of a cause rarely depends upon a speech and is but seldom even affected by it. But there is never a cause contested, the result of which is not mainly dependent upon the skill with which the advocate conducts his cross-examination.²

Put another way, nothing is more important for a criminal defendant than the opportunity to confront one’s accusers, as contemplated by the Sixth Amendment. Impeachment by shedding light on the shortcomings of the witness’ testimony in terms of his or her bias, motive, interest, inconsistent statements, competency (to see and hear events) and character (including F.R.E. 609 prior convictions and other F.R.E. 608 bad acts), may mean the difference between success and failure at trial.

The trial attorney must of course be sure that cross-examination of particular witness will benefit his or her client. Asking yourself a few questions at the outset about the potential examination will help frame your

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goals for the particular witness: Did the witness hurt your case by his or her direct examination? If so, can you mitigate the damage through cross examination? Are you able to obtain testimony on cross-examination to actually help your cause? Are you able to secure testimony on cross-examination that will hurt your opponent’s case? Do you need this witness to establish an evidentiary foundation to admit a document or other exhibit in evidence? Can you discredit his or her testimony given on direct examination (i.e., through inconsistencies revealed during direct examination)? Can you demonstrate that the testimony given during direct conflicts with the testimony of other witnesses? Can you actually discredit this witness (i.e., by showing bias or prejudice in favor of your adversary and [or] against your client)? Or does the witness have a motive to lie? Is he or she personally, financially, or otherwise interested in the outcome of the case? Was he or she not in a position to see or hear the event testified to on direct examination? Can the cross-examination be used to enhance or tear down the credibility of other witnesses? Is the witness important enough to cross-examine in order to fulfill the expectations of the jury?

Once cross-examination is determined to be the best route to take, and this most often will be the case, here are some thoughts for the trial practitioner on how to proceed:
You Need to Tell a story. Using leading questions is the best way to tell your story. Whether it is your client’s story, the story of missed opportunities, or the story of impediments to observing an important event, the jury should be provided the narrative through you placing the words into the witness’ mouth. Persuade the jury while not allowing the witness time to fully contemplate his or her answer. This is no time to discover new facts, so be reasonably sure of the answer that is coming. Do not ask open ended questions using “how” or “why.” You will also be more effective if you just attempt to establish one fact per question.

Sometimes Less is More. Just because a witness makes a mistake, that does not necessarily mean that he or she is lying. Jurors often believe that if a witness does not make mistakes while testifying, his or her testimony might not be true. Witness mistakes can be attributable to nervousness, and jurors understand that. The courtroom is an intimidating place, and everyone there is on edge. If the witness is simply mistaken, an attorney may strategically elect to not to press too hard on the inconsistency in question.

Consider asking questions with no beginnings. At times, the most effective way to save a powerful fact for the end of the question is to ask questions with no beginnings; for example: You left work at ten?
Got home at twelve twenty five? Parked behind the building? Walked up the front steps? Opened the door to your house? Keep your questions short and sweet. Use plain English.

**Do not attempt to scale unnecessary mountains.** It is not always necessary to make the witness out to be a liar. If all you need is for the jury to disregard his testimony, it does not matter why they disregard it, just so long as they do. So do not take on an extra burden. If you can come up with a comfortable way for the jury to disbelieve the witness’ testimony, that is all you need to do.

**You control the tempo.** Increasing the pace of your questioning allows you to control what story gets told during cross-examination. If the witness is lying, he or she will need time to think of the lie. The faster your questions hammer the witness, the less likely his or her chances are of maintaining the lies. Control the pace of your cross-examination, and you will deny the witness time to fabricate his or her responses. Control the tempo, and you control the cross-examination.

**Build up to a strong finish.** Do not finish a cross-examination by checking your notes to confirm that you have not forgotten anything. Jurors remember the beginning and the ending more than what is asked in the middle. Remember that.
**Quit while you are ahead.** Kenny Rogers teaches us, “You got to know when to hold 'em, know when to fold 'em, Know when to walk away and know when to run.” Attempting to improve on a favorable answer may under some circumstances become a recipe for disaster - - as is an attempt to revive a dead issue. You can only live to fight another day if you accept reality when it is before you. Do not lose a great point you make by going on too long with the witness.

**Be yourself.** Do not attempt to be some other attorney when you are attempting to cross-examine a witness. You will be more successful, believable and persuasive by being yourself. The great cross-examiners do not imitate other attorneys. Always listen to the answers you receive. Treat the witness fairly; believe it or not, your credibility with the jury is on the line as well.

**Helping your own witness prepare to be cross-examined.** It is crucial is to help witnesses understand how untrustworthy they look when they lose their cool. Videotaping the witnesses during mock cross-examinations, and showing them the video, may be very helpful. For many people, this will be the first time they have ever seen themselves on video; and once they see how undignified they look when they get upset, they will realize why you want them to control their emotions. The witness should
further be informed about the tactics your opponent may use to get under the witness’ skin and trigger their anger. Rather than using solid cross-examination skills, many lawyers will rely on raising their voice, rapid-fire questions, attacking integrity, misstating the witness’s name or rank, forcing the witness into “I don’t know” responses, staring down the witness, or other “tricks” that cause anger. If your witness is prepared, he or she will expect the lawyer’s trick, so they will not be taken by surprise and can remain calm throughout the proceedings.

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As the Crawford court recognized, the Confrontation Clause’s “ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” 541 U.S. at 61-62. The opportunity to cross-examine is sacred to the criminal defendant. A trial attorney should never squander this opportunity by ceding control to the witness, or by losing sight of the objective; that is, telling a story and exposing reasonable doubt.

However, “[t]here is no short cut, no royal road to proficiency, in the art of advocacy. It is experience, and one might almost say experience alone, that brings success. I am not speaking of that small minority of men
in all walks of life who have been touched by the magic wand of genius, but of men of average endowments and even special aptitude for the calling of advocacy; with them it is a race of experience.” Wellman, supra at p. 24-25 (emphasis added).

So keep working at it.

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