

The Art of Trial Advocacy

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An Approach to Cross-Examination¹ “It’s a Commando Raid, not the Invasion of Europe.”²

After a lengthy, relatively uneventful direct-examination, the military judge turns to you and dryly asks, “Counsel, do you care to cross-examine this witness?” All eyes in the members’ box quickly focus on you. Without hesitation, you jump to your feet and firmly state, “Yes, your honor!” As an advocate, you know that your role is to attack the opponent’s case zealously, which means that you must cross-examine this witness, but deep inside, you feel somewhat uncertain, apprehensive, and even a little scared. Of all phases of trial, cross-examination is your weakest advocacy skill. These feelings, however, are suppressed by the overwhelming desire to hear yourself talk. After all, you are a lawyer; lawyers must advocate; and you cannot advocate unless you talk. With feigned confidence, you gather your papers, stride to the podium, and begin, uncertain of what is about to come.

The decision to cross-examine the witness in the above hypothetical may be correct, but the thought process is not correct. Undoubtedly, cross-examination is one of the most difficult trial advocacy skills to master. Few attorneys have the raw talent to conduct an effective, impromptu cross-examination; most struggle. There are numerous factors that impact counsel’s conduct of cross-examination, including talent, experience, preparation, organization, and form.³ Some of these factors are especially conducive to learning and development through planning and practice; some are not. This note addresses one aspect of cross-examination that can be comfortably learned—organization. Regardless of talent and experience, organized trial practitioners can confidently approach cross-examination.

There are three phases to organizing a cross-examination. First, conceptualize the entire case. Ask yourself: “What argument am I going to make about this witness during my summa-

tion?” Second, determine what specific factors (attack points) support the argument. Finally, draft particular questions that develop each attack point. Appendix A depicts this three-step approach to cross-examination in a simple, one-page format.

Preparation complements this organized approach to cross-examination. Ideally, you will have a list of the opponent’s witnesses well in advance of trial. After interviewing the witnesses and reviewing their statements, you can deliberately prepare and rehearse your cross-examination. Preparation, however, should not stifle flexibility. Unexpected situations often arise in the courtroom. You must be able to react and to adapt to the unforeseen. The three-step approach to cross-examination not only serves as a vehicle for the well-prepared cross, but also can aid in responding to the unexpected.

Argument

The first step is to decide what argument you are going to make about the witness. This requires you to think about the “big picture.” Consider how this witness supports your theory and theme of the case. Determine what you are going to tell the fact finder about this witness during the argument. You may decide that you are not going to make any argument about this witness. If so, consider not cross-examining the witness. If, however, you are going to make reference to this witness during the argument, draft one or two sentences that define the argument about the witness. This method is similar to your thought process for deciding the theory and theme of the case, only instead of considering the entire case, you are focusing on one witness. If possible, limit the number of arguments to one or two per witness.⁴

1. In the acknowledgment section of his book, *McElhaneys Litigation*, Professor James McElhaneys discusses an inescapable aspect of writing about trial advocacy. “Everything in [this book] came from someone else. That kind of massive appropriation of other people’s material is called scholarship.” JAMES W. McELHANEY, *McELHANEY’S LITIGATION* ix (1995). This note requires a similar disclaimer. I have tried to acknowledge various sources. Beyond these direct citations, I also acknowledge lessons repeated herein that were learned from previous supervisors, colleagues, and opponents in the courtroom.

2. Videotape: Irving Younger: The Art of Cross-Examination (Cornell University, 1975) (on file with the Audiovisual Department, The Judge Advocate General’s School, U.S. Army).

3. See *id.* See generally *THE ADVOCACY TRAINER: A MANUAL FOR SUPERVISORS*, tab B, module 2 (1997); STEVEN LUBET, *MODERN TRIAL ADVOCACY* (2d ed. 1997); THOMAS A. MAUET, *TRIAL TECHNIQUES* (4th ed. 1996); JAMES W. McELHANEY, *McELHANEY’S TRIAL NOTEBOOK* (3d ed. 1994).

4. This is a fluid concept. Limiting the number of arguments to one or two per witness keeps the cross-examination focused and manageable for both the listener and the practitioner. Some witnesses, however, may lend themselves to several arguments. For example, when cross-examining the accused, trial counsel may have four or five arguments. It may not be too confusing or tenuous to develop all four or five arguments. Remember, though, the touchstone for crafting arguments about witnesses is your theme and theory. Any argument you decide upon should tie into your theme and theory of the case in some way.

Attack Points

The second step is to identify one or more factors that support your argument. These factors are called attack points. Attack points are concise statements that characterize a significant element of the argument you will make about the witness. If possible, limit the number of attack points for each witness to no more than three per argument. Once determined, arrange the attack points in the order in which you expect to address them in your cross-examination. Place the attack points with the greatest impact and import at the beginning and end of your questioning. This accommodates the concepts of primacy and recency.⁵

Specific Questions

The final step is to draft specific questions that develop each attack point. Pay attention to the form of the question. Each question should be a short, single-fact, leading question.⁶ This permits you to control the witness. Remember, you do not want to rehash the direct examination. Rather, you want to extract testimony that supports your case, which can only be done if you are in control.

Vary the form of the question. Alter the use of tags.⁷ Using one style of questioning is distracting and boring. Use inflection and modulation to strengthen the questioning; these are effective means of highlighting key points and keeping the listener interested.⁸

Ask enough questions to develop each attack point fully, but avoid asking the ultimate question. For example, when attacking a witness' perception due to inadequate lighting, you would not ask the witness: "You couldn't see because the lighting was bad, could you?" This is your attack point—the ultimate point you want to argue to the fact-finder about this witness. Instead, ask questions that solicit the ammunition you need to argue the attack point: "You were outside"; "It was midnight"; "It was rainy"; "You were in the woods"; "There were no streetlights."

Based on these questions, you can persuasively argue your attack point: the witness could not clearly see what happened.

Finally, avoid asking questions to which you do not know the answer. If you follow this rule, you enhance your ability to control the cross-examination and, more importantly, to limit exposure to the unexpected.

To illustrate this cross-examination methodology, consider the following hypothetical. You are the defense counsel. Mrs. Smith, a key government witness, will testify that she saw your client stab the victim. Your theory of the case is mistaken identity. During the summation, you will argue that Mrs. Smith's ability to perceive the crime was poor and that, therefore, her eyewitness identification of your client is unreliable. As you reflect on this argument, you identify several attack points: (1) the lighting was bad; (2) she was too far away; and (3) the event happened too fast. After arranging these attack points in the order that you intend to present them (remembering primacy and recency), you begin drafting specific questions that develop each attack point. Appendix B portrays the above hypothetical using the suggested one-page format.

Conclusion

The three-step approach does not provide the end-all for effective cross-examination. It does, however, provide an orderly approach to cross-examination—an approach that permits an advocate to decide with confidence whether to conduct cross-examination and, if so, how best to conduct it. Further, this approach furnishes a framework for cross-examining any type of witness, from an expert witness to a simple character witness. When this approach is employed, the feelings of uncertainty, apprehension, and fear will subside, and counsel can unleash a planned, triumphant "commando raid." Major Sitler, USMC.

5. An audience best remembers those points presented first (primacy) and last (recency) in a lecture. It makes sense, therefore, to present your strongest points at the beginning and end of cross-examination. These will be the points that the fact-finder recalls most vividly during deliberation.

6. See MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 611(c) (1995).

7. In cross-examination, an advocate uses leading questions with or without "tags." A "tag" either begins or ends the question and takes on many forms, for example, didn't you?, isn't it true?, isn't that correct? An example of a leading question using a tag is: "You own a car, don't you?" The tag is "don't you?" An example of a leading question without a tag is: "You own a car." To be leading, however, the inflection must fall. If the inflection does not fall in a "no tag" question, the questioner seems uncertain of the answer, which invites an explanation from the witness. See THE ADVOCACY TRAINER, *supra* note 3, tab B, module 2.

8. Inflection is a change in pitch or loudness of the voice. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 620 (1990). Modulation is the use of inflection to communicate meaning. *Id.* at 762. Using inflection and modulation will not only make your questioning more interesting, but also will allow you to emphasize key points. Consider the impact of inflection on the following statement. "I never said I would give you money." "I never said I would give you *money*." The first version acknowledges that someone said that money would be given, but it was not the person making the statement. The second version indicates that the person making the statement said that he was going to give the witness something, but it was not money. As illustrated, inflection and modulation can give new meaning to an otherwise dull cross-examination question. See THE ADVOCACY TRAINER, *supra* note 3, tab B, module 2.

WITNESS: _____

ARGUMENT:

ATTACK POINTS:

1.

2.

3.

Appendix B

WITNESS: Mrs. Smith

ARGUMENT: Her eyewitness identification is unreliable.

ATTACK POINTS:

1. The lighting was bad:

- You were outside
- Standing in a field
- It was midnight
- It was rainy
- You didn't have a flashlight
- There were not streetlights
- There was no moonlight
- It was too dark

2. She was too far way:

- The field was a football field
- It's big (100 yds x 50 yds)
- You were standing in the middle of the field
- The attack took place at the edge of the field
- You were about 50 yds away.

3. The attack happend too fast:

- You lost your glasses
- In the filed looking for your glasses
- heard yelling
- Looked up
- saw a scuffle (2 people)
- One person fell
- The other an away
- From the time you looked up until person was out of site less than 5 sec.