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Cross-Examination Made Simple

Celesq® AttorneysEd Center
www.celesq.com

5301 North Federal Highway, Suite 150, Boca Raton, FL 33487
Phone 561-241-1919

Cross-examination Made Simple (Part I)

Fundamental Rules

Michael DeBlis III, Esq.

- Trial Lawyer
- Actor
- Author
- NCDC Graduate
- Collegiate Hockey Player
- Marathon runner

Famous Quotes

- “The very nature of a trial is the search for truth.” Nix v. Whiteside, 374 U.S. 157, 158 (1986).
- “Cross-examination is the greatest legal engine ever invented for the discovery of truth.” John H. Wigmore, quote in Lilly v. Virginia, 527 U.S. 116 (1999).

Control

- Essential to a good cross-examination is the ability to exercise control over the witness at will.
- Succinct questions with laser-beam accuracy are necessary.
- It’s easy to attach a negative stereotype to “control.” I don’t use control here in the sense of domineering, intimidating, or bossy.
- Control need not be hostile.

Control

- The objective is to conduct a smooth flowing, fact-by-fact cross-examination without distracting verbal mannerisms (e.g., beginning each question with “Isn’t it a fact that …”) that has a rhythm to it.
- The following is a useful method for learning control.

Rule Number 1

- Ask only leading questions.
- There are a few reasons why.

Rule Number 1

- First, any information delivered to the jury must come from the *attorney*, and not from the witness. You want the witness to merely confirm the information with a monosyllabic, “Yes.”

Rule Number 1

- At the risk of being crass, the witness should be viewed as nothing more than a stooge who responds with *one* answer to each question: "Yes."

Rule Number 1

- When the information comes from you, your credibility rises in the eyes of the jury. The jury says to themselves, “This attorney is forthcoming and honest, and well-prepared. We can trust him.”

Rule Number 1

- Second, when the information comes from the attorney, it will be presented in the form *desired* by the attorney.
- Third, the witness will be discouraged from explaining and will develop a habit of responding obediently.

Rule Number 1

- Examples:
  - Q: What are you wearing?
  - Criticism: This is an *open-ended* question.
  - Q: Are you wearing socks?
  - Criticism: Better, but still *not* leading. Do not invite the witness to volunteer information.

Rule Number 1

- Q: Is that a shirt you have on?
- Criticism: Still insufficient for establishing control over the witness. Avoid beginning questions with the words, “are,” “is,” “do,” “did.”
- Q: You have on a shirt, don’t you?
- Criticism: I love it! Here are some variations, “Isn’t it true that …” “You do have … don’t you?” “It is a fact that … isn’t it?”

Rule Number 1

- One caveat about the phrases: “Isn’t it true that …” “You do have … don’t you?” “It is a fact that … isn’t it?” We don’t talk like this in real life when we’re speaking amongst friends and family. It is too formal (i.e., “snobbish”). These are nothing more than “filler words” that we use as a crutch in order to buy more time to think of what we are going to say next.

Rule Number 1

- As the great Terry McCarthy once said, “You want to talk to the jury the way you’d talk to a friend in a bar.”

Rule Number 1

- You might have noticed that I've inserted question marks at the end of these phrases. Don't be tricked into believing that they are "questions" in the inquisitive sense or that you should put emphasis on the last syllable of the last word so that it sounds like a question.

Rule Number 1

- What if the witness doesn't confirm your affirmative statements? In other words, she is the stereotypical, "runaway witness."
- You can encourage her with an occasional, "Don't you?" or "Right?"

Rule Number 1

- I'm often asked, "Does this mean that it is *never* appropriate to ask an open-ended question of an adverse witness?"
- Not necessarily. A rule as rigid as one that inflexibly prohibits inquiry into an area of incomplete knowledge would deprive an attorney of potentially helpful information.

Rule Number 1

- When can you explore an area in which your knowledge is lacking?
- If your questions will do no harm to your credibility or to your case, it *may* be all right to proceed.
- Decisions about whether to initiate a certain line of questioning should be made by balancing the potential good versus the potential harm. This does not mean that you will have the luxury of cogitating over it for a day. You might have a “split second” to make the decision. Yikes!

Rule Number 1

- In the back of my mind, I can hear the clever words of my evidence professor echoing, “When you know, you want to be the one to tell the jury. When you don’t know, you should not pretend you do.”

Rule Number 2

- One fact per question.
- Why?

Rule Number 2

- Example:
  - Q: You have on an orange and yellow-striped shirt, don't you?
  - Criticism: This is *five* questions.
  - (1) Shirt
  - (2) More than one color
  - (3) One color is orange
  - (4) One color is yellow
  - (5) Orange and yellow are arranged in stripes

Rule Number 2

- This is like a long sausage that has been hastily thrown on a platter without being carved up into chipolatas. It overwhelms even the hungriest stomach. It is better to establish each of these points *separately*.
- Think about it. If the witness answers, “No,” what part of the question does he disagree with? He might be quarreling with one fact in the broad question or multiple facts, but you’ll never know. Very simply, a negative answer is ambiguous.

Rule Number 2

- Does the witness dispute “shirt,” “orange,” “yellow,” or “stripes?”
- When one fact is posed per question, the witness will be forced to agree to *each* separate fact.
- In addition, greater emphasis is achieved when progression to the ultimate point occurs steadily and gradually.

Rule Number 2

- Compare:
  - (1) You have on a shirt, right?
  - (2) It has two colors?
  - (3) Orange?
  - (4) And yellow?
  - (5) And the orange and yellow are arranged in stripes?

Rule Number 3

- Know the answer.
- Example:
  - Q: Your belt is leather?
  - Criticism: Be careful. Leather and vinyl look alike. The witness may say, “no.”
  - Q: Your belt is leather *or* a leather-like material?
  - Critique: Much safer.

Rule Number 4

- Avoid characterizations and conclusions.

Rule Number 4

- Example:
  - Q: Your shirt is preppy, right?
  - Criticism: In the witness's opinion, he might not be ready to sport this shirt on the cover of "Esquire" magazine and he might reject the suggestion that his shirt is making a "fashion statement." He might become so indignant about it that it becomes difficult to reign him in.

Rule Number 4

- Try instead:
  - (1) Q: Your shirt is predominantly blue?
  - (2) Q: It has white letters embroidered across the front?
  - (3) Q: The letters are raised?
  - (4) Q: They are made of a soft material?
  - (5) Q: They form a word?
  - (6) Q: “Abercrombie?”

Rule Number 4

- Be cautious about beginning any question with the word “So” or “Therefore.” Questions such as these should be reserved for closing argument. The infamous “one question too many” usually begins with “so” or “therefore.”

Rule Number 4

- What is the one question too many?
- Recall the infamous “nose bite” case.
- No less than Abraham Lincoln was the criminal defense attorney.
- He cross-examined the prosecutor’s witness. Initially, he brought out that the witness was bird-watching.

Rule Number 4

- Then Lincoln suggested to the witness that he, the witness, had not seen the defendant bite off the victim's nose. The witness agreed.
- We are told by Irving Younger that Lincoln should have stopped and sat down. But he continued and violated the sacred commandment of asking "the one question too many."

Rule Number 4

- Lincoln's last question to the witness, the one question too many, was: "So if you did not see him bite the nose off, how do you know he bit it off?"
- The witness responds: "I saw him *spit* it out."
- In other words, Lincoln should have simply stopped after establishing that the witness did not see the nose being bitten off.
- This is a great story and makes the point for the "one question too many" commandment but it has many shortcomings.

Rule Number 4

- For starters, the prosecutor gets to redirect the witness.
- And what will the prosecutor's first question be? You guessed it: "If you did not see Ned bite off the nose, how do you know he bit it off?"
- In the first instance, when Lincoln asked the "one question too many," he looked foolish.

Rule Number 4

- In the second instance, when Lincoln observed the commandment and it was left to the prosecutor to bring out this damaging information, Lincoln looked like he was *hiding* something. This would have caused the jury to distrust him.
- Second, we are never told what are the characteristics of the “one question too many.”

Rule Number 5

- Demand the answer to which you are entitled: “Yes.”

Rule Number 5

- Example:
  - Q: Your shirt is blue?
  - A: I *guess* so.

Rule Number 5

- Try repeating the question. If this doesn't work, eliminate alternatives:
  - Q: Your shirt isn't red?
  - Q: It isn't green?
  - Q: It isn't red?
  - Q: It's blue.

Rule Number 5

- Either you will win, or the witness will be the one who looks like a fool.
- The reason why this is important, even for the most benign question, is that it reinforces the concept of control.

Rule Number 5

- If you are sloppy and let the response, “I guess so” slide by without correction, the message you will be sending the witness is that it is okay to diverge from “Yes.” This will only get worse as the cross-examination goes on. Don’t forget the expression, “If you give him an inch, he’ll take a mile.”

Rule Number 6

- Use primacy and recency.
- In other words, start on a *high* note and *end* on a high note.

Rule Number 6

- Most trial lawyers start cross-examination with a salutation. We also like to introduce ourselves.
- We greet the witness, almost always by name and try to be polite and civil, like we're asking them out for tea and trinkets.

Rule Number 6

- Example: “Good morning, Mrs. Smith. I hope you had a pleasant trip to the courthouse this morning. Let me introduce myself. I’m John Smith. If you don’t hear or understand me, stop me anytime and let me know. I’ll repeat the question. This won’t take long.”

Rule Number 6

- If the jury could speak back from the jury box they would be screaming, “Get on with it, Mr. “Pompous” trial attorney!”
- Okay. Maybe I’m exaggerating a little, but you get the point.

Rule Number 6

- These arcane and formal incantations hurt rather than help our cross.
- A study done at Duke University found that jurors are “turned off” by salutations.
- They want the lawyer to jump right into cross and deliver a message. This is what’s meant by, “primacy.”

Rule Number 6

- Slight digression into how I view cross-examination. I can’t do it without resorting to a metaphor.
- Every cross has its organic flow. I view it in three segments.

Rule Number 6

- The first segment of a cross-examination is the “launch” off the rocket pad.
- You’ve seen rockets being launched. Do you know how much kinetic energy is necessary to launch that rocket?
- Most of it is in the takeoff. You see all the power. You see the flames shooting out. The rocket is hardly moving and then slowly it begins its upward trajectory.

Rule Number 6

- The second segment is the booster rocket where you want to get out of the atmosphere.

Rule Number 6

- The third segment puts you into the stratosphere. The objective, of course, is *not* to fall to Earth.
- That's the problem for most cross-examining attorneys, including myself – *staying* in the stratosphere.
- Most good cross-examiners can get themselves into the stratosphere but how long they can stay there is another story.

Rule Number 6

- Let us apply primacy to cross-examination. Consider a purse-snatching case.
- Sally leaves O'Brien's Tavern around Midnight. She has to walk four blogs to get home. The second block requires her to walk under an overpass.
- Although lamps once illuminated the darkness underneath the overpass, they burned out some time ago and were never replaced.

Rule Number 6

- It is pitch dark underneath the overpass. As Sally is walking, she sees the shadow of a man jump out from behind a pillar. The assailant snatches her purse and runs.
- On direct examination, Sally identifies Ned, your client, as the man who mugged her and stole her purse.

Rule Number 6

- To add insult to injury, she says, “I would never forget his face.”
- You must now cross-examine Sally.
- The idea is to start with primacy – i.e., your strongest fact. As hopeless as this case might seem, there are always good facts lying underneath the bad ones waiting to be discovered.

Rule Number 6

- What are the good facts?
- This is an eyewitness identification case, and it was pitch dark when Sally saw her mugger. Your defense is likely to be *mistaken identification*.

Rule Number 6

- Note, however, that other good themes might exist: (1) Other bar patrons saw Sally taking "shots" at O'Brien's throughout the night and described her as being "three sheets to the wind" before leaving; (2) it is a cross-racial identification; (3) Sally's description of the mugger does not completely fit Ned.

Rule Number 6

- We'll use the fact that "it was dark" as our theme for primacy.
- You might begin your cross by asking, "It was dark out that night?"
- Often, primacy is thematic.

Rule Number 6

- Another great source of primacy is impeachment.

Rule Number 6

- Personally, the one that gives me he greatest pleasure and that I can't wait to pounce on is available only in criminal cases when cross-examining the deceptive "snitch" (with a prior criminal record) who sits in jail plotting his own freedom at the expense of your client's.
- How about this for primacy?
- Q: We can agree that you are a convicted felon?

Rule Number 6

- Or, if this does not strike your fancy, you could always start with, “You would do almost anything to avoid going back to jail?”

Rule Number 6

- Just as you want to *start* on a high note, so too do you want to *end* on a high note. This is what is meant by recency.

Rule Number 6

- Let's return to the purse snatching case.
- Assume, as it is often the case, that Sally is not a drinker (she is a volunteer who was raising money for a charity to help find homes for abandoned and neglected children and is as pure as the driven snow), there is no cross-racial identification, and that her description matches Ned in every respect.
- We still have "it was dark" as our primacy, but we have nothing else for recency?

Rule Number 6

- What, pray tell, do we do? Accept your limitations. Your recency will be, “It was dark under the overpass?”
- Remember: Never conclude a cross-examination with an open-ended question, lest you repeat the same mistake as good ‘ole Abe.

Rule Number 7

- Maintain credibility throughout. Credibility is everything. As trial lawyers, it's all we have. Absent credibility, the trial is lost before it has even begun.
- Everything that you do in the courtroom should revolve around establishing and maintaining credibility with the jury.

Rule Number 7

- Your client's case depends on it.
- Never violate the sacred trust that you form with the jury.

Rule Number 7

- Tips for Maintaining Credibility:
  - Your affirmative statements should never be *inconsistent* with the theory of your case.
  - Remember that there will be re-direct. One of the biggest dangers is when an adversary's re-direct makes you appear unfair or sneaky.

Rule Number 8

- Be patient.
- In acting, rushing is the enemy of the moment. When an actor rushes the moment, it looks like they have been shot out of a canon.
- As actors, we are taught that “things take the time they take, to live the moment out all the way through, and to finish the moment. Then wait to see what your scene partner does.”

Rule Number 8

- A cardinal rule for actors is to work from moment to unanticipated moment. This applies to lawyers as well.
- Returning to the courtroom, recall that the one fact per question format not only keeps the witness under control but adds emphasis to the point being made. Impatience could sacrifice both.

Rule Number 8

- Also, as eager as you might be to pounce on your best point, you have to save something juicy for the end, otherwise in the words of the great poet T. S. Eliot, you'll go out with a "whimper" instead of a "bang."

Rule Number 9

- Do the client no harm.

Rule Number 9

- To me, this is as sacred as an oath that we take when defending a client accused of a crime – to have no harm befall him when we are in control of the proceedings.
- If the witness utters something damaging on cross-examination, it is twice as bad as when it happens on direct examination. Why? Because *you* elicited it. And because you elicited it, it's as if you are *endorsing* it, however tacit it might seem.

Rule Number 9

- This is yet another reason not to ask the witness any open-ended questions.

Rule Number 10

- Close off all escape hatches. The cross-examiner who patiently eliminates every conceivable escape route before taking the witness head on puts himself in the best position of “trapping” the witness.
- This often comes up in impeachment, during the “accreditation” stage.

Rule Number 10

- Example: An officer testifies on direct examination to a fact that is inconsistent to what he wrote in his police report. You want the jury to consider the earlier statement (i.e., the one made in the police report) as being true because it is more favorable to your client.

Rule Number 10

- The more you do to explain the reasons that the officer had for being *complete* and *honest* at the time he wrote his report, the more the jury will believe that he probably was.

Rule Number 10

- Let's take a slight digression to discuss the steps involved for impeachment:
  - Step 1: Re-commit: Remind the witness and the jury exactly what the witness said on direct that you intend to contradict. This is called, "re-committing."
  - Step 2: Accredit: This is the part where you set the scene for the earlier statement.
  - Step 3: Confront. Let the jury know exactly what the witness said before.

Rule Number 10

- Practically speaking, here's how it works:
  - Step 1: "On direct examination, you said that you saw John throw a bag of drugs onto the ground?"
  - Step 2:
    - "I'd like to show you a copy of your police report?"
    - "Is this your report?"
    - "This is the report that you wrote following the arrest?"
    - "One of your responsibilities as a police officer is to write police reports?"
    - "Following an arrest, you file a report of that arrest?"
    - "Your reports are received by others involved in the investigation?"

Rule Number 10

- They rely on the information in those reports
- Your superiors rely on your reports when deciding what action to take
- You want to assist others who are involved in your investigation
- So, of course, you are thorough, accurate, and complete when writing your reports
- A police report must include all of the details
- Because you are only human
- And you might forget things if you don't write them down when they're fresh in your mind
- If there was something that you forgot to include in your police report, you could file a supplemental report
- You didn't file a supplemental report in this case

Rule Number 10

- Step 3:
  - Q: “I’d like to show you a copy of your police report?”
  - Q: “Take a look at the first sentence of the third paragraph?”
  - Q: “It says, ‘I did not observe anything in Mr. Smith’s hands.’”

Rule Number 10

- As an aside, I'd recommend concluding the impeachment here. You have all the ammunition you need to drive your point home in summation.

Rule Number 11

- Deryl Dantzler, former Dean of the National Criminal Defense College cleverly dubbed this rule, “Never insult the alligators before you’ve finished crossing the swamp.”

Rule Number 11

- Let’s set the stage. You are cross-examining a critical government witness. You are in an area in which you are unable to establish your point by prior statement or through other witnesses. Cooperation of the witness is essential.
- The key here is the manner in which the questions are asked.

Rule Number 11

- The tone should be empathetic. Accusatory wording or a hostile attitude will almost always result in the witness putting up a wall, “pushing back,” and being uncooperative.

Rule Number 11

- Example:
  - Q: Ms. James, you wanted to help catch the man who did this terrible thing to you? [With sympathy and not seething with sarcasm]
  - Q: You knew the police needed a description so that they could look for him?
  - Q: And you gave them a description because you wanted to help them?
  - Q: You saw them taking notes when you described the man, right?

Rule Number 11

  - Q: And what you told them was … [reading from victim's statement]
  - This sets up an incomplete description to impeach an eye-witness identification.
- Not surprisingly, this will backfire if it happens on the heals of a "pillage and plunder" strategy on another topic.
- Therefore, the technique is most productive early in the examination. Hence the expression – never insult the alligators before crossing the swamp!

Rule Number 11

- This cooperative technique also depends on your willingness to adapt quickly to alternative justifications in order to maintain agreement.
- This is not the time to insist on your *exact* words.
- Don’t be literal, be essential.

Rule Number 12

- Don’t lose site of the target.

Rule Number 12

- Never forget that your goal is to persuade the jury, *not* the witness. One of the biggest traps attorneys fall into is trying to convince the witness that he is wrong. These attorneys are looking to capture a “Perry Mason” moment that influences the outcome of the trial in one fell swoop (e.g., where the victim unexpectedly blurts out, “Oh my God! I made a terrible mistake. Your client wasn’t the man who robbed me!”)

Rule Number 12

- I hate to be the bearer of bad news, but these moments are few and far between.

Rule Number 12

- Instead, focus on putting dents in the witness's armor, one at a time. At the conclusion of your cross-examination, you might be surprised to find that the aggregate number of dents is just as damaging to the witness's reputation as the unexpected bombshell that goes off during a Perry Mason moment.

Rule Number 12

- As Pozner and Dodd so eloquently state, “the credibility of witnesses and cases bleed to death from a thousand little pin-pricks.”

Rule Number 13

- Keep your emotions appropriate to the situation.

Rule Number 13

- A contradiction on a minor point may be corrected better by using a prior statement to "refresh" the witness's memory than to do a full-blown impeachment.
- A concession from an adverse witness may be more important than discrediting him.

Rule Number 13

- As a colleague of mine once said, “Never shoot a mouse in the ass with a cannon.”

Rule Number 14

- Get *permission* for the kill.

Rule Number 14

- When you've got the witness "on the ropes" and you are salivating to unleash the final blow, wait until the jury gives you permission.
- If you strike too soon, the jurors will identify more with the witness than with you.

Rule Number 14

- Until they share the attorney's sense of outrage at the witness's deception, an overt attack can cause the jury to come to the witness's rescue and to instinctively protect him like a Mother Bear protects her cub.

Rule Number 14

- The great Deryl Dantzler takes us on a ride back in time to Roman civilization to emphasize this point:
  - “If you can visualize the courtroom as the Roman Coliseum and the jury as Caesar, withhold the fatal thrust until you perceive the down-turned thumb. Then have at it. It’s one of those little moments that makes life worth living.”