Most Of What I Know About Cross-Examination I Learned From The Best Lawyers In San Antonio

Against All Odds:
Winning Trial Strategies Seminar
San Antonio Criminal Defense Lawyers Association

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Mark Stevens
310 S. St. Mary's, Suite 1920
210-226-1433
mark@markstevenslaw.com

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John Wigmore tells us that: "Cross-examination is the greatest legal engine ever invented for the discovery of truth." He could be right, but I'm not sure how many people this law professor cross-examined in his career. As a criminal defense lawyer I have a more utilitarian definition. **Cross-examination is when we make prosecution witnesses say things that help us win.** This is hard because witnesses for the state usually want the defense to lose, and they typically try hard to testify accordingly. Winning cross-examination demands that you control the witness, and the best way to do that is by asking proper questions.

Countless works have been published purporting to teach us how to cross-examine effectively and some are very good. In 2014, the San Antonio Criminal Defense Lawyers Association published an edition of *The Defender* comprising cross-examination advice from 46 of the best lawyers among us. If you don't already have a copy, get one, and read it, cover-to-cover, before your next trial. You will be a better lawyer if you do.

In this paper I discuss 10 principles, most or all of which I have borrowed from others over the years. Following each principle, I have digested pertinent advice from some of the contributors to the cross-examination edition.

1.
Prepare.

Preparation is essential. Everyone has heard this admonition, so much so that every time I repeat it I fear that eyes will glaze over and the message will go unheeded. I hope not. The fact is, preparation truly is essential, and good lawyers spend much more time preparing for cross-examination than actually doing it. You are not ready to cross-examine until you have done at least the following:

- Talk to – and listen to – your client and the witnesses he names. Too many times we blindly accept the police reports and statements of police witnesses as gospel, all the while ignoring what our clients say. This is always a mistake.

- Get every bit of discovery you can, as soon as you can. Discovery in the post-Michael Morton age is great, but never think that you are not entitled

to something just because it is not enumerated in article 39.14.

- Visit the scene.
- Get the state's witness list and talk to everyone who will talk.
- Collect every piece of paper for every witness: police reports, witness statements, transcripts, cps records, medical records, forensic reports, learned treatises, newspaper articles, employment records, school records, rap sheets, social media, telephone records, videos, photographs, 911 calls. And so on.
- Take every opportunity you have to examine witnesses outside the presence of the jury by requesting hearings on motions to suppress, identification hearings, expert witness voir dire, etc, and then get transcripts.
- Organize this material carefully. All the paper in the world is useless if you cannot get it when needed.
- Create a trial notebook.

Advocacy is not science and most of its principles, however important, are not commandments written in stone. Sometimes the skillful examiner, after carefully sizing up the case, will abandon even bedrock rules. The one principle that can never be ignored, though, is preparation. Never. If you don't prepare properly, then only luck will prevent you from hurting your client, and only the lazy depend on luck. Lazy lawyers usually lose.

Robert H. Featherston

"On the 'fly' and you will 'die'."

Bernard Campion

"To impeach the devastating fact witness who testifies to each material element of the charge, we need to dig up every shred of documentation on them that can be found. Their statements to law enforcement are just the beginning.

Search for depositions in civil cases, transcripts of administrative hearings, if applicable. CPS statement or reports. Subpoena school and counseling records. Sometimes employers keep files that contain information that could be of value. Additionally, if you spend the time discussing it with your client or if you have the money for an investigator, you will likely find a neighbor business associate or relative who has a poor view of the witness's credibility. Knowledge is power. If enough effort is put into it, you will almost always find something to work with. The only thing better than a prior inconsistent statement are two prior inconsistent statements."

Albert M. Gutierrez

"My number one rule is to ask every witness, within the rules and always with a witness, to speak with me before trial–especially law enforcement. One of two things will happen: (1) the witness will say yes and you get information that will help you evaluate the case, or (2) the witness will refuse to speak with you. The second answer can be very valuable during trial once pointed out to the jury. It is a simple point made quickly."

Rusty Guyer

"Create prior statements by conducting pretrial hearings on as many issues as you can, such as motions to suppress evidence, identity hearings, and anything else regardless of their merit. The hearings provide discovery without exposing the testimony to a jury. After a hearing, request copies of the testimony. Carrying defense motions with the trial deprives the defense lawyer of the written testimony of the witnesses."

Stephanie Stevens

"Next to each question place a citation demonstrating where you can find an impeaching statement. Too often we ask a question and the witness gives an unexpected answer. You know that the witness said something different at one time, but cannot seem to place your hands on where in the police report or witness statement, or transcript, the contradictory statement was made. As a result, the witness gets away with a lie. But not if next to the original question, you write the document – page and line number – of the source of the statement. This helps you

impeach the witness faster and smoother."

Joseph A. Esparza

"Have clean copies of transcripts, screenshots, Facebook posts, text messages, whatever, ready to go as needed and tabbed and organized. Don't be fumbling around looking for your impeachment material in court during a great moment in CX and lose that momentum. You appear sloppy and it gives the witness too much time to think! Also, if you can't produce your impeachment items on command, the jury may think you're being slick and making it up."

Gerald Goldstein

"I like to divide each issue and important fact contained in a statement and/or transcript, into a separate file. But whether you use files or a notebook, or some other method for organizing your cross, it is critical to be able to instantaneously reach for a particular statement or phrase in a transcript when the need arises. Organization does not mean sticking to a written script. It means having your ideas separated by issues that you anticipate, and being able to quickly gain access to that document in order to make effective use."

2.
Cross-examine toward specific goals only.

Your cross-examination will depend on what you want to accomplish, and this depends on your theory of defense. Once you are far enough along in your preparation, you will know what your defense is (or what your defenses are). Now is the time for planning, and three things are essential to a good plan.

First, choose a strong beginning. You have to immediately grab the jury's attention, then hold it for the duration of your cross. Begin strong, because if you lose the jury's attention by beginning with bad questions, it is unlikely you will ever be able to make them listen to you again. Do not waste this precious opportunity by introducing yourself to the witness, or asking if they had a nice lunch, or exchanging other empty pleasantries. Start with something meaty.

Second, end strong. Save for the last the very most important point you are confident you can get from the witness. You never want the witness's last answer to be a bad one. By the way, in addition to beginning and ending strong, you have to be strong in the middle. Simply put, there are no "throw-away" questions in a good cross-examination. If a question is not a good one, designed to do something that helps you win, don't ask it. It's easy then: begin strong with significant and interesting questions, end strong with something safe, yet powerful, and be strong in the middle by asking not a single useless question.

Third, write your questions out, initially. Controlling witnesses requires precise questions, and you cannot expect precision if you are making up your questions as you go. Once you have written out your questions exactly as you want, practice to make sure they sound as good as they read, then familiarize yourself with them so you can ask your questions without having to read them to the witness. Transform the questions into an outline format for use in court. That way you won't forget something important, nor will you lose control of the witness or the jury's attention.

Stay on message. Every single question you ask on cross-examination should be directed at getting an answer that helps you win. If not, discard the question, because if you are not winning, you are losing. Again, there is no room in effective cross-examination for "throw-away" questions. If it doesn't generate an answer that belongs in your final argument, don't ask it.

Alfredo R. Villarreal, Jr.

"'Summation-Based-Cross' is exactly as stated. It is the execution of cross-examination of witnesses based entirely on the closing argument that will be made to the jury . . . . In order for this technique to work every one of your cross examination questions must directly relate to your closing argument. In other words, if it is not in your closing argument DON'T ask the question. This method actually forces you to stick to your defensive theme. It compels you to drive home the message of your emotional appeal to the jury because every question that comes out of your mouth on cross will hammer away at your defensive theme . . . . Begin your trial preparation by starting at the end. Remember that the summation is your opportunity to tie everything together. It is the moment to state your case with vigor and persuasion. By engaging in summation-based cross every one of your

questions will have had a purpose and there will have been a purpose for every question."

Britt Eastland

"Don't ever start your cross-examination by asking this question: 'Good morning, Officer Jones. My name is lawyer, Joe Smith. I'm going to be asking you some questions. Please let me know if there is a question you don't understand.' That's boring and lame. Instead, start right away with a powerful question that will grab the jury's attention and that will stick in their heads the entire trial. 'Officer Smith, you never looked for fingerprints on the gun you found, did you?'"

Bobby Barrera

"Many times the State likes to *save the best for last* by finishing strong with some point of evidence or opinion which is very damaging to your client. If this testimony offers you an opportunity to strike while the issue is fresh on the minds of the jury, take it and run with it, especially if you have an opportunity to hammer the witness with some indisputable error that they have made. As in comedy, timing is everything so don't lose the drama of the moment or issue by beginning your XE with *'Now, Officer Smith, where did you say you worked again?'* Open strong on cross when you have the opportunity to keep the jury's attention focused where *you* want it."

Gerald Goldstein

Have a story you want to tell. "Trial is theater, and just as the prosecution has an account of the events which their witnesses will portray on direct, your job is not only to undermine those witness's credibility, but also to elicit any fact which may help tell your side of the story, your theory of defense, which demonstrates why your client is not guilty of the charged offense.

Don Flanary

Don't' ask too many questions. "Don't bury your important issue amongst a litany of superfluous questions. Again, make it obvious what the issues are and how they work in your theme."

Eduardo Garcia

"Do not feel the need to ask questions of every witness. If the testimony did not hurt, do not chance allowing unwanted testimony to come in by asking what you think is an innocuous question."

Patrick Hancock

"I have watched too many lawyers cross-examine witnesses simply because it was their turn to talk. Jurors, I believe, appreciate being spared the irrelevant minutiae by further questioning. This restraint may benefit your client when the jurors finally reflect upon the merits of the case."

Britt Eastland

"Try to remember to mark all your defense exhibits before trial or at least sometime long before approaching the witness to discuss a particular exhibit. When you have to stop and have the court reporter mark your exhibits in the middle of your cross, it slows your rhythm. If you have to do this interruption too many times, it often starts to annoy the judge and jury."

3.
Form is important.

You must communicate well with both the witness and the jury. Ask short questions. Use simple words. Inject one new fact per question.

What about leading? Everyone says to do this, and they are right, mostly. Leading questions are the safest way to control adverse witnesses and you almost always err when you ignore this good general rule. Still, this is another rule of advocacy that is not absolute. Some of the very best questions I have ever asked on cross were not leading. Unfortunately, just about all of my worst ones were not. Younger lawyers should rarely risk a non-leading question. Older lawyers should do so only when they have carefully thought out the consequences of disobeying this very important principle.

So what is a leading question? "A question is impermissibly leading only when it suggests which answer, yes or no, is desired, or when it puts into the witness's mouth words to be echoed back." *Newsome v. State*, 829 S.W. 2d 260, 269 (Tex. App.– Dallas 1992, pet. ref'd). That is as good a legal definition as I have seen. To me, a good leading question is really a declaration, followed by a question mark present only by the implication from the tone of your voice. Use tag lines, like "right," or "isn't it true" only if the judge insists that your questions be explicitly so, or if the witness is, or pretends to be, so incredibly dense as to be unable to understand that your statement is really a question.

Stephanie Stevens

"When you impeach a witness do it with some drama to make sure the jury understands that the witness is lying, confused or mistaken. For example, if your witness testifies to something not in her written statement, approach and hand her a red pen and ask to circle on that statement where the non-existent addendum can be found. It should probably go without saying but make sure that the information is truly not present anywhere in the report before you go this route."

Brian Powers

Brevity and simplicity are your best friends. "Droning on with unnecessary questions only waters down your point. Large words and convoluted queries only serve to confuse and alienate your panel. Keep it short and simple and your points will resonate in the jury's minds to summation."

James Reeves

"Keep the questions short and simple. No complex language or acronyms unless explained prior to using. Use one thought per question, and keep the questions short. If the concept is difficult, then it calls for multiple questions all of which are short and simple. There is no record and rewind, so questions must be simple and linear so that the jurors can follow you. You can change subjects with a helpful phrase such as 'Now I want to talk about . . . .' will transition the jurors to your new subject and also counter the difficult witness. Make sure to speak loudly for jurors who may have difficulty hearing. Pause after receiving important, beneficial responses. Allow the jurors to digest the information."

4.
Find the proper tone.

It will vary from witness to witness. You will use a different tone with an obvious liar than with an elderly victim who is mistaken about her robber's identity. You will speak differently to a child than a jailhouse informer. Whoever your witness, though, you must always be appropriately respectful. The amount of respect and how you show it may differ depending on the witness, but you can never be unprofessional. You should be firm, indeed relentless when necessary, but not an overbearing bully. And never, ever can you lose your cool, or be snarky, sarcastic, or quarrelsome. Let the prosecutor do those things. Remember, cross-examination is a tool of persuasion, not a vehicle to show off your cleverness and razor-like wit.

Britt Eastland

"Pause for Effect. If you get a powerful and favorable answer from a question on cross examination that supports your theme of the case, sometimes it's a good idea to pause for effect. Wait a little bit so the answer sinks into the jurors' heads before asking another question. You might even glance over at the jury and look them in the eyes so that they know that that is an important piece of testimony to remember."

Gammon Guinn

"Don't be distracted by instant gratification. While the client may be impressed by a good attack, the goal is a "not guilty" verdict, not 'My attorney really tore up the witness'." Clients first, egos second. Finesse rather than street fighting will help the jury identify with the defense. A lawyer who appears argumentative, boring or arrogant alienates the jury. Don't fight with anyone in the courtroom, especially witnesses. The jury resents it and becomes protective of your opponent. A not guilty verdict is what matters, not winning collateral strikes."

Adam Kobs

"Craft your tone, demeanor and tempo to the witness. Use a different style with a cop than you would use with a child."

Brian Powers

"Struggle for sincerity in every question. The first time a jury told me after the verdict that I acted cocky (this is putting it nicely). I learned my lesson. There is a mile of difference between an aggressive defense and acting aggressively. It's possible and more effective to take the polite approach in your cross examination. By making your questions sound more like fact-finding queries (I call it the Columbo technique) rather than pointed attacks, you invite the jury to follow you. They will appreciate you in the long run."

Robert H. Featherston

"The courtroom certainly has its theatrical element, always your professional demeanor matters! A good criminal defense attorney will always keep a cool head, using emotion and theater to their advantage."

5.
Listen to (and watch) the witness, and react accordingly.

You will sometimes be amazed at what you hear. Yes, you must carefully plan your cross-examination, and having done so, you must stay on message. But you must also listen to the answers you get, and be prepared to move away from your plan when the witness gives you an opening you had not anticipated, as long as the direction you go in does not risk an answer that is inconsistent with your defense.

Britt Eastland

"Listen to the witness's answers. Witnesses constantly surprise you. Unless

you are *watching and listening*, you will miss nuances and graduations in the witness's testimony. Don't bury your face in your notes, worrying about the next question while the witness is answering the last one."

Norma Gonzales

"Pay attention, a lot of attention, to the direct examination and the state's opening statements."

James Reeves

"Body language is important and some jurors are very good judges of body language. Watch the witness and jurors. If a witness has submitted or given up, then it is surprising what they will say. Jurors' body language will tell you if you are boring them or if they are interested in your line of questioning. Be sure to watch and listen to the witness while your partner is writing down the responses you want to repeat in closing. Make sure to pause after helpful responses so that the jury has time to digest them."

6.
Don't ask a question if you can't handle the answer.

It is often said that a lawyer should never ask a question if she doesn't know its answer. But this is impossible. You will never know how any witness will answer any question. If you have properly prepared though, you should always be able to ask questions that give you answers that you can handle. Those are the ones you want to ask.

Gerald Goldstein

"Effective cross-examination starts with mastery of the facts of your case. Controlling a hostile witness often depends upon the witness's and jury's recognition that you know what his or her answer has to be. Your superior command of the facts is the most powerful tool you can display in convincing the witness to give you the answer you want and are entitled to."

7.
Don't stop too soon, but then stop.

Cross-examination is not for the timid. If you need an answer, ask the proper questions to get that answer, and keep going until you get it. But cross is not for the stupid, or the sloppy, or the greedy, either. So once you get the answers you need, stop. Don't ask one question too many. Save the ultimate point for summation. A useful thing to remember in cross-examination (and in life) is that, if it sounds too good to be true it probably is. Cross-examination is not discovery, nor is it done to satisfy your curiosity. Fair warning: Knowing when it is too soon to stop, and when it is too late, is unquestionably the hardest principle of all to follow. Nobody said this is easy.

Charles D. (Charlie) Butts

"Don't be greedy. When you are fortunate enough to get a favorable answer, do not push for more because the witness might either change his answer or destroy the favorable aspect of his earlier answer."

Bernard Campion

"Finally, even though the generally accepted theory is that if an adverse witness has not hurt you, you don't need to cross them at all, my preference has always been to find at least one thing to extract out of every witness called by the State or the Government that helps my case or fits into my trial strategy. The only exception would be the witness that could torpedo your case. If they haven't hurt you, get them out of the courtroom as quickly as possible. Otherwise, even the lowly custodian of records can sometimes provide a tidbit of info that puts your client in a better light and with any luck, a seemingly uneventful witness called by the opposing party can be molded into a defense witness."

Raymond Fuchs

"Don't establish your cross by following the format of the direct testimony. Sure you took all those notes during the direct examination and don't want the effort to go to waste. Well forget it. Make only the points that will be beneficial to

your defense. As soon as you get what you need for final argument stop while you are ahead."

Gerald Goldstein

"Be realistic about what you can get from the witness. Don't try to win your case with every witness, particularly hostile witnesses such as law enforcement and victims or their family. They are spring loaded to eat your lunch! My experience is that if you don't make a point in cross-examination forcefully, it may be lost on the jury. However, if you hammer your theme too hard or too often you may simply educate that witness or opposing counsel allowing them to undo all that you have painstakingly accomplished."

Gammon Guinn

"Before passing the witness, politely ask the court for a moment to look over notes. Always ask, on the record, to reserve the right to recall witnesses. If a witness has been excused the judge may refuse to bring them back, particularly if you did not subpoena the witness yourself."

Brian Powers

"Quit while you're ahead. The answers to the meaning of life and the existence of God are not just around the bend with the next question. More likely, the next question will lead to an answer that will rob you of your recent progress. Score your points, show the jury where the holes are and pass the witness. Save those earth shattering moments for summation when the opposition can't steal your wind."

Robert H. Featherston

"Lesson eight, KISS. Keep it simple stupid!." When you have met your objectives with the witness, get out. The jury has been there all day and will appreciate your brevity."

8.
Act like you know what you're doing.

When you start to score points with a good cross, the prosecutor will want to cut you off with objections, especially if she senses that you lack confidence. If the judge senses the same, he will sustain these objections and then you're done. Never let them see you sweat. So, know what you're doing, and do it right, but on those rare occasions when you don't really know, act like you do. Especially when you don't.

Guillermo Lara

"Be confident. The worst thing you can do is look uncomfortable or afraid. The jury can sense it, the prosecutor can see it, and the judge may even interrupt your questioning because of it. I know it sounds so simple but it's easy to let the stress get to you. You certainly know the case better than the prosecution at this point and your questions should show it. No matter what you do, confidence is King."

Gammon Guinn

"Develop your own style. If you are not comfortable with your style it will show and lessen your confidence. A lack of personal confidence is interpreted by jurors as a lack of confidence in the case. Don't be afraid, however to try new techniques, you want to improve your practice."

9.
Don't forget the law.

Cross-examination is not all technique. The Constitutions and the Rules of Evidence and Procedure will sometimes stymie even the most effective advocates. Anticipate those legal hurdles you will likely have to get over during your trial and find the rule or case that allows you to do what you need to do.

Robert H. Featherston

“Objections. Don’t view objections as hurting your case. In fact, the exact opposite is true! You should view objections as encouragement that you are winning at your cross-examination! Maintain your communication with the jury; watch the impact your cross has on them and the response/feedback they give you when an objection is raised by the State. Turn the objection to your advantage.”

Philip Bozzo, Jr.

“Prepare prior to cross-examination for objections that will arise during your cross examination. Be prepared with a proper legal response if called on to do so. If the Judge sustains the objection be prepared to present your question in another fashion. Arguing with the Judge over the sustained objections loses you credibility and valuable *rhythm* in front of the jury.”

10.
Study.

Much has been written about cross-examination, and some of it is excellent. My personal favorite is *Cross-Examination: Science and Techniques*, by Larry Pozner and Roger Dodd, and I have borrowed liberally from it here. Read that book and others recommended to you. Watch other lawyers, good and bad, because you can learn from both. Most importantly, get into the courtroom and cross-examine as many witnesses as you can, and decide for yourself what works best for you. Then spend the rest of your life developing and improving your skills.

Bobby Barrera

“Trying to teach XE is like trying to ‘teach’ sex. You can talk about it all you want but until you actually try it for yourself (not by yourself!) You won’t know what it really feels like and you will never learn the skills you need to be truly effective.”

<u>John A. Convery & Julie K. Hasdorff</u>

"Study the masters. You are not the first person to cross-examine a witness in a courtroom."

<u>Stephanie Stevens</u>

"Watch good lawyers whenever you can and steal ideas and techniques from them!"