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**THE FIRST AND ONLY RULE  
OF CROSS-EXAMINATION:**

**"DON'T BE A  
FLAMING JACKASS"**

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# THE FIRST AND ONLY RULE OF CROSS-EXAMINATION

## "DON'T BE A FLAMING JACKASS"

**PREFACE:** Based in large part on the "Trying Cases to Win" methodologies of Herbert J. Stern.

### I. Purpose of Cross-Examination

A. **Object:** To argue your case or, tell your client's story of innocence or reduced culpability, through the witness, to the jury.

1. Same object as in Opening and Direct and Closing

B. **Definition:** Cross-examination is the summation of your case, from A to Z, limited only by the window of information that you can reasonably expect to say through the witness, broken into statements, covering one fact per statement, at the end of which the court reporter puts a question mark.

1. Rule of the day is to not "ask questions" but to make short, simple, declarative statements

2. Corollary of this current thinking is that you ought to abide by this rule until you are pretty darn proficient at cross.

### II. What Cross-Examination is NOT: Impeachment of the witness

A. **Impeachment** is the discrediting of a witness' testimony by extrinsic means. The available extrinsic means by which a witness' testimony may be impeached are: (1) with a prior statement which is inconsistent with the witness' current testimony; (2) through the testimony of another witness who either (a) contradicts the first witness' testimony directly or (b) establishes the authenticity of a piece of evidence which

contradicts the first witness' testimony; and (3) by reference to the Rules and Laws of Probability.

B. Impeachment is one of three (3) TECHNIQUES of cross

1. Should be used most reluctantly
2. Should be used only in two (2) circumstances
  - a. When you absolutely have to
  - b. When you're pretty certain to be able to achieve it
  - c. See, infra, Section II(E)(2)

C. Allure of impeachment (what causes us to define cross-examination in these terms?)

1. We love to hurt people
2. More importantly, successful impeachment destroys the witness' credibility AS WELL AS the credibility and integrity of the opposing attorney
  - a. Remedy for other attorney: Run away from witness
    - i. Marcia Clark/Mark Fuhrman

D. Dangers of attempting impeachment

1. We put up, on our side of the table, everything we force the adversary to put up on her side
  - a. This is a measure-for-measure wager

- b. If you don't pull off the impeachment, you damage (destroy) your own credibility in an amount equal to the hoped for destruction of the adversary's credibility
  - 2. When it is belly-to-belly with the witness on credibility, the jury votes on every question
    - a. Not waiting for closing to see how you "tie everything together"
    - b. Not waiting for you to develop "lines of cross-examination"
    - c. If the jury votes with you, witness is a liar and good things happen for your case
    - d. If the jury votes against you, "that is the end of you"
    - e. AND, THEY VOTE ON EVERY QUESTION
  - 3. This is why sensible trial lawyers reach for the impeachment technique last
- E. Two (2) situations when you MUST use this technique
  - 1. When a Party is on the stand
    - a. Always (100%) true in criminal cases
      - i. Defendant
      - ii. The one or two people who are so closely associated with the prosecution's case that they can be considered to be a party

-Rule 615 elections

- b. Overwhelmingly true in civil cases
- c. WHY? Because the parties usually arrange their testimony in such a way that, if they are believed, they will win the case.
  - i. Forces the **belly-to-belly confrontation**
  - ii. Forces the wager of credibility

2. When you are pretty sure that you can pull it off

objective

- a. HOW DO YOU KNOW? You either have the evidence or you have the Rule of Probability
  - i. **OBJECTIVE EVIDENCE** = documents, transcripts, taped statements, etc., to show other statements made in the past
  - ii. **RULE OF PROBABILITY** = common sense or situation sense. It the crafting of questions in such a way that any answer other than the one you command will ring false to the jury because of the probabilities of life.

-If the witness will not answer as you command, the jury, which is voting on every question, answers the question the way it is supposed to be answered AND votes that the witness is lying



### III. Other two (2) cross-examination techniques

#### A. **TO LIMIT** the witness' testimony

1. When a witness testifies, even though they be not a liar, their testimony and our themes and theory can co-exist in the same case. This indirectly furthers our themes and theory.

2. Example: Eyewitness case

Q: Are you saying that you stared fixedly at Defendant at all times?

A: No.

Q: So, from time to time, you looked away from Defendant?

A: Yes.

c. **Line of Probability** drawn by the order of the questions.

i. But, see problem with reverse order of questions a & b

ii. Reverse order allows witness room to shuffle and does not command an answer which the jury will vote our way on

#### B. **TO GET HELP**

1. Bringing out of affirmative, helpful, positive things that the witness has for you that directly further our your themes and theory

2. Many witnesses in criminal cases have, at least some,

information for both sides

- a. Big decision for the trial attorney in every case is whether to call a witness because of what they have on both sides of case

3. Example: Eyewitness case

- a. Better viewpoint of someone else
- b. Other person with less distractions

IV. **First Major Error of Cross-Examination:** The questioning of witnesses in such a way as to compel, by command, one-word answers from them with either the belief or the expectation that the witness will only give, or seek to be compliant in giving, one word answers to the cross-examiner.

A. This is contrary to the current thinking that we must seek to compel only "yes" or "no" answers or risk entirely losing control of the examination

1. Even the current books on the subject direct that no "contracts" or appeals to the judge be made

B. Problem with some of the approaches taken is that you cannot be perceived by the jury, or judge, as the truth-giver. Just the opposite, in fact, is perceived.

1. The message that this conveys is that you are afraid of the witness because the witness has information which is harmful to you
2. Another message that is conveyed by some approaches which seek to "over control" the witness is that you do not

- care about truth, or a full and fair hearing of the evidence
- C. Control is important. However, *HOW* you control is even more important
1. Control not by command but by power, presence, order of questions, and order of issues addressed
    - a. The greatest power of cross-examination is the ability to pick the subject of the confrontation with the witness.
    - b. These selections should be determined by the cross-examiner's assessment of her ability to make her point and to prevail in the confrontation she selects.
    - c. This, in turn, will be determined by the materials the cross-examiner has at hand with which to cross-examine. These are the "tools" of cross-examination.
    - d. Example: Justice Robert Jackson's cross-examination of Herman Goering at Nuremburg
  2. Techniques for control by Posner and Dodd
    - a. See, infra, IV(D)(3)(d)(ii)
- D. Do not seek to over-control.
1. Witnesses will, on occasion, run on and throw in information which exceeds the scope of the question asked on cross
    - a. Do not ask judge for help
    - b. Do not insist upon "yes" or "no" answers

2. Stuff thrown in is of two kinds: That which is legally in the case and that which is not legally in the case
3. **Legally in the case.** The only objection is that the information is not called for in the moment
  - a. Going to have to deal with it sooner or later
  - b. It becomes a question of your effectiveness of trying to deal with the extra stuff when it comes in, as opposed to your credibility when trying to deal with it after keeping it out earlier
  - c. Advice: Take the blow and deal with it
  - d. Technique: Deal with the stuff in the moment.
    - i. Show jury the witness is messing around and is now on a mission, is partisan, or is gilding the lily
    - ii. Use techniques that punish the witness and the opponent

- repeating of questions
- using the negative of the question
- using witness' full name
- Interruption: the seat
- “So your answer is ‘yes?’”
- “If the truth is ‘yes’...”
- “You didn't answer my question, did you?”
- elimination

- iii. Other techniques over-control or are not able to be done quickly enough
  - turn back on witness (lose eye contact)
  - court reporter reads back question (too slow; they can never find anything)
  - story 3 times (too slow, too much time)

4. **Not legally in the case**

- a. If the extra stuff is not allowed into the case legally then an appeal **MUST** be made to the judge
- b. Legal reasons for this
  - i. Appeal
  - ii. Opponent may be able to use to make a *prima facie* case or to close on it

V. **Second Major Error: Failure to close the point**

- A. Once you enter upon the proof of a point during cross-examination, continue the examination until you have closed the point
- B. The current thinking is that we are never to ask the ultimate question
  - 1. Set people up
  - 2. Let the jury come to its own conclusions

3. Save it for closing
- C. Reason for the current thinking: The fear that the question will be answered wrong
1. This is not possible if we have properly crafted the cross-examination questions and have marshaled all of the facts of the case
    - a. Example: speeding case
  2. Line of probability
    - a. If answered wrong jury answers it right and witness is a liar in their eyes
    - b. Win/win situation for us
- D. Slam dunk the ultimate issue from point A to point Z in the trial
1. Put the issue out in front of the jury and face it
  2. When you find an opening, PUSH

## VI. Use of exhibits and evidence to impeach

- A. Prior statements: Have them at hand and have the necessary information at the ready. A corollary to this is that if you do not have these materials, the physical stuff, avoid the confrontation unless you have the rules and laws of probability on your side.
1. Writings: affidavits, depositions, unsworn statements,

reports, pleadings from other cases, applications, professional writings, letters, transcripts of conversations, etc.

2. Physical evidence which contradicts

B. Impeaching with witnesses

1. Somewhat more difficult to do than impeaching with prior statement

2. Still must be done in the moment

a. Jury may not be able to remember the point later (depending on length of trial)

b. Renew the issue in order to deal with it

i. *Easier to deal with the living than to try to raise the dead*

C. Grouping of facts and materials

1. Photocopy parts of statements which will be used

a. Copy for you to use (highlighted, w/ notes)

b. Clean copy for witness

c. Original documents (complete) at table

D. Put the witness away, don't dance with him

1. Rule in Queen Caroline's case

2. Evidence Rule 613

VII. **The witness in context**

- A. See Aprile materials
- B. Example: 1st question of Justice Robert Jackson of Herman Goering at Nuremburg (before getting off track)

## THE LINE OF PROBABILITY (Cross-Examination to limit)

**Factual Setting:** Mr. Brown has testified for your adversary that, in his opinion, the adversary's client was driving at 45-50 miles per hour at the time of an accident. This is less than the posted speed limit of 55 mph. You have decided that Mr. Brown is not lying, or that you cannot prove he is lying. Therefore, you decide to conduct your cross-examination in order to limit Mr. Brown's testimony.

\*\*\*\*\*

Q. Mr. Brown, you were a pedestrian at the time of the accident?

A. Yes.

Q. And you obviously could not see the speedometer in Mr. Green's car?

A. Of course not.

Q. So, all you can give us, then, is an estimate of the speed of a moving vehicle as it went past you?

A. Yes.

Q. And, once the car passed you, all you could see was its rear?

A. Yes, that's true.

Q. Now, once it passed you, you were not staring fixedly at the car, were you?

A. I don't understand what you mean.

Q. Well, once the car passed you by, you had no reason to keep it under close observation, did you?

A. Well...no.

Q. So, your estimate of Mr. Green's speed is based on your observation of the car as it passed you?

A. Yes.

Q. And, I am sure that you will agree that even at 45 miles per hour, that car passed you in just a split second?

A. Well, yes.

Q. Now, based on that bare, momentary view, all that you can do is give a very rough estimate of the speed?

A. Yes.

Q. And that rough estimate might well be off by 10-15 miles per hour?

A. Yes.

Q. You told us that your rough estimate of Mr. Green's speed was 45-50 miles per hour?

A. Yes.

Q. Well, if your rough estimate could be off by as much as 15 miles per hour, as far as you know, Mr. Green might well have been going as fast as 65 miles per hour?

A. Yes.

\*\*\*\*\*

## Diagramming the Cross-Examination

=====\*

//Material in case//Common sense//Q1 & other Qs

- = is the stuff in the case including answers to prior questions.
- \* is the place in the cross-examination where I can no longer compel a "yes" answer at the pain of the witness being disbelieved if the answer is "no."
- | is the line of probability.

## UNITED STATES v LAZARUS

**FACTUAL BACKGROUND:** Lazarus, the defendant, was a manufacturer of rubber coats and had manufactured hundreds of thousands for the government to be used by our forces during World War I. Lazarus was charged with bribing a man named Fuller, the supervising inspector of the quartermaster's office in New York, to overlook the defective merchandise that Lazarus supplied to the war effort. So serious was the crime, that the defendant was prosecuted not only for bribery, but also for sabotage.

### **Cross-examination by Martin Littleton**

(After the direct examination of Supervising Inspector Fuller was finished, Littleton began. He started with Fuller's application for employment with the United States government.

Q. Did you sign such an application?

A. I did, sir.

Q. Did you swear to it?

A. No, I did not swear to it.

Q. **I show you your name signed on the bottom of this blank, and ask you if you signed that?**

A. Yes, sir.

Q. Do you see it as sworn to?

A. I had forgotten it.

Q. You see there is a seal on it?

A. I had forgotten that also. (emphasis added)

\*\*\*\*\*

Q. This application appears to be subscribed on the 24th of May, 1918, by Charles Lawrence Fuller?

A. It must be right *if* I have sworn to it on that date.

Q. Do you remember in May, 1918, that you signed **and swore to** this application?

A. That is so, I **must have** sworn to it, sir.

Q. Do you remember it?

A. Let me look at it and I can probably refresh my memory.

(Paper handed to witness)

Q. Look at the signature. Does that help you?

A. **That is my signature.**

Q. You said that. Do you remember in May, 1918, you signed **and swore** to this?

A. Well, the date is there.

Q. Do you know that?

A. Yes, sir, I **must have** sworn to it. I don't remember the date.

Q. Don't you remember you signed your name, Charles Lawrence Fuller, there?

A. I did, sir.

Q. **And you swore to this paper and signed it?**

A. **That date is correct there, yes, sir.**

Q. **Don't you remember you swore to it the date you signed it?**

A. **I swore to it.** (emphasis added)

Q. Now, Mr. Fuller, in your application you made to the government, on which I showed you your signature **and affidavit**, you attached your picture did you not?

A. Yes, sir.

Q. And you stated in your application you were born in Atlanta, Georgia, did you not?

A. Yes, sir.

Q. You were asked, when you sought this position, these questions: "When employed, the years and the months," and you wrote in, "February, 1897 to August, 1917, number of years 20; Where employed--Brooklyn; Name of employer--Vulcan Proofing Company; Amount of salary--\$37.50 a week; also superintendent in the rubber and compound room."

Q. You wrote that didn't you?

A. Yes, sir.

Q. **And swore to that**, didn't you?

A. Yes, sir. (emphasis added)

Q. Now, were you employed from February, 1897 to August, 1917, 20 years, with the Vulcan Proofing Company?

A. No, sir.

Q. That was false, wasn't it?

A. Yes, sir.

Q. "And through my experience as chief inspector of the rubber and slicker division," that was false, wasn't it?

A. Yes, sir.

Q. That was not true, was it?

A. No, sir.

Q. And had you been assistant superintendent of the rubber and compound room?

A. No, sir.

Q. You knew it was false, didn't you?

A. Yes, sir.

Q. And you knew you were **swearing** to a falsehood when you **swore** to it?

A. Yes, sir.

Q. And you **swore** to it intentionally?

A. Yes, sir.

Q. And you knew you were committing **perjury** when you swore to it?

A. I did not look at it in that light.

Q. Didn't you **know** you were committing **perjury** by **swearing** and pretending you have been 20 years in this business?

A. Yes, sir.

Q. And you are swearing now, aren't you?

A. Yes, sir.

Q. In a matter in which a man's liberty is involved?

A. Yes, sir.

Q. And you know that the jury is to be called upon to consider whether you are worthy of belief or not, don't you?

A. Yes, sir.

Q. When you **swore** to this falsehood **deliberately**, and wrote it in your handwriting, you knew it was **false**, you swore to it **intentionally**, and you **knew** that you were committing **perjury**, didn't you?

A. **I did not look at it in that light.**

Q. Well, now, when you know you are possibly swearing away the liberty of a citizen of this community, do you look at it in the same light?

A. Yes, sir, I do. (emphasis added)