

ARTICLES

The Art of the Blind Cross-Examination: 8 Tips for When You Don't Know the Answers

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While watching her father cross-examine a witness in *To Kill a Mockingbird*, Scout Finch invokes the first rule of cross-examination that most lawyers—Atticus Finch included—learn: “Never, never, never, on cross-examination ask a witness a question you don’t already know the answer to...”

But what is a cross-examining attorney to do when he confronts a witness that he has not yet deposed? Notwithstanding the Federal Rules’ preference for eliminating surprise witness testimony from trial, attorneys are occasionally called on to cross-examine a witness blind, without the benefit of prior testimony that can be used for impeachment. For example: A true surprise witness may be added to a trial list on the eve of trial; a court may limit the number of depositions that a party can take in the case; a client may ask his attorney to limit the number of depositions taken to rein in pretrial costs; or you may be in an arbitration proceeding, where there is limited, or no discovery.

This article provides some practical tips and principles to make sure that you can effectively cross-examine a witness the answers in advance.

1. Talk to your client immediately. Although a witness has been added to a trial list, he or she may not be a surprise to your client. In fact, your client may know a great deal about the witness. Think of your client as a stopgap source of information in lieu of formal discovery. Ask your client what this witness knows and what he or she is likely to tell the court. Perhaps your client will be able to provide some useful fodder for cross-examination—including potential sources of bias or facts that can be used to impeach the witness’s testimony.

2. Listen. No attorney is ever truly called on to cross-examine a witness completely in the dark; every cross-examination is preceded by direct examination. By carefully listening to a witness’s testimony on direct examination, you will have an opportunity to hear that witness’s story for the first time under oath. Use this testimony as a roadmap for your cross-examination. Ask yourself these questions: How does this testimony square with other witnesses’ testimony in this case? How does this testimony fit with the documents and other facts in the case? Are there any facts elicited during direct examination that can be flipped in my client’s favor? While you do not want to have the witness merely repeat his testimony on cross-examination, you can use your cross-examination to pick apart gaps in the witness’s direct testimony, potentially blunting the force of the witness’s testimony.

3. Tie your questions to documents. In the absence of deposition testimony that can be used to frame your cross-examination, using documents to cabin the witness's testimony can be an effective technique. Present the witness with emails, spreadsheets, letters, and other documents and attempt to get him to agree with the words and numbers written on the page that are helpful to your case. Or impeach the witness's testimony where it deviates from documents that are in evidence.

4. Ask questions where it is difficult for the witness to disagree with you. By asking questions that have a logical, obvious answer that can be favorable to your case, you can effectively cross-examine a witness. For example, if you are cross-examining an in-house accountant of the opposing party in a civil suit, you can highlight the witness's potential biases toward his employer by asking questions about the fact that he receives a paycheck from his employer, that his employer could terminate his employment. The answers to such questions should be obvious—yes, employers typically pay their employees to work for them but serve to underline sources of potential bias that can be emphasized during closing arguments. Or ask the witness about methods or standards that are common to all members of his profession—for example, asking the accountant if he tries to gain as much information about his client's financial position as possible—so that you can highlight potential failures to abide by these common standards. If the witness gives a non-obvious answer—trying to dodge the evident—he may appear obstreperous and lose credibility.

5. Take some measured risks. While the conventional wisdom is to avoid open-ended questions on cross-examination, they may be deployed judiciously to test the witness's memory. Although you would want to avoid asking a witness a non-leading question on a matter of true import to the case—allowing a witness to offer long-winded answers that are likely unfavorable to your client—limited “who, what, when, or where” questions can be used to fact-check the witness's story. Ask a witness if she recalls the time of day that a car accident occurred. If she answers correctly, little damage has been done to your case—presumably, the jurors have already learned when the accident happened. However, if the witness flubs the answer, you can flag that inconsistency in your closing argument.

6. Focus on what the witness is not saying. If the surprise witness testifies only to some issues at the periphery of the case or he testifies to a subset of issues relevant at trial, utilize your cross-examination to note what the witness is not saying. Highlighting the absence of a witness's relevant knowledge can diminish the witness's testimony. For instance, in a breach of contract suit where the parties' prior course of dealing over many years is important, a witness may be called to testify about one meeting between the parties. Use your cross-examination to catalogue the witness's lack of knowledge about the remainder of the parties' relationship or his non-involvement with other meetings over the course of multiple years.

7. Know your key case themes. As with any effective cross-examination, focusing your questions on the core themes of your case is vital when you are interrogating a surprise

witness. By emphasizing broad themes, you can avoid some of the unknown dangers that lurk in the details of a cross-examination in the dark.

8. Sit down. After having listened to a surprise witness's direct testimony, ask yourself: Is there anything to gain from cross-examining this witness? It is possible that a surprise witness avoided a deposition for good reason—he actually was not all that important to the case. If that is the case, less may be more. Simply shrugging off a witness's testimony by declining cross-examination can telegraph to a jury that you thought that witness was unimportant. Conversely, if a surprise witness offered damaging testimony during direct examination that you have no hope of rebutting, consider whether you have anything to gain from a fruitless cross-examination. Offering a meek cross-examination may serve to highlight the harmful aspects of the witness's testimony. In these instances, it may be best to decline cross-examination.

The bottom line: While cross-examining a witness without the benefit of knowing his answers in advance may seem as treacherous to do as “frog-sticking without a light,” as Scout observes in *To Kill a Mockingbird*, these pointers should permit you to cross-examine successfully a surprise witness.

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