

Making Cross examination Effective

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What the cross examination is

Cross examination is the examination of a witness in a legal proceeding by the adverse party.

It takes place after examination-in-chief: the examination of a witness by the party who calls him. Cross examination is followed by re-examination: the examination of the witness subsequent to the cross examination by the party who called him. The section 137 of the Indian Evidence Act, 1872 (IEA) defines these terms.

The Chapter X (Section 135 to 166) of the IEA deals with legal provisions relating to examination of witnesses. But the examination of witness is much more than what the law speaks of, in terms of skills needed, quality ensured and the outcome it brings out in the process. This write up is exclusively on cross examination.

Don't confuse cross examination with a deposition of witness. Deposition is to find out information but cross examination is to ascertain the truth of the facts in

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Importance of cross examination

The testimony of a witness is not legal evidence unless it is subjected to cross examination. Evidence becomes wholesome or full-fledged only after cross examination. If no opportunity is given to the adverse party to test the evidence of a witness the evidence cannot be treated valid legal testimony.

In other words, no evidence is valid unless the party affected by the evidence had an opportunity to test its truthfulness by cross examination.

Purpose of cross examination

The object of cross examination is to impeach the accuracy, credibility and general value of the evidence given in chief. Cross examiner dissects the direct testimony of the witness and exposes its weaknesses. Cross examination introduces some facts, highlight / weakens some other facts or challenges the credibility of the witness.

The cross examination sifts the facts already stated by the witness so as to detect the discrepancies and to elicit suppressed facts. It is a quest for ascertaining truth rather than destroying direct testimony of the witness as some would believe. It extracts what the witness has not said in the chief or direct examination. It proves the other side story is inadmissible, incorrect or untrustworthy.

The cross examination will bring out from an adverse party something that is need to destroy the force of what the witness has already stated in chief examination. It would also help show how the witness is to be believed from the past incidents.

In cross examination, the examiner probes whether the story made in the chief is tainted or not, or exaggerated or falsehood. The adverse party can construct a



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new line of story from the mouth of the prosecution witness.

In cross examination, a witness may be asked questions:

- To test his veracity (the quality of being correct, true, or close to the true value)
- To discover who he is or what his position in life is
- To shake his credit by injuring his character

In short, the cross examination highlights inconsistencies, demonstrate bias of the witness, attacks witnesses' credibility, highlight errors and identify portions of testimony for bolstering your case.

Utility of cross examination

There is no substitute for cross as a means to separate truth from falsehood and reduce exaggerated statement to their true dimension.

No cross is needed if witness says nothing that harms your case. If the witness has no information that is favourable to you, then also no cross examination is needed.

When not to cross examine

Cross examination is not necessary if the direct examination does not reveal anything damaging to you. Cross examination, on the other hand, may help the witness redeem a poor direct testimony. A poor cross may allow the witness to clarify points and include omitted testimony. Saying "no questions" would be the best choice in many a case.

When the witness leaves no loophole in his chief examination and you know of no weak point in witness's testimony, it is always prudent not to cross examine him.

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In cross examination one must know when to stop the examination and exit. If the examiner knows what he needs from the witness, he must stop when he gets it. Do not always expect too much from an adverse witness.

Cross examination is an art

Cross examination is an art. It is the most difficult of all the arts of the advocate. Cases are often won because of its skillful use.



An indiscreet cross can spoil a case. The ability to cross is like a sixth sense. It is a natural intuitive art which requires careful cultivation. Have a clear purpose for every question you ask in cross examination.

It is always better to write out your questions if you cannot remember everything clearly or you have a chance to miss some important ones. Listen to chief examination carefully to decide whether to abandon any pre-planned questions or not.

Start strong and end strong

In cross examination, the advocate must start strong and finish strong.

Primacy and recency must be the rule in start asking questions. Pick something important to start questioning and end with something even more important. Start

from the last question and move backward. A weak opening may make the witness feel more confident. Similarly, a weak ending will leave the lasting impression of an unsuccessful cross. It is always better to keep a few questions ready for the end of the cross examination.

But take the witness by surprise by dodging the sequence of questions. Moving back and forth in timeline while questioning would help destroy the tutored testimony of a witness. If you want a particular answer do not put the question directly.

Cross examination is an organic process even if there is some preplanned order in questioning. Ask simple questions that do not allow the witness a loophole to escape. The questions a cross examiner asks must be in the witness' own words if possible.

If you obtain a really favourable answer, leave it and pass quietly to some other inquiry.

Be fair to the witness

In cross examination, an advocate must do everything with dignity and fairness to the witness. Every witness is not a liar.

Keep cross examination simple. Most of the factual or legal questions can be summarized into simple points. Frame questions in such a simple language that there can be no confusion or misunderstanding. Use specific questions containing simple words having one fact per questions so as to avoid inconceivable interpretation later. Avoid asking reckless questions without any definite purpose. Unskilled questions are worse than no questions at all. A complex multi-part question helps the witness wriggle out easily from giving right answers.

Start a cross examination with a gentle smile and in a polite manner unless there is some other reason to start otherwise. Don't ask any question in an objectionable form and manner. Be always respectful to the court. Don't cross examine on minor points which lead the court anywhere.

Ask questions in a way you elicit the answer you need. Ask questions in such a way you elicit "yes" replies to your questions.

Be a master the facts

Mastering the facts is essential in winning a cross examination. Be a master of the facts on record before you begin your cross examination. The cross examination opens up the other side version of the story. Nothing is unprofitable than an aimless cross examination that lead you nowhere.

Extensive preparation is needed to cross examine the expert witness. Experts have special knowledge.

A trial lawyer must learn issues of fact and points of law clearly and present them in court in the fewest words possible. Then the trial will be short. The judgment will be equitable and will not be appealed from. It will survive even if appealed.

Look at the eyes of the witness

A skilled cross examiner seldom takes his eyes from the witness examined.

Cross examination is a communication from mind to mind. If the witness is a skillful one and does not look at the eyes of the examiner, the examiner can tell the witness something like this: "I am here asking you questions. Is it not impolite to look at the person asking you questions?"

In cross examination, one should use body language, eye contact, physical stature and positioning in the court room effectively. It is better to stand solidly

on both feet. Don't lean. Directly face the witness. Speak clearly and forcefully. But don't be offensive or abusive. Assert authority.

Ask leading questions in cross examination

In cross examination, the examiner is expected to ask only leading questions. A leading question is a statement with a tag line such as "Isn't it" or "is that correct". Use short simple leading questions with four to six words. For example: "You wrote the letter. Didn't you?"

It is better to lock the witness into a no-escape position by closing the gate, in a planned cross examination with right questions in proper sequence. Each gate is a possible escape route for the witness. Once closed the witness may not be able to escape it.

Please remember not to ask open ended questions starting with "who", "what", "when", "how", and "why", because the answers to such questions would be unexpected or unmanageable.

However you can ask any question to which you do not know the answer when you do not care what the answers will be or you are asking the question exclusively for rhetorical purpose.

Leading question when a witness turns hostile

If a witness the prosecutor calls turns hostile, he can ask leading questions to the witness with the permission of the court. A "hostile witness" is one who is not desirous of telling the truth at the instance of the party calling him.

When the prosecution cross examines a witness called by him, the testimony is treated normally washed off the record.

However acceptable portions can be acted upon by the court. It is wholly left to the court to decide whether the hostile testimony of a hostile witness is reliable

or not.

Dealing with talkative witness

To deal with talkative witness, the cross examiner may use effective eye contact. Telling the witness just answer “yes” or “no” and asking rapid questions etc are other means to bring him to the proper track.

Providing narrative and evasive answers by the witness is a way to escape direct answers to your cross examination questions. It may create an impression that the witness is evading the proper answer and that will have adverse effect on his testimony.

In cross examination, the witness need not be permitted to explain his answers. He needs to be permitted to simply answer the question. If the opposing counsel wants him to give an explanation, that can be done in his re-examination.

Raising objections while cross examining

Make objections when you have a sound legal basis to do so. Raising strategic objections will give you a tactical advantage.

An objection may cause your opponent to divert from the line of questioning he has been following. In cross examination, you should be alert for questions that are misleading, offensive, oppressive or repetitive. Such questions are not permissible in a fair court room practice. Some poor cross examiners equate repetition with success.

Contradicting with previous statement

If a witness does not seem to be telling truth in comparison to a previous statement he can be confronted by showing the statement, in writing or reduced to writing, to extract the truth. This is permissible under Section 145 of the IEA and 162 of the CrPC. It is called impeaching the testimony of the witness.

Impeachment is trapping a witness for inconsistency in his testimony with his own earlier version of the event. Such an earlier version is called a prior inconsistent statement. The Section applies only to his own two contradictory statements, but not with anybody else's statement. Before contradicting a statement, the signature below the statement, if it is there, is to be proved.

To contradict a witness the exact passage in his statement under section 161 CrPC should be read out and put to him to know whether he admits having made such a statement before the investigating officer. Such a statement of witness to police is used only for contradicting the witness.

The statement read out to the witness should be included as in the deposition within inverted commas. If the witness admits having made that statement then there is no contradiction.

On the other hand the witness denies having made such a statement, and then it should be mentioned in the deposition itself in brackets. By this process the contradiction is brought on record, but it is yet to be proved.

Thereafter, when investigation officer who has recorded the statement is examined in the court, the passage duly marked for the purpose of contradiction should be read out to him, and he should be asked if the witness had stated as mentioned in that exhibit. If the investigating officer answers in affirmative the exhibit can be deemed to have been properly proved.

To impeach a witness for inconsistent statements in the court room, consider using the phrase: "Did you give this answer to this question?" Then read the question, its answer and then stop.

An inconsistent statement is sufficient for you to argue that the witness is an unreliable one. The cross examiner should show that the witness tells pretty lies freely, makes inconsistent statements, views things in a biased manner, and keeps an unreliable memory. If he does so, any evidence from him is unreliable.

When you impeach the witness' testimony you are impeaching his chief examination testimony, but not the cross examination testimony. You can impeach him only when the witness has made a definite answer in the chief examination.

Impeach a witness only on major points and do it only when there is a chance of success. Merely having some inconsistency in evidence is not sufficient to impair the credit of the witness. All inconsistent statements are not sufficient to impeach the credit of the witness. In the past, great importance was given to minor contradictions and omissions. So discrepancies which do not go to the root of the matter and shake the basic version of the witness cannot be given undue importance.

Minor variations in testimony in testimony cannot be the basis to discard intrinsic value of the evidence altogether. Unless discrepancies, contradictions and inconsistencies affect the core of the prosecution case, they cannot be the basis to reject their evidence. Normal discrepancies are bound to occur in the depositions of witnesses due to erroneous observation, defective memory due to mental disposition at the time of the occurrence etc. (Please see *Bhoginbhai Hirjibhai v. State of Gujarat* (AIR 1983 SC 753))

Be courteous to the witness

When a witness comes to depose before the court in a criminal trial he is doing a public service to the criminal justice system. He has no personal stake in the litigation. Therefore he is entitled to receive all respect and protection the law prescribes.

If the counsel's manner is courteous and conciliatory the witness will lose fear and enter into a fair minded testimony. By shouting and browbeating the lawyer confuses the wits of the witness. Some lawyers disarm the witness by quiet and courteous manner but some frighten them by the roaring method.

A good advocate should be a good actor. Clever cross examination can obscure much evidence that would otherwise tell against him. Speak distinctly when conducting cross examination and compel your witness to do so. A pleasant and cordial cross examination is a better option than a weary pointless cross examination. In cross examination it pays to be gentleman lawyer almost always. Control your manners in the most trying times.

Qualities a cross examiner must have

In cross examination, a cross examiner must show ingenuity of thought, clear perception, patience and self control, power to read other person's mind intuitively, judge their character by face, master knowledge of the subject and inherent instinct to find out the weak point in the witness deposition.

Don't be argumentative in cross examination. Cross examination is only for asking questions and seeking answers but not for arguments. Use open questions in cross examination when you want to fish for luck or when you know the damaging answers will not leave you far worse off.

A cross examiner needs the skill to extract things that would help him in winning his case, from other side's witness. Some of such details will be express but some others will have to be inferred from the answers that his questions will bring out.

Cross examine with the sixth sense

Cross examination is the only tool an advocate has to enter the hidden areas of a man's mind and root out a fraudulent deposition. It is an intuitive art which requires careful cultivation backed by sound theoretical understanding and practical experience.

One may practice for forty years and yet he may remain a poor cross examiner but someone else may practice for just forty days and yet he can be a good

cross examiner. A good cross examiner requires sound knowledge, through practical experience and an intuitive exploration of mind, many of these qualities can be refined effectively with some efforts.

Additional Reading

1. Francis L Wellman: The Art of Cross Examination with the Cross-Examination of Important Witnesses in Some Celebrated Cases. New York, Touchstone, 1997
2. Y Rama Rao : Art of Cross Examination of Witnesses. Hyderabad, S Gogia & Company, 2002
3. Kant Mani: Principles of Criminal Cross Examinations with different Type of Questions & Answers. New Delhi, Kamal Publishers, 2018
4. The Supreme Court judgment in *V. K. Mishra and another v State of Uttarakhand and another* (AIR 2015 S.C. 3043): The judgment narrates the procedure of bringing on record contradictions and omissions in simple words.



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thanx for precious guidance



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