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Five Witness Cross-Examination Strategies

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In this video, Proskauer partner and leading commercial litigator, Bart Williams, shares five of his courtroom strategies for cross-examination. Bart's experience as one of the nation's most sought after trial attorneys makes for an invaluable commentary and dynamic guide for litigators today.

Transcript

Bart Williams: Hello everyone. My name is Bart Williams, and I'm the leader of the trial practice team at the Proskauer Rose law firm in Los Angeles. It's my privilege to talk today on the topic of cross-examination.

My background is that early in my career, I worked as a federal prosecutor, prosecuting primarily white collar criminal cases.

But for the past 30 years since that time, my practice has been doing trials, typically business trials, sometimes for the plaintiff, more often for the defense. But I've been on both sides. I occasionally will do white collar criminal defense today. But my area of expertise is on being a trial advocate in business cases.

Today I'm going to talk to you about cross-examination. Obviously it would take quite a bit of time to cover all of the dos and don'ts of cross-examination, all of the techniques. I'm not going to do that today. Instead, I'm going to suggest five things, five recommendations for the preparation of a good cross-examination. It's really an approach for the person who's executing the cross, or for the people who are helping that lawyer to prepare for cross-examination.

#1 Identify the Type and Establish Your Goal for the Witness

Bart Williams: Recommendation number one, what kind of witness is this? What's the goal of the cross-examination? And I tend to put witnesses into one of three buckets.

Bucket A is the witness that I seek to limit. That is, I like to think of it as putting the witness in a box. How can I put this witness into a box? How can I describe the limitations on what this witness can and cannot do? Every witness has limitations. Almost no witness covers the entire case and all of the things that the other side of the case has to prove or disprove. They all have little components.

And so the approach that I take is okay, so what is it that this witness does that is finite, and how can I establish all of the things that this witness cannot do? That's the approach. It's how can I put the witness in a box?

Here's an example. Let's say it's an expert witness. And this witness can establish the fact that a particular substance is found in a person's body. They can't tell you if it's good for them, bad for them, toxic to them. They certainly can't say whether it causes cancer or not. Their job as say a pathologist is to establish that there's a substance of the type that is the subject of the case in the body. That's all they can do.

A good part of the cross-examination is describing all of the things that that witness cannot establish. Doctor, you're not here to establish that cancer was caused by the appearance of the substance in the body. You can't tell us whether it's toxic at all. Your job isn't to do that. That's not what you're trained to do, and on and on and on about all the things that the witness cannot do.

In a business case, sometimes the box or the limitation of what the witness can do is established temporarily.

They weren't at the company at the time that big decisions were made. At the time the email that is the focus of the other side's case was written, this person wasn't even there, didn't receive it, didn't know. Limitations on what they see and did. The classic example would be in a car crash case, where a person's attention was drawn to the crash by the sound. They turned their attention after the accident, so they can't tell the jury anything about what happened before, how quickly the cars were moving, et cetera. That's the classic box for a witness in that type of a case. So the first category, the first effort that I make, is to figure out is this a witness that I'm going to limit?

A good part of the cross-examination is describing all of the things that that witness cannot establish.

Category B, what's a second type of witness? This is the witness that you seek to discredit. You believe that based upon all of the evidence you have, it could be prior witness testimony in a trial previously or in a deposition, it could be a document that they wrote, it could be a document that they received and didn't say anything about, they basically assented to the document, whatever the combination of information that you have, you put a witness in this category B, the discredit witness category, if you believe you can show that they're not worthy of belief. You believe that based on all of the information that you already have in your hands that you can establish they are not to be believed. And that's what the trial is all about, the witness whom you seek to discredit.

The final category is rare, but it's worth its weight in gold when you can find it. And that's the type of witness I say that you are going to ride into the sunset. This is a witness who despite the fact that they were called by the other side, despite the fact that the other side believed that this witness helps them a lot, you believe that this witness helps you. So you are believing that this is a truth-telling witness. You are not going to discredit them. You're going to embrace them. And so notice that this category is inconsistent in terms of truth-telling from the second category that I was describing, the discredited witness. Here, you are embracing the witness. You are saying this is a truth teller, and your tone and the kinds of questions that you ask of the witness will be asked in a way that suggests that you believe that the witness is telling the truth, only it helps you and not the other side. It's rare, but when you have that type of witness, it can be magical in a trial.

#2 Establish the Proper Tone

Bart Williams: My second recommendation is tone, tone. That is, what is the tone that I should adopt as a cross-examiner at the beginning of the cross-examination? Notice I'm saying at the beginning. Your tone can change. But rare is the witness who it's appropriate to jump on from the very beginning of the cross-examination. And yeah, that's a mistake that so many trial lawyers make. I used to make that mistake for years actually, after I left the U.S. Attorney's office.

Why was that? Well as a prosecutor, as a federal prosecutor in particular, we didn't bring cases unless we had the goodies on somebody. So we had established for days or weeks the guilt of the person or persons who were defendants in the case. By the time the defense case came on, that is by the time I was cross-examining someone, we normally had the jury believing this person was pretty guilty. And so I had earned the right to adopt a tone of righteous indignation at the time I cross-examined the defense witnesses.

But in a civil case, where it's not as clear, where the reason you're in trial is because there's a real dispute here, it's the kind of a case where there's a real shooting match that's going to go on here. If you jump on the first witness that you are cross-examining, the jury often will be saying why is Mr. Williams adopting that tone? I actually like Mr. Jones, the witness. He seemed pretty nice. He's been on the stand for five hours, day and a half, whatever it may be. Why is this guy jumping all over him from the get-go? In other words, you have to earn the tone of firmness or righteous indignation. You have to earn that over time. And the only way to do that is to begin the cross-examination in a pleasant way, in a friendly way.

In a civil case, start with a tone of respect and courtesy and have a plan for when your tone may change throughout cross-examination.

Strategy #2 Establish the Proper Tone

So eight times out of ten, the proper tone is a tone of respect, of courteousness. You can still be firm, but you have to change the tone over time. And I will often have in my outline notes about when I think the tone might change, to remind myself that my tone might change a little bit with the witness.

So recommendation number two is be mindful of your tone, be mindful of who this witness is, be mindful of how you should approach the witness at the beginning of the cross-examination. And think about the other tones that you might adopt along the way.

#3 Make a List and Check It Twice

Bart Williams: Recommendation number three, I call it make a list and check it twice. Make a list, and check it twice. And what do I mean by that? You have an outline. Most folks who conduct a cross in a business case, let's say, will have some combination of items you want to establish through the witness, or actual questions where word for word you've written the question out, because you're being mindful of the words that you're using. We have an outline. And that outline, depending upon the person and your style, can be extremely detailed or perhaps a little bit less.

What I'm talking about when I'm talking about this list is not the outline itself. It's a list of those things that you will not sit down without establishing. You have to cover these things. They are the highest priority things, and the list is comprised of items that you know you can establish. It's not something that you hope to prove. It's not something that you think that you have the better of the evidence, no, no. These are facts or sub-facts that you can establish. The witness has said it before, the witness wrote it before, the witness has agreed to it before. And it's really, really important.

So what I do for this is I take a 4-by-6 card, and I write out these five to seven things. I try and never to go more than seven. And I tape that card on the left flap of my cross-examination outline. It just has a few things. It's one side of the card. And when I say check it twice, I mean that if there's any pause, say a court break, a bathroom break, the end of the day, lunchtime, any break in the conduct of my cross-examination, I check that card. I see how am I doing? Have I covered those things? And then at the end, the very end when I think I've covered the outline, but of course I may have moved around in the outline, gone to the eighth section before the second one, whatever, in the flow of things, I check that card, and I make great pains to do it in front of the jury. I will say your honor, may I have a moment? And I will check to the left hand side of my notebook. I will check with my colleagues. And then and only then will I say I'll pass the witness, or no further questions.

Make a list of the highest priority things that you know you can establish.

Strategy #3 Make a List and Check It Twice

I believe that that does a lot of things. It establishes for the jury that this person has a process. They have a way of doing it. They're organized. They knew what they were trying to cover. They're checking to make sure that they covered it. This person has all the bases covered, and I can rely upon him as the truth teller in the case. It's all part of that goal at the end of the case for the jury to say when Mr. Williams is talking, I can believe what he's saying, I know that he's checked the facts, I know that he's double-checked them, and then he stops. And you do it after witness after witness. They know that when you get near the end, you say your honor, may I have a second? And that's when you, you consult that list, and that's when you make sure that you've checked off everything on the list. I don't need a pen. I don't need to write anything; that's distracting. You can just look at it, and you can make a mental note of whether you've covered things. So that's the third recommendation: make a list and check it twice.

#4 Impeach the Witness Using Prior Inconsistent Statements on Non-trivial Matters Whenever You Can

Bart Williams: My fourth recommendation is the one that I'll spend a little bit more time on, because it's the one I'm passionate about, and it's the one that I think makes the biggest difference in cross-examination. By far, this is the most effective technique that cross-examiners have been using for a long, long time. But for some reason, some reason, people don't do it enough. What am I talking about? Well my fourth recommendation is impeach the witness with prior inconsistent statements on non-trivial matters when you can. Impeach the witness on cross-examination using prior inconsistent statements on non-trivial matters when you can.

It sounds simple. It sounds like okay, if you have the person saying something that they didn't say before, they're contradicting their previous testimony, you should bring out that testimony and read it. It sounds basic. Most lawyers who've taken any sort of a trial advocacy class have been taught the mechanics of how to do it. But what I've observed over many, many years of practice is that for some reason, lawyers don't do it. They don't use the technique. And there are lots of theories about why lawyers don't do it when they could. My theory is that lawyers get a little bit afraid because it takes a while. It can take some time.

What do I mean by that? Well those of you who've tried cases and have tried cross-examination and have tried to impeach people know that sometimes the first thing when you pull out that prior testimony and you have the notebook with the prior inconsistent statement from their deposition, the first thing the other side is going to do is going to say your honor, I don't have, I don't have the statement in front of me, may I have a moment? So they delay while they search at their table for the pamphlet that contains the prior testimony. Then they ask for time to read it. Then they say to the court your honor, this doesn't seem to be impeaching at all. This isn't impeaching testimony. By this time, a minute, 90 seconds has passed. The jury may or may not remember what the question was. The witness may or may not remember what the question was. And that's the goal of the lawyer on the other side, is to delay and to make it hard.

But despite all of that, and despite the fact that lawyers do that all the time, almost reflexively, the first time you impeach a witness, they won't necessarily do it the second or the third or the fourth or the fifth. And why won't they? Because if you do it right, if you are impeaching the witness on something that's important, that's not trivial, so for example, if the person testified on the stand that it was cool on the night in question, and their previous testimony said it was 52 degrees on the night in question, well that's quibbling. To some people, 52 degrees is cool. To some, others, it may not be. That's not proper impeachment. But if you've done your job, and you are reserving your impeachment to those instances where the witness has truly deviated in a significant way from what they said before, such that when the judge reads that prior testimony, she's going to say well no, this looks like the same question and a different answer. If the answer is going to be same question, different answer when the judge reads it, that's when you impeach. And if you do that once, the lawyer may try this delay tactic. If you do it twice, they'll be less inclined. And the third time, even less inclined.

And by that time, every single time you impeach the witness, you are eroding the witness's believability, and you are heightening your own.

So impeaching a witness with prior inconsistent testimony does two things. First, it establishes control over the witness, which is the most important thing for cross-examination. The reason the system allows us to use leading questions that suggest the answer, like isn't that so or isn't that correct, the reason that it allows us to do that is for control purposes. But impeaching a witness, when they try to get outside the lines, when they try to become advocates for the other side, is really helpful. And so what I believe you should do is every single time that you can impeach with prior inconsistent testimony, you should do it.

So what are some of the things that you can do to make this process run smoothly? One of the things that I do is to hand out these notebooks that have the prior testimony beforehand. I make a big deal about it. I ask the court for permission to hand it out once the witness is already on the stand. I give one copy to opposing counsel, one copy to the judge. Notice that I don't give a copy to the witness him or herself. The reason for that is in federal court, under rule 613 of the Rules of Evidence, the witness is not entitled to see a copy of their prior testimony before that prior testimony is read. The rule says it flat out. So in federal court, you have no obligation to do so. I will cite that rule for the court if the court has any sort of desire to hand it out. In state courts around the country, sometimes you do, sometimes you don't have to hand out the prior testimony. So I always will have a copy. It just depends on the jurisdiction you're in.

Every time you impeach the witness, you are eroding the witness's believability, and you are heightening your own.

Strategy #4: Impeach the Witness Using Prior Inconsistent Statements on Non-trivial Matters Whenever You Can

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But here's another thing about the notebook that I found incredibly helpful. It's not just that that testimony is in a notebook. It's in a bright red notebook, the brightest red color that you can possibly find. It's fire engine red. It's not dark; it's easy to see. Why is that? It's because you want everyone in the courtroom to know that when you go for that particular notebook, that means this witness is about to be impeached. It's like Pavlov's dog. So you've handed out a bright red notebook to opposing counsel, another bright red notebook to the court. You have your own bright red notebook that isn't sitting on the lectern or the podium that you're using because then it's open. The jury can't see it. It's a closed notebook that is put on the edge of the table. And everyone can see it. And when you get to that point where you say your honor, may I have permission to read from Mr. Smith's prior sworn testimony, his deposition on January the 5th, page five, line five through 25, you then take a step towards the notebook. And you pick up the notebook and open to that page, and then you read from it. Once you've done that once, twice, three times, the effect is palpable. Everyone in the courtroom knows that when Mr. Williams is taking a step towards that notebook, something's about to go down.

This witness is about to be made very uncomfortable, because I'm going to be reading questions and answers that are contradictory to what they just said.

I've had the experience multiple times where by the third or fourth time I'm impeaching the witness, once I take a step towards that red notebook, the witness will say oh, if I said it differently before, then I must've said it, that must be right. I must've said it differently, before I've even gone to the notebook. And I'll say, when they do that, I'll say that's very nice, but let's check. And I'll take the notebook, and we'll read the questions and answers and confirm that in fact they had given meaningfully different testimony on a prior occasion. All of that erodes the confidence that the jury has in the witness, even the witness that seems so likeable, even the witness that they liked so much at the beginning. When they're answering the question can I rely upon what that witness had to say, or should I be relying upon what Mr. Williams has to say, the choice becomes a little blurrier. And each time you impeach, your credibility goes up, the witness's credibility goes down. And more importantly, your control over the witness increases. Even that witness that is tough as nails, been there a million times before, the expert witness who's testified hundreds of times, if they've testified hundreds of times, chances are, and you've done your work, chances are they're going to testify in a way that is meaningfully different today than they did previously. It's just human nature. They don't say things the same way. They'll say it stronger today than they did on the previous occasion. They'll put nuance in it that makes it sound like a stronger opinion than they were willing to give on a previous occasion.

So if you can, it's worth the time. Be patient, go through the process, and be confident. Because over time, you will erode the credibility of the witness. So that's recommendation number four.

#5 Make Your Closing Argument Points during the Cross-examination; Don't Wait

Bart Williams: My final recommendation is a little bit more subtle. And it is make your closing argument point during the cross-examination; don't wait. Make your closing argument punchline point on a line of questioning during the cross-examination and don't wait. And for those of you who have studied on trial advocacy, you may be wondering wait a minute, I was taught to hold my arguments for closing argument. You were taught perhaps that you never ask a question to which you don't know the answer. That's one of the ten commandments of cross-examination by the famous lecturer from NYU, Irving Younger, who's one of the most, he's one of the best lecturers on trial advocacy I've ever seen. He's passed away now. But one of his commandments was don't ask a question to which you don't know the answer.

But what most people don't know is that Professor Younger had a caveat to that. And the caveat was unless the answer doesn't matter.

Don't ask a question to which you don't know the answer unless it doesn't matter what the answer to the question is. What do I mean? The orthodox way, the conservative way to do a cross-examination. For example, let's say you have a witness. And this is an expert. And they've testified, they've actually written articles on a particular topic many times before, peer-reviewed articles. And let's say the issue is, and the case is, does someone being exposed to a particular substance that causes cancer? That's what the case is about. And this person has written five or ten articles, sometimes alone, sometimes with others. And those articles say I believe that there is an association, a correlation between exposure to this substance and cancer. But they've never actually said that exposure to the substance causes cancer. They've said more study is needed. The conclusion of their article say things like we should really look into this because there appears to be a modest association between these two factors.

Don't ask a question to which you don't know the answer unless it doesn't matter what the answer to the question is.

Strategy #5 Make Your Closing Argument Points during the Cross-examination; Don't Wait

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Well the orthodox thing to do would be to go to court, put those articles in front of the witness, establish their dates, go to the conclusions, read the conclusions into the record, establish what the conclusions in fact said, and then wait until closing argument to argue what that means. The theory behind it is that you don't want to quibble with the witness. The witness of course is going to have an answer to that. After all, he's here in court saying that in this case, he can give an opinion about whether or not this particular person's exposure to the substance caused their cancer. So they're ready for that question. They're going to have an answer to the question. And the thought is you don't go there; wait until closing.

In my view, the problem with that is that in business cases, closing argument could be days, sometimes weeks, sometimes sadly, a month away. The jury is not going to remember the doctor very well and certainly may not remember what those articles had to say if there was no punchline at the time. So my view is yes, you do establish what the articles said. You establish when they were written.

But the closing argument punchline in that case would be doctor, isn't it true that you say one thing when you're outside of court, when you're writing peer-reviewed articles that people who do what you do are reading and analyzing, and you say an entirely different thing when you're here in a court of law, having been paid by plaintiff's counsel. Isn't that right? Now of course the doctor is going to have an answer to that. They're going to go on and on about oh, all the factors that caused them to reach the conclusion today. But the point is you know they're going to do that.

And your follow-up question is doctor, you can't point anybody, you can't point anybody to any article that you ever wrote that ever said that being exposed to this substance actually causes cancer. You never put that down on a piece of paper until you were in this courtroom paid by the lawyers on the other side. That's a fact, isn't it? You know you can do it. And that's your punchline. And when you make your punchline point in the moment, the chances that someone is going to remember it or hear it goes up exponentially.

And you can do that with almost every line of questioning that you undertake. You're looking at what the person is going to say, you know what they're going to say, and your technique is you explain to the jury in the moment why that matters. Do it at the time.

So those are my five recommendations for cross-examination. I hope you found them helpful. Again, take the parts that you like, leave behind those that you don't, and good luck.

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