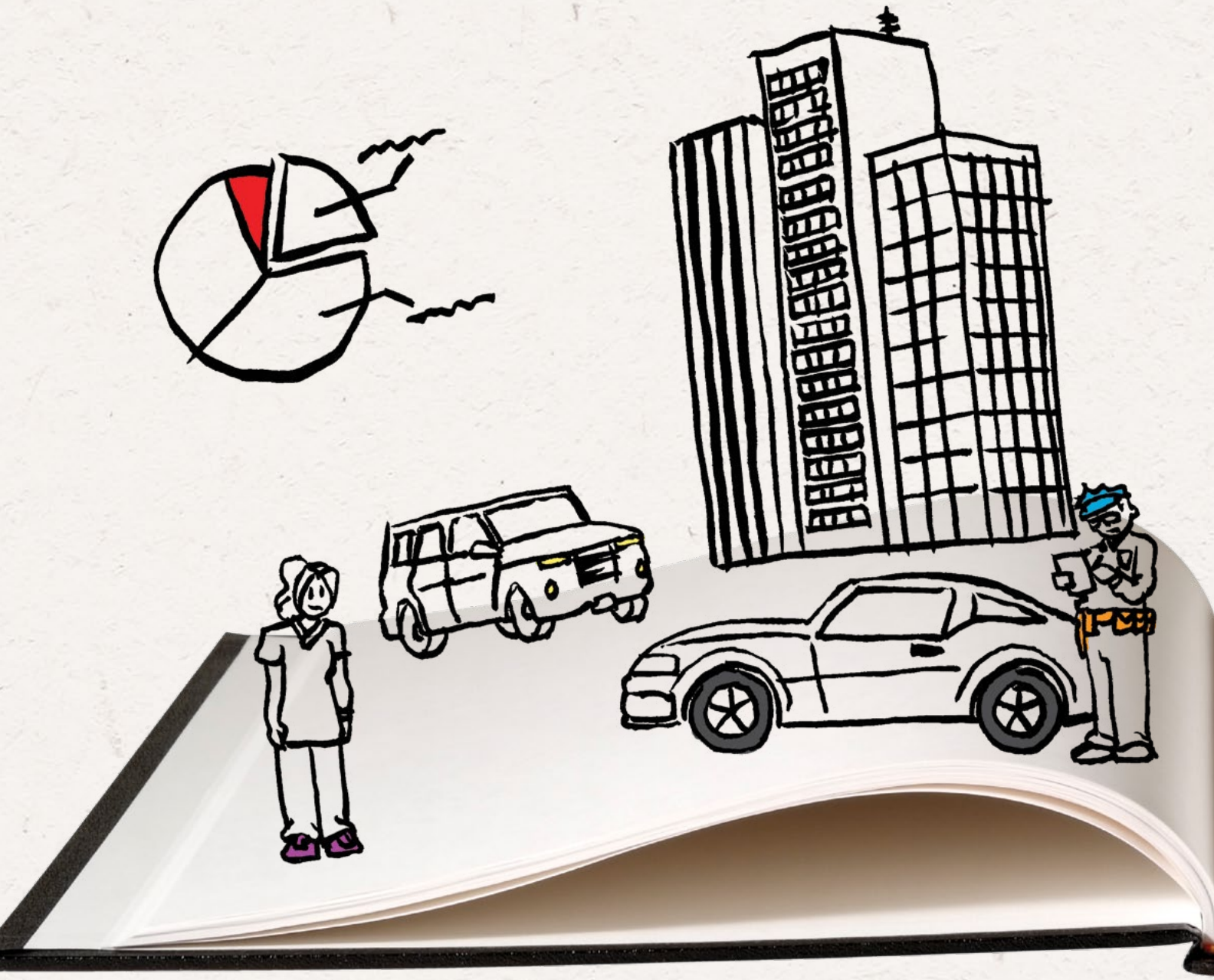
Fundamentals of Cross-Examining a Witness at Trial



Many trial attorneys believe that cross-examination is the most important part of a trial. Although show-stopping cross-examinations are always beneficial and entertaining during a trial, they are rare. In reality, a well-prepared attorney can win a case without a dramatic cross-examination if the attorney understands how to effectively conduct cross-examination of each witness to tell a cohesive story and continuously advance the attorney's theory of the case.

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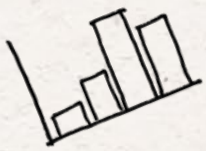
Cross-examination is a critical component of any trial, whether it is used to elicit facts from a witness or to discredit a witness. Under Federal Rule of Evidence (FRE) 611, the scope of cross-examination is generally limited to "the subject matter of direct examination and matters affecting the witness's credibility." However, a court "may allow inquiry into additional matters as if on direct examination." (FRE 611(b).) For convenience and efficiency, courts often allow attorneys to inquire about additional matters on cross-examination so that a witness does not have to come back to testify when it is the cross-examining attorney's turn to present their case in chief.

When delivering cross-examinations, each attorney has their own style. Some attorneys are direct, quickly making each point and moving on. Other attorneys use their voice and body language to help emphasize points and maintain their pace. Although there is no right or wrong way to conduct a cross-examination, there are several key principles for success.



This article explains the fundamentals of cross-examining a witness at trial and highlights best practices for cross-examining attorneys. It provides guidance on:

- Determining the purpose of each cross-examination.
- Preparing for cross-examination.
- Refreshing a witness's recollection during cross-examination.
- Undermining a witness's credibility through cross-examination.

Search Preparing a Witness to Testify at Trial (Federal) for strategies counsel can use to equip a witness to provide strong trial testimony.

DETERMINING THE PURPOSE OF THE CROSS-EXAMINATION

Although some attorneys view the main purpose of cross-examination as undermining a witness's credibility (see below *Undermining a Witness's Credibility*), cross-examination does not always involve discrediting witnesses. Attorneys may use cross-examination to:

- Establish necessary but uncontroversial facts.
- Tell the fact-finder a well-reasoned story through the witness.

An attorney should understand and keep in mind how a witness's testimony will ultimately contribute to the attorney's overall theory of the case. Knowing the exact purpose of each cross-examination allows the attorney to:

- Focus on eliciting the testimony the attorney needs for the case.
- Better control witnesses and their testimony during cross-examination.
- Reduce the risk that the attorney will ask questions or make statements that do not serve any real purpose, causing the judge or jury to become disengaged.
- Strengthen the evidence in the case.

For example, in a criminal trial, a prosecutor introducing DNA evidence may call to the stand the person who collected the evidence to establish the basic facts that led to the DNA analysis. Although the prosecution's intent may be to use that witness solely to discuss the gathering of DNA evidence and establish a proper chain of custody, the defense attorney could cross-examine that witness to establish other relevant facts that advance the defense's theory of the case. These facts may include the conditions at the scene of the incident that may have led a victim or another witness to mistakenly identify the defendant as the perpetrator (for example, that it was dark outside when the DNA collector arrived and there were no streetlights). In this case, the defense attorney's purpose in cross-examining the witness is to use the prosecution's own witness, who was called to testify about the crime scene investigation, to help establish details about the scene of the incident to support the defense of the case.

PREPARING FOR THE CROSS-EXAMINATION

To properly prepare for cross-examination, an attorney should:

- Review the facts and develop a cohesive theory of the case.
- Know which witnesses will testify and identify how each witness's testimony can be useful to the attorney's case.
- Draft an outline of short, clear, and focused questions or statements to use during cross-examination.
- Organize the relevant evidence and practice delivering the cross-examination.

DEVELOP A COHESIVE THEORY OF THE CASE

Cross-examinations should not be planned in a vacuum. Instead, cross-examinations are most effective when prepared last, with the other components of the trial in mind. An attorney's chances of winning a case are better where the attorney uses each component of the trial to advance a cohesive theory of the case.

Before drafting a cross-examination outline for any witness, an attorney should first:

- Review the discovery and witness statements.
- Develop a theory of the case.
- Draft the opening statement and closing argument.

Search Opening Statements and Closing Arguments in Civil Jury Trials for guidance on how to effectively prepare and deliver opening statements and closing arguments.

IDENTIFY FACTS TO ELICIT OR REFUTE ON CROSS-EXAMINATION

Once an attorney has developed the theory of the case and drafted the opening statement and closing argument, the attorney should have a good idea of the basic facts the attorney needs to establish or refute at trial to support the attorney's theory of the case. By this time, the attorney should also have a good idea of the witnesses that both sides intend to call at trial. The attorney should make a list or chart of each essential fact and indicate next to each fact the witness who can provide or refute the fact.

Additionally, if an attorney expects an opponent's witness to testify to certain facts that the attorney wants to refute through cross-examination, the attorney should write down any facts that the witness may testify to that refute the witness's own testimony. For example, if a nurse will testify that she witnessed a nursing home resident hit another nursing home resident, but the nurse did not record the incident in her notes or report it to anyone, the attorney might write down the expected testimony as "witnessed hitting," but also include the facts that refute the testimony, for example, "did not write in notes or report to anyone."

Overall, for each witness, the attorney should determine the ultimate purpose of the cross-examination and how the information the attorney seeks to elicit from the witness is important to the attorney's theory of the case.

DRAFT SHORT AND CLEAR QUESTIONS OR STATEMENTS

Under FRE 611, courts generally must allow attorneys to ask leading questions on cross-examination (FRE 611(c)(1)). When drafting the cross-examination questions, the attorney should consider the following best practices to maintain control of the cross-examination and the witness:

- **Seek to make statements that the witness can simply agree with, rather than asking questions.** Delivering statements designed to elicit the witness's agreement helps emphasize that the attorney is the storyteller. To draw out the desired evidence at a good pace, the attorney should generally aim to ask questions or make statements that the witness will respond to with a simple "yes." By framing the cross-examination to get only a "yes" response, the attorney remains in control as the storyteller and the witness plays only a supporting role in front of the fact-finder. However, in some circumstances, an attorney may want to elicit disagreement from the witness (see below *Witness Disagreement*).

- **Avoid finishing sentences with "right" or "correct."** These terms are superfluous and may improperly highlight to the fact-finder that someone other than the attorney is needed to tell the story.
- **Keep questions or statements as short as possible.** A witness will likely feel more comfortable responding to the cross-examining attorney's question or statement with only a "yes" if the question or statement is short and simple. Being succinct helps ensure that the attorney's cross-examination is clear, enables the attorney to develop a good rhythm with the witness, and keeps the witness engaged.

- **Avoid asking compound questions.** Aside from provoking opposing counsel to rightfully object and interrupt the flow of the cross-examination, asking two questions in one can confuse the witness and cause the attorney to lose control of the storytelling. For example, the witness may inform the attorney in the middle of cross-examination that the witness is confused or, worse, ask follow-up questions or answer the attorney's questions incorrectly due to the confusion.
- **Know the reason for drafting each question or statement.** This helps the attorney have a strong sense of purpose when the attorney approaches each witness during the trial.

ORGANIZE EVIDENCE AND PRACTICE DELIVERY

To ensure an effective cross-examination, an attorney should:

- Become as comfortable with the subject matter of the case as possible.
- Gather and organize each piece of evidence or document to be shown to the witness, including by:

Cross-examinations should not be planned in a vacuum. Instead, cross-examinations are most effective when prepared last, with the other components of the trial in mind.

Federal Trial Toolkit

The Federal Trial Toolkit available on Practical Law offers a collection of resources to assist counsel with preparing for and conducting a civil trial in federal court. It features a range of continuously maintained resources, including:

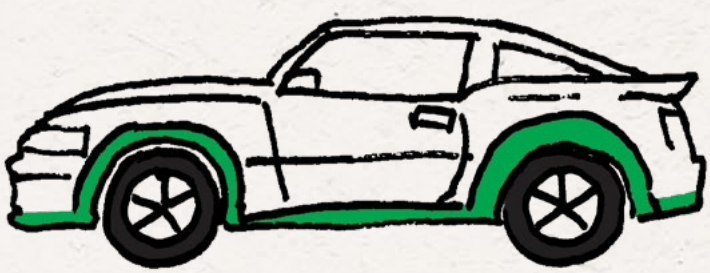
- Preparing for Trial (Federal)
- Civil Jury Trials (Federal)
- Bench Trials in Federal Court
- Corporate Counsel Trial Readiness Checklist
- Scheduling Order Under FRCP 16(b)
- Final Pretrial Order Under FRCP 16(e): Overview
- Admissibility of Evidence in Federal Court Flowchart
- Mock Jury Exercises
- Social Media: What Every Litigator Needs to Know
- Drafting Jury Instructions and Verdict Forms
- Motion for Continuance of Hearing or Trial
- Issue Preservation Checklist
- Post-Judgment Motion Comparison Chart

  - printing sufficient copies of any document that the attorney intends to present to the witness to distribute to other key players in the courtroom, such as opposing counsel and the judge, or, if evidence is being presented electronically, prepare paper or electronic copies to provide to opposing counsel;
  - keeping copies of each document in separate folders to reduce the risk that the attorney might become confused in a flurry of paper in the middle of cross-examination; and
  - annotating the attorney's copy of each document (whether in paper or electronic format) with the points the attorney wants to make with that document.
- Order the evidence in a way that tells a clear, compelling story.
- Learn in advance how to operate any audio or visual equipment in the courtroom that the attorney may need to use during cross-examination.
- Practice speaking slowly and clearly so the judge and jury will understand what is being communicated.
- Remember to face the jury occasionally during cross-examination in a jury trial to remind the jury that the attorney is in control of the storytelling.

REFRESHING A WITNESS'S RECOLLECTION

In some cases, a witness who previously gave a statement that is favorable to the opposing party may claim not to remember it in response to a line of questioning about the subject matter during cross-examination. If that happens, the cross-examining attorney may attempt to refresh the witness's recollection with a writing, such as a police report containing the prior statement or deposition transcript (FRE 612).

When a witness testifies to not remembering a previously made statement, the attorney may ask the witness if there is anything that might refresh the witness's recollection. However, the witness may respond "no" simply because the witness does not know or remember that a writing exists to aid the witness's memory. If the witness says "no," the attorney no longer has a pending question that enables the attorney to show the witness the prior statement.



To avoid this situation, rather than asking the witness if anything will refresh the witness's recollection, the attorney should both:

- Reference the writing containing the prior statement and indicate that it should refresh the witness's recollection, for example, "Allow me to refresh your recollection with the statement you gave the police."
- Ask the judge for permission to approach the witness and show the witness the prior statement. The attorney should instruct the witness to take a moment to review the statement. After the witness has read the statement, the attorney can then ask the witness the same question previously posed.

UNDERMINING A WITNESS'S CREDIBILITY

In some circumstances, an attorney may wish to discredit a witness on cross-examination, which is permitted under FRE 607. Various strategies may be available to undermine a witness's credibility during cross-examination. Some of the most commonly used strategies include:

- Eliciting witness disagreement.
- Establishing witness bias.
- Highlighting a witness's prior inconsistent statements.
- Establishing omissions in written reports.
- Using evidence of a witness's character to attack or support a witness's credibility.

WITNESS DISAGREEMENT

As discussed above, an attorney should generally avoid framing questions or statements on cross-examination to elicit disagreement from the witness (see above *Draft Short and Clear Questions or Statements*). However, in some cases, the attorney may seek to elicit disagreement from the witness to:

- Make it obvious that the witness is lying (FRE 608).
- Expose a character trait of the witness that helps advance the attorney's theory of the case (see below *Witness Reputation and Character*).

For example, if establishing that the witness easily loses his temper is a key point in the case, the attorney may want to demonstrate this point to the fact-finder during cross-examination by deliberately making a statement that the attorney knows the witness disagrees with in an effort to make the witness visibly angry.

An attorney may glean what questions or statements a witness may disagree with from reviewing discovery or interviewing or deposing the witness before trial. However, the attorney should carefully weigh the pros and cons of framing a question or statement to trigger disagreement. If eliciting disagreement serves only a minor purpose, having a witness give a negative response may undermine the effectiveness of the cross-examination by disrupting the flow of the attorney's storytelling and focusing the jury's attention on the witness's disagreement instead of the attorney's critical points.

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BIAS

One of the most common methods of undermining a witness's credibility is to show that the witness is biased. An attorney can demonstrate witness bias in various ways, such as by establishing during cross-examination that the witness:

- Has a close relationship with the opposing party.
- Is a paid expert.
- Stands to benefit from providing certain testimony.

For example, if a witness is a family member of the opposing party, the attorney can establish bias by eliciting the witness's agreement to the attorney's statements that the witness is the defendant's sibling, the witness loves the defendant, and there is very little the witness would not do to help the defendant.

PRIOR INCONSISTENT STATEMENTS

A witness's prior inconsistent statement made under oath generally may be used to both establish the truth of the matter asserted in the prior statement and to undermine the witness's credibility (FRE 801(d)(1)(A); FRE 613(b) (describing when prior inconsistent statements are admissible)).

If the witness's trial testimony contradicts the witness's prior sworn statement, such as one made during a deposition, the attorney should establish on cross-examination:

- The date on which the witness made the prior statement.
- The circumstances under which the witness made the prior statement (for example, in the presence of a court reporter who recorded the testimony).
- That the witness was under oath and swore to tell the truth when the witness made the prior statement.

Once these facts are established, the attorney can direct the court and opposing counsel to the page (and line number, if applicable) of the written or recorded prior sworn statement, such as in a deposition transcript, and read the prior inconsistent statement verbatim during cross-examination.

Search Evidence in Federal Court: Overview for more on a witness's prior inconsistent statements.

OMISSIONS IN WRITTEN REPORTS

Another method to impeach a witness, particularly a witness who is testifying in a professional capacity such as a nurse or police officer, is to highlight that the witness failed to record an important event in a written report that the witness was expected to complete. To conduct an effective cross-examination based on an omission in a written report, the attorney should ask questions or make statements that help to:

- Provide background to set the stage for the important points the attorney wants to make. For example, if the attorney is cross-examining a witness about the witness's observations, the attorney should start by

asking questions that establish the circumstances that led to the witness being present for the event.

- Build up the witness's training and experience to establish the witness's familiarity with the subject, focusing on the experience that relates to the point the attorney wants to make (for example, establishing that the witness's job as an experienced nurse entails observing physical and behavioral changes in patients).
- Show why it is important for the witness to make the writing, for example, because:
  - writing down the information is part of the witness's job;
  - the witness was trained to follow a certain protocol in similar situations; and
  - there are consequences for the witness's failure to write down the information.
- Establish the point necessary to advance the attorney's theory of the case, such as that the witness is not credible because the witness's failure to write down the information shows that:
  - the incident did not actually occur; or
  - the witness broke protocol without a good reason, despite the witness's training and experience.

WITNESS REPUTATION AND CHARACTER

A party may use evidence of a witness's character to attack or support the witness's credibility, with certain limits (FRE 404(a)(3); FRE 608; FRE 609). An attorney may attack or support a witness's credibility by establishing that the witness has a reputation for lying or telling the truth. However, an attorney may introduce evidence showing that a witness is generally honest only after that witness's character for truthfulness has been attacked. (FRE 608(a).)

An attorney may introduce evidence of a witness's character for truthfulness or untruthfulness through fact or opinion testimony about the witness's reputation (FRE 608(a)). To establish a witness's reputation, an attorney can try to locate people from the witness's childhood, neighborhood, or place of employment who are familiar with the witness's reputation and can attest to it. The reputation witness needs to know how others in the witness's community regard the witness.

An attorney cannot introduce evidence to prove specific instances of a witness's conduct for the purpose of showing that the witness is a liar or is honest, except for certain criminal convictions (FRE 608(b); FRE 609). However, the court may allow an attorney to cross-examine a witness about specific instances of the witness's conduct (or the conduct of another witness whose character the witness being cross-examined has testified about) if the conduct is probative of the witness's character for truthfulness or untruthfulness (FRE 608(b)).

If a party attacks a witness's credibility through reputation evidence, the opposing party can attempt to rehabilitate the witness's credibility by exposing flaws in the reputation evidence. For example, the opposing party can attempt to show through cross-examination that the reputation witness has not known the person for long or that the size of the community that is the source of the witness's "reputation" is not sufficiently large. The opposing party may also cross-examine the reputation witness about the basis of the other witness's reputation, including asking about specific instances of conduct. (FRE 608(b).) For this reason, before putting a reputation witness on the stand, the party should make sure that the basis for the reputation testimony is sufficiently sound to survive a rigorous cross-examination. PL