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When to cross-examine

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Thanks to the movies and television, many lawyers seem to believe that a vigorous cross-examination is essential for every opposing witness. The truth is very much the opposite.

Cross-examination may be the most interesting part of a trial (and the most fun, at least when things are working right). But it's also the most challenging and the most dangerous, and should be undertaken, if at all, with great care.

What makes cross so challenging? To begin with, you're examining a witness who is almost always unfriendly, and occasionally outright hostile. So you're usually trying to elicit helpful information from someone who doesn't want to be helpful. And you're usually trying to control someone, using only your questions, who doesn't want to be controlled.

Because of that, there's a reasonable chance — especially if you aren't being careful — that the cross-examination will actually damage your case. The most obvious risk is that you may elicit harmful testimony. It's particularly painful to have a witness say something damaging on cross that didn't come out on direct.

But even if you don't step on a landmine, you can still undermine your case with a weak or ineffective cross-examination. It isn't helpful, for example, simply to repeat and reinforce your opponent's evidence. Or to irritate the jury and judge by squabbling with the witness. Or to wallow in tedious detail. Or to waste everyone's time by asking the same questions over and over.

In short, lots of things can go wrong on cross-examination. Don't let yourself be seduced by the allure of trying to win the case through a "killer" cross-examination, without thinking through the dangers.

Before you say a word, ask yourself: Is this likely to work? Is the potential gain worth the risk? And if I try it, how do I minimize that risk?

Put another way, the first rule of cross-examination is the same as the first rule of medicine: "First, do no harm." So before you start your cross, think about the following:

1. Has the witness really hurt you? If not, why are you doing this?
2. Is the witness's testimony on a peripheral issue, or something that truly matters? Are you just going to wind up emphasizing something minor or even trivial?
3. Can you realistically get the witness to give any testimony favorable to your case? Or are you more likely to have the witness repeat or emphasize something negative?
4. Was the witness credible? If so, do you have anything to work with to attack his or her credibility? If not, could you inadvertently rehabilitate the witness?
5. Are you confident that you know how the witness will answer your questions?
6. Is this cross-examination actually going to add anything to your closing argument?
7. Is there an alternative way to respond, like using another witness?

If you do decide to cross, have a strategy and/or a goal. The strategy may not be very complex; for example, it might be "show that the witness is lying."

Still, you need to think carefully about where you want to go and how you expect to get there. You also need to think about where you will be if your strategy doesn't work, or only gets you part way to where you want to go.

Sometimes the most effective cross is two words: "No questions." At the very least, you haven't harmed your credibility, strengthened your opponent's case, or wasted everyone's time.

If you are in doubt as to whether you should conduct a cross-examination, take a pass. Dismiss the witness with a confident air, and move on.

Finally, don't press your luck. If you've scored your basic points, sit down. A great deal of self-inflicted damage is caused by lawyers trying to turn an A-minus answer on cross into an A-plus. That usually doesn't work, and it's much more likely something bad will happen**.**

Previous installments of Tried & True can be found here. Judge F. Dennis Saylor IV sits on the U.S. District Court in Boston. Prior to his appointment to the bench, he was a federal prosecutor and an attorney in private practice. Daniel I. Small is a partner in the Boston and Miami offices of Holland & Knight. He is a former federal prosecutor and teaches CLE programs across the country.