

CHAPTER 1

PHILOSOPHY AND OVERVIEW OF THE SCIENCE OF CROSS

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§1.03 Controlling Ourselves Is the Necessary First Step in Establishing Control of the Witness

The goal of cross is first to obtain truthful testimony. In order to encourage a hostile witness to be more honest, we must establish control over the examination of a hostile witness.

Productive cross is the result of our harboring our factual resources. We seek to introduce, expand upon, and put into context our best facts. Secondly we seek to use facts and their resulting inferences to diminish either the believability or the importance of facts upon which our opponents rely. Our success at controlling the witness is largely a product of our dedication to thorough factual preparation and delivery of a predominately scripted cross. Preparation of our intended crosses leads to risk minimization. We construct low risk/high gain question sequences, avoiding the flashy but often fatal high risk/high gain adventures. We first attempt to make our points and bolster our theory with answers we know or strongly believe we can obtain. Our chapters on cross preparation systems (Chapters 6 through 9), page preparation techniques (Chapter 11), and sequences of cross (Chapter 12), are as fundamental to predictably meaningful cross as are the book's many chapters on cross techniques.

§ 1.04 Cross Is More About Winning Than About Not Losing

So much of the historical teachings on cross stress the use of cross to blunt our opponent's attack. The spirit of such teaching is to use cross to survive our opponent's facts and then try to win with our own witnesses. We reject such a limited role for cross.

The techniques of advanced cross preparation and delivery elevate the importance of cross. We use cross to make the points central to our themes, not merely to diminish the points made by our opponent. Of course we will impeach where appropriate, and introduce facts that undermine the opponent's theory. But most crosses offer us the opportunity to do far more than hurt the opponent's theory. We can and should use their witnesses to prove our theory.

§ 1.05 Modern Cross: Much More a Science, Much Less an Art

The art of cross" as a term is misleading. It conveys the erroneous message that some trial lawyers have the talent to cross-examine while others don't. It assumes cross has no rules or fixed reference points. Cross skills can be taught and employed by all who have the desire and the willingness to study and use the modern techniques of cross.

§ 1.08 Rethinking the Goals of Modern Cross

Cross is not a contest between us and the witness, nor is it combat with a hostile witness or an exercise in damage control. When we view cross in such aggressive terms, we can mistakenly come to view cross as so dangerous that cross should be very limited or foregone in favor of the supposedly more reliable direct examinations. This very negative and limiting view of the purposes of cross leads to the thought that the primary goal of cross is to impeach an opposing witness.

Cross is simply another opportunity to build and teach our case. We use the witness as a conduit of information to the jurors. Certainly there are elements of attack within many crosses. But more fundamentally, cross is an opportunity to elicit favorable facts as opposed to simply attacking

unfavorable testimony. Modern trial strategy employs cross to win cases, not merely to fight against losing cases. We employ cross to expose and develop the truth of our theory, not solely to undermine our opponent's theory. As we will discuss, developing favorable facts through witnesses called by the opponent has reliably greater impact than developing those same facts through our witnesses.

§1.10 Consistently Theory-Directed Cross-Examinations Are the Mark of an Accomplished Cross-Examiner

Cross must always serve its primary purpose which is to advance our theory of the case, and secondarily to undermine our opponent's theory. Good cross done consistently is of more value than great cross done occasionally. Good cross done consistently becomes great cross by the very fact that we reliably employ cross to our great advantage.

Our goal is not to create a single beautiful cross, or to develop the ability to occasionally devastate a witness on cross. Our goal is to raise the value of each of our crosses, to maximize the impact of our favorable facts. When we prepare for each witness using the chapter method, we will almost surely increase the number of times our crosses go extremely well.

§ 1.11 A Prepared Cross Frees Us Up to Better Use the Answers

We are at our best when we develop our crosses before trial, not during trial. Spontaneity at a podium is a dangerous technique. By working from prepared chapters of cross we free ourselves to better hear and react to the answers.

§1.13 We Build Our Case Out From Our Planned Crosses

Cross is a tool we use to build factual support for our theory. By developing our crosses first, we quickly identify what helpful facts we can wring from an opposing witness. We position ourselves so that we have far fewer credibility battles that must be won. By causing the opponent's witnesses to admit a fact, we allow ourselves the opportunity to say to a jury "These are the facts that even they admit." We become less dependent on our own lay witnesses and experts.

We can then build on the facts we will reliably adduce from the opponent's witnesses to create powerful, fact-specific and theory-based opening statements. Knowing what facts we can reliably produce in cross allows us to draft openings that are less dependent on a jury believing the testimony from our witnesses.

Because we have repurposed cross as an opportunity to introduce and explain facts that support our theory, the facts we prove in cross become central to our closing argument. We can begin to hear our closing take shape as we draft our crosses. A powerful closing argument flows naturally from our planned crosses.

Once we have identified the facts we believe we can reliably produce through cross, we can narrow down the direct examinations needed to fill in the evidentiary gaps.