

CHAPTER 5

CONSTRUCTIVE CROSS

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§5.01 Constructive Cross Defined

Constructive cross is not just a technique or even a group of techniques. Constructive cross is an **entire methodology**. It is a way of approaching the vast majority of cross-examinations faced by the trial lawyer. Constructive cross represents a shift in the historical outlook on the central purpose of cross.

The methodology of constructive cross stands for the proposition that a witness who is both:

1. identified by the factfinder as supporting the opponent's position or at least neutral to the two sides, and
2. who is called by the opponent to support their theory of the case or who is called for purposes of cross by you **can and should be cross-examined**, using leading questions, with a primary goal of adducing facts that support our theory of the case.

In simplified form, the methodology of constructive cross reads:

First, use opposing witnesses to build our theory of the case (constructive cross); and

Second, challenge opposing witnesses on the opponent's theory of the case (destructive cross).

§5.03 Constructive Cross Changes the Fundamental Question Facing the Lawyer With the Right to Cross-Examine a Hostile Witness

Constructive cross builds the cross-examiner's own theory of the case through the cross testimony of the opponent's witnesses

Historically, the lawyer about to cross-examine would ask herself one fundamental question: "Has this witness hurt my theory of the case?" If the answer was "no," asking no questions was often suggested to be the correct technique. Under the modern theory of constructive cross, the lawyer about to cross-examine must ask herself two fundamental questions, not one. The first question to be asked is "Does this witness possess facts that can build or strengthen my theory of the case?" This is the more important question. The second question remains: "Has this witness hurt my theory of the case, and if so, do I have material available that will allow me to challenge the witness in those areas?"

§5.04 Destructive Cross Remains an Available and Necessary Component of Cross

In preparing for cross, it may still be useful to search for available facts to build chapters that challenge a witness's rendition of facts or to otherwise impeach the credibility of the witness, on a selected point, on their qualifications, on their outlook in general, or facts which attacked the opponent's theory of the case.

§5.06 Overview of Advantages of Constructive Cross

- [1] **Time Is the Measure of Importance; Constructive Cross Uses More Time to Teach and Less Time to Challenge**

Time truly is the measure of importance in the courtroom. This formula is especially applicable to trials before a jury. The jurors are in a strange learning environment.

The more time a lawyer spends on any given fact or area, the more the lawyer signals to the factfinder that the fact or area is important—whether or not that is the desired message.

Engaging in destructive cross-examinations that challenge an opponent's theory of the case inevitably attaches greater importance to that body of evidence. To cross-examine on a particular area of testimony simply because that area hurts our case is to spend even more time educating the jury on that group of facts.

[2] Preparation of Constructive Chapters of Cross Is Often Based Upon Facts to Which the Expected Answer Is "Yes"

Critical to an understanding of constructive cross is the realization that constructive cross does not cause a witness to admit that which they believe to be untrue or answer "yes" to facts that they do not know. Constructive cross is designed to draw out of the hostile witness favorable facts which they must acknowledge are accurate. To achieve our goals, we build constructive cross chapters based on facts we believe the witness will admit.

More particularly, we are looking for facts which the witness will accept as valid statements based on their perception that they cannot deceive or deny in this area. Quite frequently when engaged in constructive cross chapters, the witness fails to perceive how a fact he knows to be accurate is of any assistance to the cross-examiner's theory of the case. As a consequence, the witness may not search for avenues of evasion because he does not perceive the need to evade.

[3] Constructive Cross—A Positive Presentation

Destructive cross questions, more often than not, include a negative ("not" or "no") in the body of the question.

It is easier to create a visual image from a question that announces a fact than a question that denies the existence of a fact. When sentences are phrased in the positive rather than in the negative, there is less confusion and there are fewer colloquies between the cross-examiner and the witness.

[4] Establishing a Favorable Fact Through an Opposing Witness Has Greater Power and Greater Certainty Than Obtaining the Same Answer Through a Witness Identified With Our Side of the Case

A fact that supports our theory of the case, testified to by a witness on cross, is more readily accepted by the factfinder than that same fact testified to on direct examination by our own party or witness. By human nature, and by instruction of law, the factfinder examines the testimony of an interested witness with skepticism to see if the perceived bias, interest, motive or relationship to the case overcomes or taints the believability of the testimony.

A principal reason why any factual agreements between the cross-examiner and a hostile witness are especially powerful is that the opponent can never urge in closing argument that facts verified during his own witness's testimony are not to be believed.

[5] Opponents Have a Difficult Time Preparing Their Witnesses for a Constructive Cross

Our theory, not the opponent's theory, is the bedrock of our presentation. As a result, it is far easier for us to guide the examination into areas well known to us. In essence, we are playing on our turf. The opponent faces a difficult problem when he wishes to prepare his witness for a constructive cross.

Even when a constructive cross chapter can be identified by the witness as helpful to the cross-examiner and harmful to the witness's side of the case, if the chapter is built around facts the witness must admit, a recognition of the harm thereby caused will neither enable nor encourage the witness to withhold the truthful testimony. The recognition just makes the witness more anxious.

[6] Tone of Cross

Constructive cross, because it is not an attack, is more conversational in tone. The witness does not perceive a personal attack on his integrity or on history, and therefore he is less confrontational or defensive in response. The cross tone is more akin to teaching than advocating.

[7] Constructive Cross Avoids Some of the Pitfalls Inherent in Direct Examination

Constructive cross is an efficient, concise, and focused presentation of facts that can support our theory of the case. The chapters of constructive cross are a tool that we may use to narrow the scope of direct examinations, to reduce the length of direct examinations, and to employ direct examinations as a means of introducing materials that cannot as effectively be gained from other witnesses, or to reinforce the importance of points scored in the constructive cross-examinations.

[10] Witness Anxiety Assists the Cross-Examiner Who Is Performing Constructive Cross-Examinations

Trials produce anxiety in all participants. Cross creates anxiety, both for the cross-examiner and for the witness being cross-examined. With that said, when we are conducting constructive cross on factual territory that we know so well, there is less anxiety for us. Conversely, because the topic on which the witness is examined is a series of chapters for which the witness is less well prepared and less intimately aware, the witness's anxiety must be at a higher level than when he is defending his well staked-out turf.

In constructive cross we build chapters around scenarios of our own choosing, which may well differ from the scenarios of importance to the direct examiner. As a result, the witness may feel he is on strange ground. When this is the case, anxiety is a consequence. The anxiety does not come from tone of voice or gestures; it is inherent in a situation in which the witness either does not understand why he is being examined on this area, or, having recognized the importance of the area, the witness perceives that he is required to affirm facts which assist the cross-examiner.

The constructive cross chapter does not try to win a battle; it aims to show there is no battle as to this set of facts. While indeed the lawyers may later debate the inferences that can be drawn from those facts, at least the cross-examiner's desired facts will have been placed beyond dispute. Anxiety on the part of the witness narrows the witness's psychological room to seek evasion.

§5.09 Constructive Cross Is A Bigger Advantage When Crossing Without Discovery

Constructive cross can be of greater importance in planning the cross of a "no discovery" witness. We never look forward to cross of a witness for which there is no discovery or very limited discovery. Our emotions are higher and more anxiety-driven than with other witnesses. That same anxiety and high emotion is also true for the witness. The witness and cross-examiner have not been exposed to each other; the tension of unfamiliarity is higher (see Chapter 14, Cross Without Discovery §§ 14.01, 14.02).

To eliminate as much risk as possible, and to make the cross as safe as possible, the selection of the chapters to use on cross becomes critical. When that selection is based on our theory of the case, and not the opposing theory of the case which the witness was put there to support, there is less risk for us.

The cross-examiner may experience trepidation because we do not know what the witness will say, but it is at least equally true that the witness does not know the topics (chapters) that we will initiate during our cross. Once we begin to cross-examine constructively on our theory of the case, the witness is almost always unprepared to have analyzed answers to those questions. Even if the witness does recognize our theory of the case, the witness is never as prepared on our theory of the case as he is on his own theory.

§5.10 Using Filtered Listening During Direct Examination to Hone Chapters of a Constructive Cross with a "No Discovery" Witness

As discussed in depth in the chapter on cross without discovery (see Chapter 14, Cross Without Discovery), we will utilize filtered listening during the direct examination of a witness for which there is no discovery. There are two filters. The first filter is what can we obtain from this witness that will support our theory of the case. The second filter is what the witness has said that will undermine the opponent's theory of the case.