

CHAPTER 10

THE ONLY THREE RULES OF CROSS

SYNOPSIS

- § 10.01 “Great” Cross: A Misleading Term
- § 10.02 Great Cross Teaches**
- § 10.03 Cross-Examiner’s Control of Themselves
- § 10.04 Great Cross-Examinations Eliminate Distractions
- § 10.05 When to Say “No Questions on Cross, Your Honor”
- § 10.06 Relationship of the Three Rules to Time**
- § 10.07 Relationship of Cross to Anxiety and Confidence**
- § 10.08 Real Time Learning in Cross**
- § 10.09 Achieving Control and Real Time Understanding Through the Form of the Question
- § 10.10 The Historical Context of the Only Three Rules of Cross
- § 10.11 Rule 1: Leading Questions Only**
- § 10.12 Leading Questions Allow the Cross-Examiner to Become the Teacher**
- § 10.13 Use Short Declarative Questions
- § 10.14 Declarative Questions Give Understanding to the Jury
- § 10.15 Dealing With Witnesses Who Don’t Want to Answer
- § 10.16 Five Ways to Retrieve Answers
- § 10.17 Avoid Enemy Words That Give Control to the Witness
- § 10.18 What Happens When the Enemy Words Are Used
- § 10.19 A Greater Danger: Open-Ended Questions Encourage Long-Winded Answers Even to Later Leading Questions
- § 10.20 Mood and Emphasis
- § 10.21 Word Selection, Tone of Voice, and Word Emphasis

§ 10.22 The Importance of Word Selection

§ 10.23 Word Selection Describes Theory

§ 10.24 Rule 2: One New Fact Per Question

§ 10.25 A Time-Honored Method to Teach the Factfinder

§ 10.26 Vague, Equivocal, or Subjective Words Do Not Count as Facts

§ 10.27 Isolate the Fact in Dispute to Fix the Vague Question

§ 10.28 Redefine the Disrupted Issue Using Objective Facts

§ 10.29 The More Detail the Better

§ 10.30 Subjective Interpretation

§ 10.31 Faster, Cleaner Crosses

§ 10.32 The Three-Step Method to Fix the Equivocal, Vague Question

§ 10.33 Avoiding the Compound Question Avoids Objections

§ 10.34 The “Close Enough” Answer

§ 10.35 How Not to Fix the Bad Question

§ 10.36 Never Abandon the Valid and Necessary Leading Question

§ 10.37 Facts, Not Conclusions, Persuade

§ 10.38 Conclusions, Opinions, Generalities, and Legalisms Are Not Facts

§ 10.39 Conclusions Are Not Facts

§ 10.40 Opinions Are Not Facts

§ 10.41 Generalities Are Not Facts

§ 10.42 Legalisms Are Not Facts

§ 10.43 Creating Impact One Fact at a Time

§ 10.44 Infusion of Emotion Question by Question

§ 10.45 Word Selection Made Easier by Envisioning the Event

§ 10.46 Labeling

§ 10.47 Rule 3: Break Cross into a Series of Logical Progressions to Each Specific Factual Goal

§ 10.48 From the Very General to Very Specific Goals

§ 10.49 General Questions Lock in and Make Easy the Specific

§ 10.50 Proceeding from the General Question One Fact at a Time Makes the Specific Answer Inescapable

§ 10.51 The General to the Specific Creates Interest

§ 10.52 The More Difficult the Witness, the More General the Chapter Must Start

§ 10.53 Checklist for Rules

§ 10.54 The “Yes” Answer Is the Most Understood Response

§ 10.55 The Technique of Seeking a “No” Response

§ 10.56 Seeking the “No” Answer in Order to Marginalize the Witness

§ 10.57 Making Sure to Receive a “Yes” Where “Yes” Is Really the Answer

§ 10.58 “If You Say So” Answer Helpful But Still Requires Interpretation

§ 10.59 Requiring the Unequivocal Answer for Impeachment and Appeal

§ 10.60 The Techniques of the Only Three Rules Can Lead to Unexpectedly Honest Answers

§ 10.61 Self Correcting the Cross-Examiner’s Honest Mistakes

§ 10.62 The Three Rules—Building Blocks for Advanced Techniques

§10.02 Great Cross Teaches

Cross is not an exercise based on emotion, presence, and oratory. It is not the cross-examiner showing the witness and all of those who observe—but primarily the witness—that we are smarter, quicker, louder, more demonstrative, or more fearsome. It is about teaching our theory of the case to the factfinder. Each of us view the cross as pitting our skills, our preparation, our intelligence, and our techniques against those of the witness. Cross is not about a performance by an advocate, but rather the teaching of facts that are critical to our theory of the case.

§10.06 Relationship of the Three Rules to Time

The three rules of cross are designed to maximize the amount of factual information coming before the jury in the shortest amount of time. Juries have changed in the last decade.

Remember, time is the measure of importance in the courtroom, not the oratory inflection or volume of the cross-examiner's voice. Importance equals time.

§10.07 Relationship of Cross to Anxiety and Confidence

Each of us perform better when our confidence is higher. When we are confident, the words come easier. When we are confident, the thoughts come quicker. When we are confident, the goal appears obtainable.

Anxiety impedes the processing of information. Anxiety destroys confidence. Anxiety undermines confidence. Anxiety leads to frustration, anger, embarrassment and fear. This goes for witnesses too.

With the three rules of cross and other techniques in this text, our confidence can remain at a high point while the confidence of the witness is eroded and replaced with anxiety. The relationship between us and the witness is an inverse ratio. When our confidence is high, the witness's confidence is low. When our anxiety is high, the witness's anxiety is low. Ultimately, the witness is less likely to tailor his testimony, whether in the obvious form of "lying" or in the less obvious form of carefully orchestrating his testimony to fit into the theory of the opponent's case.

§10.08 Real Time Learning in Cross

The three rules are designed to permit the factfinder to learn our theory of the case and to understand effective attacks upon the opponent's theory of the case in real time. Real time is defined as being the instant when the questions and answers are spoken in trial.

§10.11 Rule 1: Leading Questions Only

The Federal Rules of Evidence and the rules of evidence of all states, permit leading questions on cross (Fed. R. Evid. 611(c)). Simultaneously, the right to use leading questions is almost wholly denied the direct examiner. This is the fundamentally distinguishing factor of cross. It is the critical advantage given us that must always be pressed.

Despite this incredible opportunity, many of us do not take advantage of this rule and insist on asking open-ended questions. This is unnecessary at best and foolhardy at worst. The “leading questions only” technique means that, in trial, we must endeavor to consistently phrase questions that are leading. No matter what the reason or rationale, a non-leading question introduces far greater dimensions of risk and occasions far less control than a question that is strictly leading.

One of the greatest risks occasioned by the use of open-ended questions is not the answer that may be given to that question. The answer may be perfectly acceptable to us. However, by asking the open-ended question, we have failed to consistently train the witness to give short answers to leading questions and not to volunteer information. By teaching inconsistently, with every open-ended question we sow the seeds for later problems in the cross.

§10.12 Leading Questions Allow the Cross-Examiner to Become the Teacher

If we are to teach the case, we must demonstrate that we understand the case. The leading question positions us as the teacher, while the open-ended question positions us as a student. Through the open-ended question it is the witness who becomes the teacher. When we use leading questions, it places us in control of the flow of information. The leading question also allows us to select the topics to be discussed within the cross. These topics will be referred to throughout the book as the chapters of cross.

§10.24 Rule 2: One New Fact Per Question

The scientific method provides that the experimenter has a controlled environment and adds one variable at that time to that environment to determine the effect of that variable.

Under the scientific method, if the experimenter changes two variables at the same time, the experimenter would be confused as to the cause of the result, and no dependable findings or conclusions would result. The experimenter could not be certain which variable produced the greater result.

We need acceptable conclusions supported by facts to work successfully. They need to add only one new fact per question. This is a critical component in the quest for witness control. By placing only a single new fact before a witness, the witness’s ability to evade is dramatically diminished. Simultaneously, the ability of the factfinder to comprehend the significance of the fact at issue is greatly enhanced.

§10.33 Avoiding the Compound Question Avoids Objections

This method of asking only one fact per question also assists in meeting or eliminating objections. As discussed, when we ask only one fact per question, we avoid having to interpret the meaning of a “no” answer. Similarly, when avoiding compound questions, counsel sidesteps multi-tiered objections that include objections to the form of the question, thus allowing counsel to better meet any forthcoming objection.

§10.37 Facts, Not Conclusions, Persuade

The second rule of one fact per question tightly controls the witness. The witness has before him but a single new fact. It is hard for the witness to express confusion or be evasive. Moreover the jury is more easily educated by this technique of factual presentation. Because the facts are so detailed and because the facts are presented one at a time, the jury will reach the conclusion to which the facts inevitably point. The jury will embrace the same logical conclusion we suggested.

One might say, the technique of one fact per question is akin to planting acorns in a jury box, not oak trees. Remember it is us, not the jury, who is intimately familiar with the facts. The jury must slowly and carefully be brought to the conclusion sought by the advocate. It is far safer to let the jury reach its own conclusion based on the facts rather than demanding that conclusion from a hostile witness. The structure of one fact per question meticulously builds the picture so that the jury reaches our desired conclusion, even though the conclusion itself may never be put to the witness. See Chapter 2, *The Chapter Method of Cross* and Chapter 11, *Page Preparation of Cross*.

§10.38 Conclusions, Opinions, Generalities, and Legalisms Are Not Facts

We always feel the need to move faster in a trial. Judges become impatient. Juries send signals of boredom. Witnesses show a willingness to become uncontrollable. All of these facts make us want to move quicker. Unfortunately, we tend to think that moving to conclusions, opinions, generalities, and legalisms makes for faster movement. When studied, conclusions, opinions, generalities and legalisms do not move the case along faster. Worse, they inadequately teach our theory of the case.

Individual, precise, detailed facts will always overcome a conclusion, opinion, generality, or legalism. The reason? Facts (multiple and precise) paint a mental image. Conclusions, opinions, generalities, and legalisms paint no image at all.

§10.47 Rule 3: Break Cross into a Series of Logical Progressions to Each Specific Factual Goal

Cross of a witness is not a monolithic exercise. Instead, the cross of any witness is a series of factual goal-oriented exercises. The third technique of the only three rules of cross is to break the cross into separate and definable goals.

Each section or chapter of cross must have a specific goal. It must be so specific and so clear that we, if asked at any time without notice (as judges are inclined to do), can identify the factual point we are seeking to make. Another way of envisioning this is to view cross as a series of pictures that must be painted.

The vast majority of cross-examinations have many specific goals (see Chapter 2, *The Chapter Method of Cross*). However, we should still proceed a chapter at a time in order to establish a single identifiable goal at a time. Cross is a series of specific goals. Each goal, in turn, must be developed individually and fully before proceeding to the next specific goal.

Too often advocates envision the cross of a witness as having a single, overriding goal such as:

- “destroying the credibility of the witness;”
- “showing the defendant drove negligently;” or
- “proving the defendant robbed the store.”

To think of cross in such a manner is to make the preparation and presentation of the cross exceedingly difficult. It is too big. Furthermore, the advocate will notice that these are all conclusory goals, not factual goals.

Cross is ideally suited for the establishment of factual goals. Cross is ill-suited for the establishment of conclusory goals. Setting aside for the moment the fact that jurors are unpersuaded by conclusions, witnesses called by the adversary are extremely unlikely to agree with our conclusions. It is therefore improper and unnecessary to conceive and plan cross in such global terms. Instead, it is far easier and more productive to engage in the technique of breaking down every cross into its individual factual goals. As the lawyer accomplishes those factual goals, the factfinder is led to the appropriate and desired conclusion.

There are two reasons for developing specific factual goals. First, it is easier for the jury to follow any line of questioning if it clearly and logically progresses to a specific factual goal. An organized presentation that is broken down into several individual points invites attention.

The second value in breaking cross into individual factual goals, is that it allows the judge to know where we are proceeding so that we will be permitted to continue. Judges want us to “move it along.” There must be a reason to cross the witness. Before rising to cross, the advocate must have firmly in mind the individual goals of that cross.

A wonderful by-product results when we clearly have specific goals every time we are requested by the court to identify those goals. Eventually the trial judge and the opponent learn that, there is always a specific goal. When in doubt, opponents will not object, nor will judges sustain the objection if made. This gives us even greater latitude in our examination.

Each specific goal within a cross should either assist us in building our theory of the case, or assist us in undermining the opponent’s theory of the case. It is unnecessary and unwise to pursue factual goals that do not impact the contrasting theories of the case.

§10.48 From the Very General to Very Specific Goals

A logical progression dictates that the issue to be developed must proceed from the very general to the specific goal. Think of it as a funnel. The general questions funnel the witness to specifics.

Witnesses will find it easier to agree to general issue questioning before they are brought to specifics. This is true particularly when specific facts will be harmful to the witness. A witness is unlikely to admit at the onset of cross that he is a chronic liar. However, a series of facts may well establish that the witness can understand why people would lie, has been in situations where a lie benefited the witness,

and has lied in those situations. We should start out generally and proceed slowly and methodically, one fact at a time, to the specific goal of establishing that the witness is a “liar.”

The goal is to provide the factfinder with sufficient facts by which they may infer that the witness is a liar. The technique, as always, is to provide facts to the witness through leading questions making it more likely that the witness will give truthful “yes” answers. We should strive to score the points factually, leaving it up to the factfinder to draw the appropriate inference.

§10.54 The “Yes” Answer Is the Most Understood Response

A: No.

What has the witness said? It is true that with a little concentration the listener may realize that the witness has confirmed that the document was not provided to the investors. But the chance for misunderstanding is greater, as is the concentration needed to assimilate the information. Where possible, the question should be put to the witness in such a way that the desired and expected answer is “yes.”

If we want the jury to remember Mr. Kay, a witness who is a liar, we will phrase every question so that the answer must be “yes,” so that the jury remembers, “Yes, he is a liar.”

Picking up our prior example:

Q: You lied to the police?

A Yes?

Q: You lied to the probation officer?

A: Yes

Q: You lied to your wife?

A: Yes

Q: You lied to the bank?

A: Yes

Conclusion? He is a liar.

§10.55 The Technique of Seeking a “No” Response

As noted, there are some specific, important exceptions to the customary technique of phrasing leading questions designed to elicit an affirmative response. There are occasions in which one of our goals is to establish the absence of evidence, of things not done, of missed opportunities, or some other scenario characterized by a lack of facts.

THE ONLY THREE RULES OF CROSS

One exception to the “yes” principle is the witness that has done nothing to add to this case, or from our point of view, the theory of the case. We wish to convince the jury to remember nothing said by this witness or to think of the witness as a person who said or did nothing. Remember, people do not understand negatively phrased questions as well as they do affirmatively phrased questions. By phrasing the question so that every answer is “no,” we leave the jury with the impression that this witness did nothing, this witness contributed nothing, and that this witness was a “zero” in this trial.