The Art and Ethics of Cross-Examination

Outline

I. Cross-Examination

a. What Is It?
   “Cross-examination is the greatest legal engine ever invented for the discovery of truth. You can do anything with a bayonet except sit on it. A lawyer can do anything with cross-examination if he is skillful enough not the impale his own cause upon it.”

b. Why Do We Do It?
   - used to elicit information helpful to the cross-examining party and is used to test, in a professionally responsible manner, both the testimonial capacity and the testimonial reliability of the witness

c. What Do We Hope To Achieve?
   - Sixth Amendment requires that testimonial reliability “be assessed in a particular manner: by testing in the crucible of cross-examination”
   - That crucible is where “reliability can best be determined.” If a witness’s statement is testimonial, “the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation,” and confrontation necessarily implicates cross-examination

II. What Makes Cross-Examination an Art?

“There is no short cut, no royal road to proficiency, in the art of advocacy. It is experience, and one might almost say experience alone, that brings success. The conduct of a case in court is a peculiar art for which many men, however learned in the law, are not fitted; and where a lawyer has but one or even a dozen experiences in court in each year, he can never become a competent trial lawyer.” -Unknown

- Persuasion
- Control of Witnesses
- Challenge a different version of the testimony
- Ultimate medium of expression of the ability to confront in the testimonial sense
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III. What Legal Ethics Rules/Principles Govern Cross-Examination Generally?

a. Generally
   - Opportunity to cross-examine and the adequacy of the cross-examination undertaken remain essential benchmarks of professionally responsible representation
   - Rules developed for behavior that can and should be expected from members of the legal professions
   - Behaviors that allow us to predict what each is going to do in particular situations
   - Unlike ethical norms that control individual behavior, legal ethical rules are not open to personal beliefs
   - Ethics rules are rules that must be followed in order to be part of the legal profession

IV. Overview of Ethics Rules and Standards Pertinent to Cross-Examination

Virginia Rules of Professional Conduct Governing Cross-Examination

Rule 3.3 Candor Toward The Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal;

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, subject to Rule 1.6;

(3) fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(c) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.
IV. Overview of Ethics Rules and Standards Pertinent to Cross-Examination (Cont’d)

(d) A lawyer who receives information clearly establishing that a person other than a client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:

(1) such information to comply with law or a court order;

(2) such information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(3) such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation;

(4) such information reasonably necessary to protect a client’s interests in the event of the representing lawyer's death, disability, incapacity or incompetence;

(5) such information sufficient to participate in a law office management assistance program approved by the Virginia State Bar or other similar private program;
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Rule 1.6   Confidentiality of Information vii (Cont’d)

(6) information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential.

(c) A lawyer shall promptly reveal:

(1) the intention of a client, as stated by the client, to commit a crime and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned, and, if the crime involves perjury by the client, that the attorney shall seek to withdraw as counsel;

(2) information which clearly establishes that the client has, in the course of the representation, perpetrated a fraud related to the subject matter of the representation upon a tribunal. Before revealing such information, however, the lawyer shall request that the client advise the tribunal of the fraud. For the purposes of this paragraph and paragraph (b)(3), information is clearly established when the client acknowledges to the attorney that the client has perpetrated a fraud; or

(3) information concerning the misconduct of another attorney to the appropriate professional authority under Rule 8.3. When the information necessary to report the misconduct is protected under this Rule, the attorney, after consultation, must obtain client consent. Consultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client.

National Prosecution Standards, 3rd Edition – NDAA viii

a) Standard 1-1.1 Primary Responsibility
   “The primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth.”

b) Standard 1-2.1 Standard of Conduct
   A prosecutor should act with candor, good faith, and courtesy in all professional relations. A prosecutor should treat witness fairly and professional and with due consideration. In questioning the testimony of a witness, a prosecutor should not engage
in a line of questioning intended solely to abuse, insult, or degrade the witness. Examination of a witness's credibility should be limited to legally permitted impeachment techniques.

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c) Standard 6-5.1 Admissibility
A prosecutor should not mention or display, in the presence of the jury, and testimony or exhibit which the prosecutor does not a good faith belief will be admitted into evidence.

d) Standard 6-6.1 Fair Examination
A prosecutor should conduct the examination of all witnesses fairly and with due regard for their reasonable privacy.

e) Standard 6-6.2 Improper Questioning
A Prosecutor 1 should not ask a question which implies the existence of a factual predicate that the prosecutor either knows to be untrue or has no reasonable objective basis for believing is true.

f) Standard 6-6.3 Purpose of Cross-Examination
A prosecutor should use cross-examination as a good faith quest for the ascertainment of the truth.

g) Standard 6-6.4 Impeachment and Credibility
A prosecutor should not misuse the power of cross-examination or impeachment to ridicule, discredit, undermine, or hold a fact witness up to contempt, if the prosecutor knows the witness is testifying truthfully." Only where the prosecuting attorney has knowledge of the truthfulness and veracity of a witness and where the purpose of the cross-examination is to undermine the credibility of the witness, should constraints be imposed. *In his quest for justice*, the prosecutor should not attempt to mislead a witness by using improper and unfair tactics. The prosecuting attorney, in his examination of witnesses on both direct and cross, should be guided by conduct that is not inconsistent with *a good faith quest for justice*.

**ABA Standards For Criminal Justice Prosecution Function & Defense Function**

a) Standard 3-1.2(c) Function of the Prosecutor
The duty of the prosecutor is to seek justice, not merely to convict.

b) Standard 3-2.8(a) Relations With the Courts and Bar
“ A prosecutor should not intentionally misrepresent matters of fact or law to the court.”

c) Standard 3-5.6 Presentation of Evidence
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- A prosecutor should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of its falsity.”
- A prosecutor should not knowingly and for the purpose of bringing inadmissible matters to the attention of the judge or jury offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the judge or jury.”

ABA Standards For Criminal Justice Prosecution Function & Defense Function (Cont’d)

- A prosecutor should not permit any tangible evidence to be displayed in the view of the judge or jury which would tend to prejudice fair consideration by the judge or jury until such time as a good faith tender of such evidence is made.”
- A prosecutor should not tender tangible evidence in the view of the judge or jury if it would tend to prejudice fair consideration by the judge or jury unless there is a reasonable basis for its admission in evidence. When there is any substantial doubt of the admissibility of such evidence, it should be tendered by an offer of proof and a ruling obtained.”

d) Standard 3-5.7 Examination of Witnesses
- The interrogation of all witnesses should be conducted fairly, objectively, and with due regard for the dignity and the legitimate privacy of the witness, and without seeking to intimidate or humiliate the witness unnecessarily.”
- The prosecutor’s belief that the witness is telling the truth does not preclude cross-examination, but may affect the method and scope of cross-examination. A prosecutor should not use the power of cross-examination to discredit or undermine a witness if the prosecutor knows the witness is testifying truthfully.”
- A prosecutor should not call a witness in the presence of the jury who the prosecutor knows will claim a valid privilege not to testify.”
- A prosecutor should not ask a question which implies the existence of a factual predicate for which a good faith belief is lacking.”

e) Standards 4-7.5 and 4-7.6 Presentation of Evidence and Examination of Witnesses – Defense Standards
- They are the same as Presentation of Evidence and Examination of Witnesses Standards for the Prosecution.
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Group Discussion Problems

1. The defendant’s public defender learned that a client of another lawyer in the public defender’s office would testify against the defendant. The court appointed another lawyer for the witness. When the witness through new counsel consented to the defendant’s lawyer’s use of his confidences in cross-examination, the court refused the lawyer’s request to withdraw.

Identify the ethical problem(s) and various solution(s).

2. Lewis was accused of murder. Jones testified as an alibi witness for Lewis. On direct examination, he stated that he and Lewis were “good friends” and were “pretty tight.” Jones confirmed that he and Lewis were at Lewis’ grandmother’s house when the crimes allegedly occurred. On cross-examination, Jones admitted that he had been convicted of distribution of cocaine. The prosecutor then asked Jones, “Is that your connection [to Lewis]?” Defense counsel objected to this last question, stating, “I hope it [does not] mean what I think it means.” The circuit court overruled the objection and allowed the prosecutor to proceed with the question.

Identify the ethical problem(s) and various solution(s).

3. The trial court, sua sponte, prohibited defendant from cross-examining adverse witnesses called by plaintiff.

Identify the ethical problem(s) and various solution(s).

4. Commonwealth Attorney purposefully and specifically asked questions outside the scope of direct of a criminal defendant.

Identify the ethical problem(s) and various solution(s).

5. The defense attorney for defendant John (accused of stealing) knows that the primary eye-witness to John’s crime is telling the truth about what she saw. The defense attorney cross-examines her, deliberately attempting to show that she is lying during her testimony.

Identify the ethical problem(s) and various solution(s).
1. U.S. v. Oberoi, 331 F.3d 44 (2d Cir. 2003)
   The public defender’s office took an interlocutory appeal, and the circuit court reversed
   and ordered the appointment of new counsel for the defendant. The court acknowledged
   that the lawyer could have continued the representation without risking the reversal of a
   conviction because of the witness’s consent. The lawyer, however, believed that he could
   not ethically disclose confidences in cross-examining a client or former client even with
   consent, and the court accepted that as a reasonable concern. The court noted that ethical
   rules establish minimum standards of conduct and that attorneys may reasonably
   maintain higher standards—“an attorney who expresses ethical reservations about cross-
   examining a former client using his secrets and confidences, even with client consent,
   acts in the highest tradition of the profession.”

   This questioning was an abuse of the prosecutor’s right of cross-examination to show
   bias because the prosecutor already had established that Lewis and Jones were close
   friends, and the questions at issue merely served to imply to the jury the existence of
   other unrelated crimes committed by Lewis.

   Right of cross-examination is absolute. Trial court conduct in this case is reversible error.

   Commonwealth 26 Va. App. at 786. “[T]o confine the cross-examination of the accused
   to such matters as have been brought out on direct examination is “palpably unfair to the
   prosecution,” for since it cannot call him as a witness or compel him to testify on direct
   examination, unless it could develop relevant facts on his cross-examination it might be
   deprived of all means of proving them, and this, too, although the accused, by voluntarily
   taking the stand, had waived the privilege of self-incrimination…Cross-examination . . .
   entitles the Commonwealth to bring out . . . facts relating to the guilt or innocence of the
   accused . . .”

5. How the witness says something may be just as important as what they said. The defense
   attorney may still attempt to discredit the witness or their testimony for other reasons.
   Counsel may want to show:
   a) Motive to lie (love, hate, greed, revenge, jealousy),
   b) Interest in outcome (financial, situational),
   c) Bias or prejudice for or against party,
   d) Failure or weakness in perception (senses- sight, smell, hearing or conditions darkness,
      distance, blocking, glance, overstimulation)
   e) Failure or weakness in memory,
   f) Failure or weakness in communication (inability to express testimony, confused),
   g) Inconsistency in testimony or conduct
The Art and Ethics of Cross-Examination
Helpful Information & Compiled Sources


4. Ethics and Professionalism Standards: Dealing with Cases Involving Scientific Evidence, James M. Dedman, National College of District Attorneys, available through: Pros-CLE@yahoogroups.com


6. Irving Younger's 10 Commandments of Cross Examination, American Bar Association Section of Litigation, from a speech given by Irving Younger at ABA Annual Meeting in Montreal, Canada, Aug., 1975


8. The Ten Commandments of Cross-Examination, Timothy A. Pratt,

RULE COMMENTS AND ENDNOTES

\[1\] John Henry Wigmore, Evidence § 1367 (3d ed. 1940)
\[4\] Rule 3.3 Comments

[1] The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value. [2] ABA Model Rule Comment not adopted.

[1] Rule 1.1 Comments

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner.
Expertise in a particular field of law may be required in some circumstances. [2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question. [2a] Another important skill is negotiating and, in particular, choosing and carrying out the appropriate negotiating strategy. Often it is possible to negotiate a solution which meets some of the needs and interests of all the parties to a transaction or dispute, i.e., a problem-solving strategy. [3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest. [4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person.

Maintaining Competence [6] To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education. The Mandatory Continuing Legal Education requirements of the Rules of the Supreme Court of Virginia set the minimum standard for continuing study and education which a lawyer licensed and practicing in Virginia must satisfy. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

Virginia Code Comparison - Rule 1.1 is substantially similar to DR 6-101(A). DR 6-101(A)(1) provided that a lawyer "shall undertake representation only in matters in which . . . [t]he lawyer can act with competence and demonstrate the specific legal knowledge, skill, efficiency, and thoroughness in preparation employed in acceptable practice by lawyers undertaking similar matters." DR 6-101(A)(2) also permitted representation in matters if a lawyer "associated with another lawyer who is competent in those matters."

Committee Commentary - The Committee adopted the ABA Model Rule verbatim, but added the third paragraph of the Comment to make it clear that legal representation, in which a lawyer is expected to be competent, involves not only litigation but also negotiation techniques and strategies.

\[1\] Rule 1.6 Comments - Confidentiality of Information

[1] The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights. [2] The common law recognizes that the client's confidences must be protected from disclosure. The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance. [2a] Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that clients usually follow the advice given, and the law is upheld. [2b] A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. [3] The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client,
whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. [3a] The rules governing confidentiality of information apply to a lawyer who represents an organization of which the lawyer is an employee. [4] The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

*Commentary (National Prosecution Standards, 3rd Edition)*

It is axiomatic that the prosecutor’s primary duty is not to convict but to see that justice is done. Underlying this duty is a judgmental obligation imposed upon the prosecution to carefully balance the importance of the evidence in question against the potential humiliation and disgrace to the witness. A dilemma frequently encountered in criminal trials is whether, in the cross-examination of a truthful witness, restraints should be imposed upon the examining advocate. Only where the prosecuting attorney has knowledge of the truthfulness and veracity of a witness and where the purpose of the cross-examination is to undermine the credibility of the witness, should constraints be imposed. In his quest for justice, the prosecutor should not attempt to mislead a witness by using improper and unfair tactics. The prosecuting attorney, in his examination of witnesses on both direct and cross, should be guided by conduct that is not inconsistent with a good faith quest for the ascertainment of the truth. Prejudicial error, bred by improper examination tactics, might result in an undesirable conclusion of a criminal trial. The interrogation of all witnesses should be conducted fairly, objectively, and with due regard for the dignity and legitimate privacy of the witness.” *Emphasis added.*