

Tips for Preparing for Cross-Examination of Adverse Witnesses

Know your jurisdiction's laws and office policies; this is not an exhaustive list and is not intended to replace supervisory discussions. For cross-examination of a minor respondent, please see NDAA's *Handbook for Juvenile Prosecutors*, Trial Preparation Chapter.

Guiding principles (there may be exceptions to these, depending on your case):

- A thorough review of all the evidence and paperwork is critical to an effective cross-examination.
- Different approaches, styles, demeanor may be appropriate for different witnesses. Example: A harsh cross-examination of an elderly person may not be helpful to your case.
- Be aware of your tone and wording of questions at all times; maintain your professionalism.
- It may not be necessary to cross-examine every witness; assessing cross will help your case.

Preparing for cross examination of defense witnesses:

- Run criminal history for all potential defense witnesses for purposes of impeachment.
- Obtain other background information from social media, phone records, school/employment records, psychiatric records, etc. (some records may require a court order).
- Obtain/review any reciprocal discovery that you are entitled to; it may inform your case and may contradict defense witness testimony.
- Review all witness statements/actions (texts, emails, body worn camera footage, 911 calls, social media etc.).
- Attempt to speak to potential defense witnesses and review discovery; note inconsistencies (disclose any exculpatory information).
- Document in an outline, chart, etc. prior statements and utilize that document to compare to trial testimony during the witnesses' direct testimony; this will help guide your cross-examination and summation.

During the cross-examination:

- Consider whether the witness is lying, biased, or mistaken, and develop your cross-examination questions and strategy from that standpoint.
- Obtain concessions that the witness would have to concede or lose credibility by denying.
- Corroborate your case through the witness to the fact finder.
- Where the witness has not given a pretrial statement, point out facts provided during direct examination that conflict with statements made during cross or that conflict with other witness testimony or information introduced through exhibits (video evidence, for example).
- Have co-counsel take notes at trial table; be mindful that taking notes may unintentionally signal to fact-finder that something is important.
- Impeaching witness/challenging credibility (be familiar with evidentiary foundations)

- Most cross-examination questions should be asked in a leading way that prompts a yes or no or other short answer. Example: Isn't it true that...? This format allows you to control the witness.
- Listen carefully to the witnesses' answers; they may not testify the way you anticipate them to.
- Know how to lay a foundation to impeach by using a prior inconsistent statement.
- Don't ask a question you don't know the answer to.
- Goals of cross-examination of defense witnesses include corroborating your case, discrediting the testimony of certain witnesses; obtaining new testimony favorable to your case.

Ask the witness:

- to confirm as many innocuous facts as possible but facts that support the theme of your case. Ex.: layout of house or neighborhood, family members, neighbors, phone #, social media use, etc. as well as any facts that establish the elements;
- to confirm any details from his or her prior statement that confirm your theory of the case;
- to confirm that details from previous statements conflict with each other;
- to agree that certain details from their testimony conflict with details from their pretrial statement

Preparation for Expert Witness Cross Examination:

- Review expert's credential, institutions affiliated with expert, qualifications (is expert qualified in the field they are testifying about). Check for accuracy of resume/curriculum vitae details including areas of expertise;
- Read the expert's articles, literature; watch videos (from YouTube and other sources) of lectures, trainings, etc.; determine through other research if expert's writings are reliable. Were the articles well-received in the field? Peer reviewed? Cited elsewhere? Contradicted later? Does it cite credible sources?
- Review prior testimony, including what field and in which states expert was previously qualified as expert, what opinions expert gave, etc. Obtain testimony from prior trials if available; speak to the trial prosecutor;
- Determine if the scientific method/test the expert is testifying about is generally accepted in the field or has been adopted in your jurisdiction? (know your state's standard in this area, i.e. Daubert/Frye or other standard); Is this a novel discovery or opinion? Research any tests performed and explore if they were properly validated and applied;
- Explore bias: Obtain fee schedule/how much the witness is getting paid; know whether the expert always testifies for the defense;
- Interview expert ahead of time. If possible, utilize expert to make points that assist your case. Consider whether to hire own expert as consultant or as witness. Consider doing a motion to bar testimony if appropriate.