

Excellence in Cross-Examination

Strategy of Cross examination

I am going to suggest to you that judges are normally able to tell only four things about a debate: they can tell who was the most at ease; they can tell who had the most concrete information; they can tell who was the easiest to understand; they can tell whose speech or remarks they remember best. Judges are not normally able to tell who was "right", which side won the argument or won particular issues.

If this hypothesis is correct, it should govern your approach to cross examination debating. Your purpose is not to convince your opponent that you are right, but to install yourself in your judges' minds as the person who is most at ease, most concrete, most understandable and most memorable.

Witnesses rarely confess to murder in court, and even more rarely in cross examination debate. Your purpose as an examiner is more modest. You hope to convince the judge, not the witness, that you are correct. Your opponent whom you are examining ceases to be relevant - at least in the sense that although you are asking him questions you do not particularly care what answer he in fact gives. If by clear questioning you paint your opponent into a corner, it does not matter that he at the last moment makes an inconsistent denial. It is enough if the judge realizes that you are right as a result of the questions asked. Obviously, it will make your success more apparent if the witness admits that you are right; it is sufficient, however, that it is apparent to the audience.

This fact governs your entire strategy as witness and examiner. It means that the successful witness will never be defensive or surly: that tells the judge that the examiner is asking damaging questions and makes the judge sit up and take notice.

Even if the judge does not understand why the witness is defensive, the judge infers that the witness is losing ground. Similarly, as an examiner, don't be frustrated when a witness denies questions which must obviously be answered "yes". The judge knows the correct answer to the question, and he is the only one you are seeking to convince. Your calm, deliberate manner will convince the judge that you are succeeding.

B. Uses of Cross Examination

Novice debaters assume that cross examination is simply an extension of rebuttal: a second chance to refute arguments made by your opponent. That is a use of cross examination, but only one:

a) Rebuttal

The questions can be used to show that the witness is mistaken, to show that the witness is uninformed or ignorant of the facts or important issues in the debate, or to show that part of the witness's argument contradicts another part.

b) Construction

The questions can be used to set up the witness, particularly now that each speaker (except the first) asks questions of an opponent immediately before giving his or her own speech. You can do several things here: get the witness to admit that he is familiar with particular evidence or accepts the validity of your source ("You're familiar with the findings of the Kelly Commission?"); you can pin down details of your opponents' case ("Would you give the police the power to search without cause?"); you can get the witness to agree with hypothetical arguments or with some of the underlying assumptions in your argument.

c) Compromise the credibility of the witness

Particularly if the witness is not being entirely truthful or is guessing at some of his answers, you can use the period to expose him. You can show the judges that the witness is hesitating, avoiding the questions or lying.

d) Relation

Finally, you can use the question period to focus on the differences between the two teams ("We agree that police need more protection in society, we simply disagree on the best way to achieve that.")

Excellence in cross examination requires that the questioner size up the witness and determine which of these four strategies can be pursued most effectively given the particular witness, examiner and judges. Normally, of course, some combination of approaches is in order. If I can generalize, however, I would suggest the following:

- in the first cross examination, show the relation between the cases right away.
- in the first couple of examinations, spend your time on constructive purposes: it's more effective and more devious than rebuttal.
- whenever the witness is on shaky ground, move in for the kill: expose through questioning that he is not to be believed
- in the last two examinations, or when you run out of other questions, focus on rebuttal

C. Advice to Questioners

It follows from what has already been said that the most important concern of the questioner is to create a positive impression on the audience. Let me make some observations about the nature of questions and then give specific advice.

Nature of the Questions

Questions in cross examination debate are very different from those in Parliamentary debate. In Parliamentary debate, only a single question may be put, and it carries the burden (either through humour or straight refutation) of making a point. That is very difficult to do. In cross examination debate, however, a whole series of questions may be asked, and by seeking information a little bit at a time, a much more substantial point may be made. There is a more important reason for asking questions in a series: your purpose is to convince the audience; if you jump around, you may lose them. By asking questions in a series you let the audience follow your line of thought, and understand the purpose of the questions. You allow the judges to recognize your ability to think logically. And by focusing on three or four important lines of questioning, you signal to the judge that you can distinguish between important and trivial matters.

Manner

Questioning is a mental martial art. Few trained witnesses can withstand professional questioning which is tough and fair. Almost any debater can be pushed around by his examiner. There is therefore a great tendency for the judge to sympathize with the witness. The excellent debater solves this problem by being careful not to seem unfair or take advantage. His manner is gentle, sincere and friendly - and only becomes tough after it is clear to the judge that the witness is being evasive or lying.

Advice

1. Leading questions

Ask short, leading questions. When a lawyer says to his client, "You were only travelling about 30 miles an hour when you had the accident, weren't you" he "leads" his client to the answer he wants - a different answer, perhaps, than he would get if he asked, "Did you notice how fast you were going?" or "How fast were you going when you had the accident?" In cross examination debate, you should always ask

leading questions - not because they show the witness what answer you want (although that is important) but because they show the judges what answer you want. Do not ask, "What do you think . . ." or "How do you explain . . ." Such questions invite an answer of book length and are not focussed. Instead, invert the question and supply the answer you want the witness to reach: "You think . . ., don't you?" This often forces a "yes" or "no" answer (and even if it does not it narrows the issue greatly), it makes the issues clear for the judges, it leaves you in control of the examination, and it tells the judge exactly what the purpose of your question is. It follows from this that the best form of question is normally one which is short and contains a statement that you put to the witness. So, in a debate on "free" university tuition, don't ask, "What proportion of a student's income is spent on tuition?"; turn the question around and ask, "An average student spends about 25% of his income on tuition, doesn't he?"

2. Factual questions

It is almost impossible to ask questions of value during an examination. You are almost always best advised to limit yourself to factual questions - which prove the value you are asking the judges to accept. If you are denying the need for more police powers, ask questions that show that the number of assaults on police officers are declining anyway. If you are showing the danger of police powers, ask questions which show abuses and accidents as a result of police powers.

3. Don't argue

NEVER argue with your witness. It wastes your valuable cross examination time; it is a breach of the rules (which permit only questions) and so will result in a penalty; it is unnecessary if you are in control; and it gives your witness a chance to hedge or answer back.

If the witness wishes to argue, leave the subject and return to it in your own speech a few minutes later. Then the witness cannot explain his side of the matter, and you've not wasted your examination period. Any argument during

the questioning period is normally a matter of unsubstantiated assertion on each side: "Did too" "Did not". The excellent debater waits until his speech, produces the factual information to contradict the witness completely, and then smashes him and moves on.

4. Tie answers down

Debaters occasionally make damaging admissions in their speech. If they do so, it is very important that you nail down the admission in your cross examination period. Do it gently: don't let them see what mistake they have made, and don't let them know what you are up to. Make use of the admission in your own speech - when it is too late for the witness to cover up.

Equally, make use of admissions obtained during cross examination. Your first remarks in your speech should almost always be, "Before I get to the body of my speech, I'd like to deal with the admissions that my opponent made under cross examination." This is vital: it makes clear to the judges why the admissions were damaging; it nails down the admission before your opponent can blur it in his team's next speech; it makes a good transition between the questioning and your speech.

5. Leave answers alone

Don't repeat a witness's answers unless they are inaudible. If you do, the witness will normally worry that he has made a damaging admission, and hedge the answer. "The car was going 30 miles an hour?" "Twenty - five" "Twenty - five miles an hour?" "Maybe it was 20." When you get a good answer, leave it alone.

6. Ask in positive form

Never ask questions with a negative in them. "You agree that the crime rate isn't rising?" "Yes" is an unintelligible exchange. If you have really trapped the witness, then in his final rebuttal he will weasel out of the trap by pointing out that "Yes" meant, "Yes it isn't rising" instead of "Yes it is rising" or vice versa.

7. Ask a Series of Questions

You should break each line of questioning into individual questions in which you seek to make only one point per question. And you should normally have between three and ten questions in a given line of questioning. (If your purpose is constructive, for example, to obtain plan details, or to show the relationship between the affirmative and negative case, one or two questions may be enough. Only in your "rebuttal" use of questions is three - to - ten - in - a - series a useful rule of thumb.)

8. Relevance

If your questions are being asked as a form of rebuttal, tie them to the preceding speech as closely as you can. The newest judge will be able to tell how closely the questions that are asked follow from the speech that has been given. More sophisticated judges will know that that is not the test of the questions. Although it might not be the test, the better you can tie it in, the better it will be – if your questions are being asked as a form of rebuttal.

There is a second sense in which this is important: Have you heard a debater ask a question and wondered whether he was listening to the answers? No matter what he hears, he seems to ask the next question. An excellent examiner responds to answers by nailing down any equivocation, by re - framing the remainder of the questions and by responding to what he has learned about his opponents weaknesses of fact and strategy.

9. Don't back down

Judges sometimes misinterpret courtesy for backing down. While you must be courteous, you must demonstrate that you are in control. When you have the answer you want, or when the witness begins to stray from the topic, or ask questions, bring him back to the subject tactfully and try another tack: "Thank you witness, that answers the question." or "Perhaps we can get to that later, for now all I asked was . . .", or "I'll ask the questions now, thank you." To disarm the

witness and make a favorable impression with the audience, it is often wise to begin with neutral questions, and move from the general to the specific.

Similarly, you must not try to choke off an apparently damaging answer - because the judges will conclude (whether the answer is damaging or not) that some facts are against you and you are trying to cover up your weak position. The only time you can interrupt an answer without alienating the judges is when it is clearly irrelevant, and often then only after a long series of irrelevant answers. If the witness avoids answering a question, ask it again, if possible in exactly the same words. This is an effective way of underlining the witness's evasion. Be polite, however; asking leading questions as suggested above will give the audience the impression that you are being tough with the witness. If this is accompanied by any intimidation by voice or gesture you are likely to lose the sympathies of the audience. For the same reason, don't demand a particular answer of the witness: your goal is to convince the audience, not the witness. Even if he does not give you exactly what you want, if the audience realizes that he is equivocating, you obtain the same measure of success. And it may be that your argument can be made with what he gives.

10. Order of Questions

In choosing which lines of questioning to use, keep two considerations in mind: if you run out of time, you must have already covered the most important areas of your examination - so put them first. On the other hand, you want to end on a strong note - as much of your strategy is creating the impression of success, rather than obtaining any particular admission from the witness. So you may decide that you should stop early - rather than commence a line of questioning that you will not be able to see through to its conclusion.

D. Predicting an answer to a question

From time to time, in planning your examination, you will want to know what

answer you will likely get to a question. Let me suggest that you can predict the answer:

1. If it is a matter of established fact;
2. Based on admissions from his speech;
3. If it is in the interests of his case;
4. If it is according to the presumed prejudices of the judges; or
5. If it is against the interests of your case.

E. When not to ask questions

Don't ask a question once you find:

- The witness does not know the answer to a relevant factual question, whether because he is ignorant or mistaken;
- The admission you want is so damaging that the witness will hedge the answer;
- You want to focus attention on only a limited area of the debate;
- There is a gap between your premises and your conclusion.

(Sections D and E are taken from an untitled paper on Cross Examination presented at the 1988 National Seminar by Doug Peets)

F. Constructing Effective Questions

I think it is quite easy to construct effective questions once you are armed with the foregoing advice. Let us consider the steps to follow.

1. Decide what admissions you want from the witness. What is the purpose of the questioning? The easiest way to write questions is to start backwards: decide what you would like your opponent to admit (be reasonable!) and devise questions that will elicit that admission. As a negative debater in a debate on "Increasing police powers" you may decide you want the following admissions: The public generally (and police officers in particular) are not in greater danger now than in past; and The public needs to be protected from _ the police, too (and so, you imply, we should not increase police powers).

2. Recognize that admissions fall into two principal categories: Admissions of fact, and conclusions. Normally, you will ask a series of factual questions designed to produce a conclusion. So once you start with what conclusion you want the audience to draw, attempt to break that conclusion into a series of factual statements that lead to it. In the example above, "Has the crime rate increased or decreased since 1980?" is a factual question that would lead to the conclusion that you want: the danger is no greater now than in past.

3. Once you have your draft question, make it a leading question. This ensures that it implies the answer that you want, and is normally accomplished by inverting it. The questions in the example above become, "The rate of violent crime has decreased since 1980?" and "The number of assaults against police officers has declined in the same period?"

4. Add the factual basis to the question. It is not enough to imply the answer; your question should also have the content that makes it indisputable. In the two examples above, the questions, although leading, might still produce an unsatisfactory or disputed answer. They should be improved: "In 1983, the rate of violent crime declined from 14 incidents per thousand population to 9 incidents per thousand?" and "In the same period, assaults against police officers declined from 312 to 249 in Canada?"

You now have your cross examination questions. They may benefit from editing and polishing (and they may identify to you areas of your own case that require further research) - but you should now be a strong cross examiner.

Of course, what specific questions you ask is very much a result of the particular debate resolution, the side you are on, and the position your team takes on the several issues in the debate. Because the examiner may only ask questions, it is very difficult to cross examine on abstract issues (which, in any event, should be avoided in a debate). The possibility of error or police abuses in the present system is vague; the case of Donald Marshall is concrete. The crime

rate is vague; the case of Clifford Olson is specific. If abstract issues are to be dealt with, they should be taken by concrete examples, analogies or particular instances.

G. Answers

Your objective as witness is the same as your objective as examiner: to create a favorable impression with the audience. To do that, you should appear cooperative and helpful. You must not become defensive (which signals that you are making damaging admissions). And you should not stall - that signals that you do not know the answer, that it is damaging, or that you are unprepared. Answering a question with a question reveals a poor knowledge of the rules. You want to convince the audience that you are forthright, well prepared and correct in your views; you don't want to alienate them through bad manners. In particular, if a question has trapped you, be as nonchalant and pleasant as possible - by doing so, the judges may miss (or misunderstand) the effect of the admission you are forced to make. Further, such an attitude may bluff the opposing debater into thinking the admission unimportant or also to your advantage.

The first step to being a good witness is to be well prepared. It is fundamental to our craft as debaters that for every argument (or authority) there is an equal and opposite argument (or authority). Your success as a witness depends in part on you having located that "reply" and being able to produce it quickly. Cue cards with the necessary information readily at hand may prove invaluable in the height of cross examination when time is precious. (The rules prohibit you from consulting your partner while under examination.) Of course, if you are well prepared, you will understand the issues; when the examiner asks a question, you should be able quickly to understand the issue being raised and be prepared for the opportunity to present the "reply" - that opposite argument or authority that your research has produced to support your conclusion.

Your job as a witness breaks down into four steps:

- (1) Listen to the question carefully. Be certain that you understand what is being sought before you attempt an answer - but don't stall;
- (2) If you do not understand the question, ask for clarification; if the question is really several questions, ask the examiner which one he wants answered;
- (3) Answer the question truthfully, and as briefly as possible. Long answers always look evasive, and may create a bad impression on the judges. Worse, a long answer uses up the examination period - and the best impression you can create comes when you answer "all of the questions your opponent could possibly have" and still have time left over. A long answer is also more likely to contain information damaging to your case than a short one.
- (4) Don't make speeches, and don't declare to the audience "I know where you are going with that line of questioning!" Far better that you should (apparently with out trying) turn the questions to your advantage.

H. Strategies in answering questions

In answering questions, you must, of course, tell the truth and be (and convey the impression of being) forthright; but you can do so within the limits of the following. You have two possible approaches:

(1) The examiner is wrong or mistaken - and so you give him an answer he does not want or does not expect. You disagree with him. If this is to succeed, you should have at hand sufficient information or reasoning to make it clear why your answer is correct, and not merely an evasion.

(2) Sometimes you can give the examiner the answer he wants or expects without hurting your case. This can be very effective. For example, it may be that,

a) the logic or premise on which the questions are based is wrong: even if you answer all of the questions the way the examiner wishes, that may not prove the conclusion he wishes to draw. (Even though there have been a number of recent, sensational police killings, that does not

show the rate of violent crime is generally increasing.);

b) the answers you give do support the conclusion your examiner wishes to draw, but that conclusion itself does not prove his case as a whole. (There are a lot of abuses under the existing parole system, but that does not by itself call for a return to Capital punishment; it seems to call for parole reform.);

c) many of the answers you give are ones your examiner seeks, but to crucial questions you give an answer he does not want or does not expect. You may be able to give the examiner most of what he wants without hurting your case. (It is true that 40% of car accidents are "alcohol - related" but that statistic does not mean that 60% of those who drink - and - drive don't have accidents; it means that of all drivers - those who have been drinking and those who haven't - a disproportionate percentage of the total accidents are caused by those who drink and drive.);

d) the answers you give do support the case of examiner, but it may be that the evidence as a whole is against it. (Incarceration is more expensive than Capital punishment, but that doesn't end the debate on the death penalty.).

Whichever approach you take - and of course, it may be different for different lines questioning - it may be necessary to make clear to the judges why the conclusion the examiner wants does not follow from the answers you have given. I recommend that the next debater on your team begin his speech by referring to the two recent cross examination periods - in which your team answered questions and then those questions which your team has just been asked. His purpose in doing so is to explain away any apparently damaging answers you have given, and to highlight the damaging nature of the answers your opponent has just given. ("Before I begin my constructive remarks, ladies and gentlemen, I'd like to say a brief word about the two cross examinations recently concluded. Under examination, my opponent admitted that the crime rate has declined over the last three years, while at the same time complaints against

the police have increased. This reinforces our belief that there is no present need for an increase in police powers. At the same time, you will recall that when my colleague was cross examined, he admitted that protection of the public is the reason for a police force, and that a police force is vital to the protection of society. But these questions show that the Affirmative team has missed the point of the debate: we are not suggesting that the police force be disbanded - - of course we need a police force. The real question is whether we need a more powerful police force at a time when crime is declining and there are many objections to the existing police powers . . .").

However you answer the questions put to you, it is best to be forthright and cooperative, and so create a favorable impression with the judges. If the examiner is mistaken, show later why his questions don't make sense, or don't justify the conclusion he seeks. If the question requires an extended answer, ask for permission to give an extended answer; if the examiner refuses, you win the point in the minds of the judges; if he consents, he can hardly complain that you are taking too long. ("There are four reasons why we believe that. Do you want me to explain them?")

I. Summary

Although the cross examination period forms only a small part of the debate, it offers an opportunity to make your entire argument more effectively, and to display your superior research, questioning and planning skills. That opportunity should not be missed.

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~Brian Casey April, 1989