EZ CROSS-X: Suggestions To Make Your Job Easier

The nice thing about cross-examination is that you always start with a little something. The witness has just finished testifying on direct examination. Like negotiating, you want the person you are dealing with to commit to a first offer. We take notes during direct examination to see what commitments the witness has already made.

We don't always cross-examine. Sometimes the best option is to say, "No questions." If the burden of proof has been satisfied, move on.

Why cross-examine? As the finder-of-fact faced with conflicting evidence, you may need to choose between two different stories. Cross-examination can tilt the scales to one side or the other.

On the other hand, you may be faced with missing evidence. Typically, there is a list of statutory or regulatory elements that must be satisfied before action by an administrative tribunal is authorized. Cross-examination can sometimes fill those gaps.

In administrative hearings, we don't always have as much pre-hearing information as is available in court litigation. Litigation is expensive. Certain matters are handled administratively to save time and money. Usually, we have a file of some sort that we can use to study and prepare. You may know before the hearing that there are conflicts or gaps in the evidence. Once you hear a witness testify, you can compare what has been said to what you have in your file and decide whether to cross-examine.

Other witnesses may have already finished testifying. You can compare their testimony to that of the witness on the stand. Compare what you hear and contrast it with what you already have – then weigh the evidence. Which witness was more credible?

There is an old cross-examination rule of thumb that you may have heard: "Never ask a question to which you don't know the answer." That saying is especially applicable to jury trials. As an administrative finder of fact, however, you have the experience and expertise to sort through the evidence and only consider what is proper and relevant. Because the file that you were provided may be limited, you may need to ask questions to

which you don't know the answer. You can use cross-examination to explore further for context in addition to measuring credibility. You can also cross-examine on issues unrelated to the elements to explore witness credibility.

Another old rule of thumb for cross-examination is: "Always use leading questions." Stereotypically, we think cross-examination is used to control hostile witnesses. Use of leading questions does help in that situation.

Sometimes a party to a hearing tries to muddy the waters. Your objective is to seek clarity. When leading a witness, have them agree or disagree to only one statement of fact at a time.

With the more informal atmosphere of an administrative hearing, the witness may be cooperative. If we are respectful and ask open-ended questions, often a witness will volunteer even more information than asked. The volunteered information may support the statutory elements. Sometimes, the volunteered information will contradict what the witness said earlier.

To borrow from another profession, we can ask who, what, when, where, why, and how to explore more completely what the witness knows (and how they know it). The journalist method is also very helpful to test witness credibility. Often a witness will make a very broad statement of fact. Our task is to find out how the witness came to know that "fact."

When we are confronted with an outlandish statement, we often defend ourselves by saying, "Consider the source." The same wisdom is applicable in an administrative hearing. Look for cracks in the foundation that underlie the statement.

A jurisdiction's standard jury instructions can provide helpful guidelines to plan cross-examination:

> **Civil Jury Instructions 3.03 CREDIBILITY OF WITNESSES**
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> You may consider a witness's intelligence; the opportunity the witness had to see or hear the things testified about; a witness's memory, knowledge, education, and experience; any reasons a witness might have for testifying a certain way [bias / interest in outcome]; how a witness acted while testifying [demeanor]; whether a witness said something different at another time;

> whether a witness's testimony sounded reasonable; and whether or to what extent a witness's testimony is consistent with other evidence you believe.
>
> 8TH Circuit U.S. District Judges Civil Jury Instructions https://ecf.mowd.uscourts.gov/jmi/civil_instructions.htm

By asking who, what, when, where, why, and how, we can determine whether the witness is making assumptions or exaggerating lesser facts. What is the source of the information that's in conflict with other information in the administrative record? Did the information come from someone who appears biased or unusually interested in the outcome of the matter? Was the information based upon an old memory or was it written down at the time of the event? Was the information based upon personal observation or an assumption? Was the witness in a position to see or hear?

Listen carefully to each answer and follow up. Be curious. As a finder of fact, you are freer to explore during cross-examination than is an advocate. During such questioning, the witness may commit to positions that are inconsistent with other evidence. As your questions become more and more specific, you will often start to get "I don't know" or "I don't remember." At some point, the testimony is impeached. Sometimes cross-examination will strengthen the witness's testimony. That can also help you make your decision.

> *Q: How do you know that the crash occurred at 1:00 AM?*
>
> *A: I called 911 right away. Here, look at my cell phone log.*

Once cross-examination becomes conversational, you can change the pace to laser in on the witness's credibility. Look for a seemingly reliable item of evidence already in the record with which the witness will likely disagree. For example, in driver's license cases, there is often an alcohol test result over the legal limit. Drivers do not like to admit that they were intoxicated. There may already be indicators of embellishment or minimization. The law enforcement officer may have already testified that the driver acknowledged consuming some alcohol ("two beers"). The driver-witness probably knows that there is recorded audio of such a statement.

The cross-examination question can be non-confrontational: "Do you agree with the officer's testimony that you only had two beers?" The witness will be sorely tempted to agree with such a statement. When he does, it stands in stark contrast to the high level of alcohol shown on the test record. At that point, it may be reasonable for you to infer that the witness did not tell the truth.

If the evidence establishes that the witness knew their statement was untrue when stated, you may consider other parts of the testimony unreliable as well. A witness's false statement, however, need not be intentional in order to impeach credibility. Frequently, witnesses have poor memory or lacked the opportunity to know what they assumed to be the truth.

> *Finding of Fact: The greater weight of the evidence establishes that the driver's memory of the events leading up to the investigation was impaired by the consumption of alcohol.*

Either way, the witness's credibility may have been impeached.

When you have conflicts or gaps in the evidence, take courage and cross-examine the witness. Like a judge, you may have the right to question witnesses. The information that you learn may help you reconcile inconsistencies and get the whole truth. As a result, you will have a higher level of confidence when making decisions for your findings of fact.