



## PREPARING WITNESSES

**OBJECTIVE:** To prepare your witnesses so that there are not any surprises in their testimonies, either under direct or cross-examination.

The better you prepare your witnesses for an arbitration, the greater credibility they will lend to your case. The successful presentation of your case is dependent on the arbitrator understanding the TRUTH from your witnesses.

- I. Points To Be Made
  - A. Identify your main arguments.
  - B. Develop necessary evidence and testimony.
  - C. Witness to make CLEARLY DEFINED POINT(S).
  - D. Witnesses must understand what their testimony will stress.

At an early stage in the preparation of your case for arbitration, develop the main arguments to be made. Essentially, you want to think clearly through your entire case and understand what your case is about and why the union's position is the correct position. Once these main arguments have been clearly identified, then you must develop the necessary evidence and testimony. To deliver the testimony, you need witnesses. Each witness should be clear as to what they know about a particular case. They should only speak to make CLEARLY DEFINED POINT(S). Witnesses should understand what their testimony will stress.





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II. Select Qualified Witnesses

- A. Who will best speak with relevance to the issue?
- B. Establish their qualifications through questions.
- C. Be certain. Ask further questions of clarification.

From all those available, pick out the best qualified to testify. You might do this with a series of questions and note how their responses speak with relevance to the case. Be certain that you are making a good choice and that their responses do not vary with further questions of clarification.

III. Prepare Witnesses For Direct Examination

- A. Select questions.
- B. Ask questions to the witnesses in a "dry run."
- C. Know the answers.

Once the points that fit your argument have been developed and you have selected the appropriate witness(es), construct the questions to be asked of the witnesses that will illustrate your point. Go over those questions with the witnesses so that there is a complete understanding, on the part of the witnesses, of the argument you are trying to make and **WHAT THE ANSWER IS**. You must know what answers your witnesses will give prior to his/her answering your questions at the arbitration hearing. **YOU WANT NO SURPRISES!**

IV. Prepare Witnesses For Cross-Examination

- A. Instruct the witnesses to give factual answers.
- B. No opinions.

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- C. Instruct them to only answer the questions they understand.
- D. Demeanor.
- E. Ask the witnesses the most likely management questions.
- F. Ask the witnesses further questions of clarification.

When preparing your witnesses for cross-examination, look for questions that the management advocate would most likely ask and pose those questions to your witnesses. You want your witnesses to be prepared for the other side and the questions they may ask. It is possible that other side will attempt to develop some point of their own through your witness.

Instruct witnesses to answer questions honestly and factually. They should not give their opinions on cross-examination. Only short answers that are factual. Warn them that the other side may attempt to confuse them. If they do become confused, witnesses should say they are confused and request the other side to rephrase the question.

Instruct witnesses to maintain their composure and not to be coy or "slick." Instead, they should look the questioner in the eye, don't mumble, and act relaxed. Construct a list of likely cross-examination questions and go over that list with your witnesses. Any weak areas should be approached with questions of clarification to highlight any possible variance in responses. **REMEMBER -- NO SURPRISES!**





### SUGGESTIONS FOR QUESTIONING WITNESSES IN AN ARBITRATION CASE

**INFORMATION  
NEEDED  
FROM THE WITNESS**

**QUESTIONS WHICH WILL  
PUT THAT INFORMATION  
ON THE RECORD**

Name

What is your name?

Position

What is your position at work?

Relationship to case

Are you acquainted with the grievant? (Are you friends or just co-workers?)

Expertise - if an expert witness

In what capacity?

Length of employment (if necessary)

How long have you been with the Company?

Knowledge of grievance

Were you present when the grievant refused to obey the order given by Foreman Johnson to the grievant?

Observed incident involving grievant

Would you tell the arbitrator what happened?

Location of the incident

Exactly where did this occur?

Time

What time was it?

With experience, much of this will become routine and you will not need this much detail. Remember that the bulk of the presentation should be **FACTS AND EVIDENCE**. Argument, most of the time, is a minor part of the case.

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## **TEN COMMANDMENTS OF CROSS-EXAMINATION:**

Source: National Labor Relations Board Training Material

There are ten commandments for conducting a competent cross-examination. If you violate these commandments, you will instantly regret it. These commandments, not in order of importance, are as follows:

### **I. BREVITY:**

- A. A cross-examination should be short and distinct. You should never make more than three points about a witness's credibility. It is better if you only make one or two points.
- B. The first step to persuasion is having arbitrators remember the information presented to them. If the cross-examination is brief, the arbitrators will remember the testimony.
- C. Arbitrators must learn most of the information from what they hear, whereas normally they acquire information through their eyes. Therefore, oral presentations should be concise and to the point.

### **II. SHORT QUESTION, PLAIN WORDS:**

- A. Do not use legal words and phrases. Use plain English and the simplest words possible.

### **III. NEVER ASK ANYTHING BUT A LEADING QUESTION:**

- A. A leading question puts words in the witness's

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mouth by suggesting the desired answer. The law of evidence prohibits leading questions on direct examination. You should put words in the witnesses' mouth on cross-examination to make the witnesses say what you want them to say, not what they want to say.

- B. The hallmark of an effective cross-examination is when a witness never says anything beyond "yes" or "no."

IV. ASK ONLY QUESTIONS TO WHICH YOU ALREADY KNOW THE ANSWERS:

- A. If you do not know the answer to a question, or have a very good idea of the answer, do not ask the question. (If you do not know everything there is to know about the case, you should not be trying it.)
- B. Exceptions to the above rules:
  - (1) You may ask a question if you do not care what the answer is, but be sure that it does not matter.
  - (2) If there is an important question you want to ask, but you do not want to risk an unfavorable answer, you should develop the knack of escalating your knowledge by asking apparently innocuous questions on cross-examination. The significance of these questions is to find out what the answer to the important question would be. Nobody should know what you are doing, so that you can drop the important question when you realize the answer will be unfavorable.

V. LISTEN TO THE ANSWER:

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Occasionally you will get a spectacularly favorable answer which contradicts the rest of the testimony in the case, including the testimony of the witness. Allow some energy to listen to the answers of your questions so that you hear this type of answer when it occurs.

VI. DO NOT QUARREL WITH THE WITNESS:

If the witness gives an answer inconsistent with the rest of the evidence, drop that line of questioning. Then, argue that answer and the inferences from it in summation. Do not argue with the witness about the answer. The witness probably does not know he gave a favorable answer, and the effect of your quarreling with the witness will give him an opportunity to withdraw or explain away that answer.

VII. DO NOT PERMIT A WITNESS ON CROSS-EXAMINATION TO SIMPLY REPEAT WHAT THE WITNESS SAID ON DIRECT EXAMINATION:

It is permissible to ask a witness one or two questions and then repeat what was said on direct examination. This is done to set up the witness for the cross-examination. However, if you allow witnesses to repeat large portions of their earlier testimony, the only thing you will accomplish is to reinforce that testimony.

VIII. NEVER PERMIT THE WITNESS TO EXPLAIN ANYTHING:

The use of only leading questions controls the witness's attempts to explain his/her answers. Save your questions regarding explanation for summation.

IX. AVOID ONE QUESTION TOO MANY:

It is difficult to recognize the one question too many.





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As soon as you ask the one question too many, you will know it.

X. SAVE IT FOR SUMMATION:

This commandment is only needed in special cases, whereas the other nine commandments are needed every time you cross examine. The case in which the need for this commandment arises is one which turns on the testimony of one witness. Your job is to make the arbitrator disbelieve that witness.

## CROSS-EXAMINATION TECHNIQUES

I. INTRODUCTION

- A. An Important Tool
- B. An Art That Develops With Experience
- C. Active Listening -- For Making Notes

Until the management presents it's case, the union's case, no matter how well prepared, is strictly tentative, having been prepared on a foundation of anticipation. Therefore, while the management's case is in actual progress, the union must mold the kind of final defense that will refute most convincingly what the management has presented.

Cross-examination IS an art - you probably WILL be better at it as your experience grows. But if you follow the suggestions in this section, you will not only be able to do a competent job of cross-examination, but also have a solid base upon which to improve.

In order to analyze and digest the management's

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case, it is most important to take careful notes.

1. The cross-examination of management witnesses
2. The presentation of any necessary rebuttal witnesses
3. The closing arguments
4. The preparation of post-hearing briefs

While management witnesses are testifying, you are making notes and looking ahead to cross-examination and rebuttal witnesses. Therefore, in taking notes, underline any testimony which in your opinion should be considered in relation to the cross-examination and the presentation of rebuttal witnesses. To avoid confusion on this matter, it is desirable to underscore the testimony you are going to probe in cross-examination with one color pen or pencil and underscore the testimony you are going to handle through the use of rebuttal witnesses with another color pen or pencil.

## II. OBJECTIVES OF CROSS-EXAMINATION

- A. To Discredit The Witness
  1. False Approach
  2. Truth is the aim of arbitration

To leave the witness a quivering, helpless hulk on the witness stand is not your objective. Rather, it is your objective to discredit what the witness states as fact when it is not fact.

- B. To Discredit The Testimony Of The Witness
  1. Show witness is mistaken

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## 2. Build new testimony

It is impossible and probably counter productive to vilify every witness produced by the opposing party. However, it may be possible to show the arbitrator that a witness may be mistaken in one or more areas of testimony. This assumes that you do not like what the witness has testified and want to discredit the witness. In many circumstances, however, cross-examination is an opportunity not to discredit what has come before, but to build new testimony favorable to you.

### C. Challenge "Established" Facts

1. Contradiction highlights
2. Inconsistency between two witnesses under cross-examination

A contradiction has more impact when two witnesses called by the same side disagree than when witnesses called by opposing sides disagree. The possibility of such contradiction is increased by the rule permitting exclusion of witnesses from the hearing.

### D. To Produce Affirmative Testimony

1. Favorable testimony to your case
2. Seek favorable testimony first
3. Seek to discredit contradictory or unfavorable next

A fourth major objective of cross-examination is to use it to contribute favorable testimony. That is, you may elicit testimony which does not contradict the witness or other witnesses, but which produces affirmative testimony to aid your case. The most obvious example of this is when the witness, during direct examination, has testified to certain facts that hurt your case, and also to other facts, that are helpful. Your cross-examination could consist simply of

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getting the witness to repeat the favorable portions of the testimony. A more difficult task is to bring out new, favorable facts during cross-examination.

In other words, the most important point to realize is that cross-examination is not limited to trying to show that a witness is lying and that you should structure your cross-examination accordingly. You may want both to discredit the witness by showing bias, and to elicit testimony favorable to your case. You are more likely to achieve both goals if you first develop the favorable testimony. Witnesses will be more likely to give helpful testimony if you have not first tried to expose them as biased people whose testimony is unworthy of belief.

### III. Determine Whether to Cross-Examine

- A. DO NOT cross-examine if the witness does not hurt you
- B. Only cross-examine issues covered that matter
- C. Be flexible

Another primary consideration is also one of the most abused: if the witness hasn't hurt you, don't cross-examine. Knowing this is one thing, practicing it is another--because advocates are too inclined to interpret the testimony of an opposing witness as harmful. Nevertheless, there are clearly situations in which staying seated and silent is your best tactic.

It is rare that you take issue with everything said by an opposing witness. You may only plan to controvert the opposing party on only one or two issues. In such a situation, a wide-ranging cross-examination dilutes the impact of the issues on which you will ultimately rely.

Thus, the decision whether to cross-examine is a complex one. In some cases, no cross-examination at all is appropriate; in others, witnesses should be cross-examined





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only on particular points of testimony.

The crucial factor is to make these decisions in light of your overall theory of the case, with an eye to the issues you will emphasize in closing argument.

#### IV. TYPES OF CROSS EXAMINATION

Knowing the rule does not really assist you to carry it out. Perhaps it is more helpful to look at cross-examination in terms of three categories: (1) the advocate can present evidence which will refute the witness; (2) although the advocate cannot directly refute the witness, the witness' story is inconsistent with common experience; (3) the advocate cannot refute the witness, and the witness' story appears credible. Let us analyze each situation.

##### A. Cross-Examiner Presents Evidence To Refute The Witness

1. The witness states one thing and cross-examiner knows the witness is wrong.
  - a. Witness misstatement wrong, but favorable, FINE!
  - b. Witness misstatement wrong, and unfavorable, cross-examiner can refute through further questions or other evidence such as a rebuttal witness.

If there were more of these situations there would be fewer ulcers among union representatives. In this situation, the witness has testified to certain facts on direct examination, harmful to the cross-examiner's case. The cross-examiner, however; has information admissible in the record which can refute at least some of those facts.

The key phrase here is "admissible in the record." It

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means that the cross-examiner can show, through someone or something other than that witness' own testimony, that what the witness has testified is not correct. Clearly, this is a cross-examiner's strongest position.

What are the implications of this analysis for the cross-examiner? For one thing, it contradicts the notion, "do not ask a question unless you know the answer." If you receive an answer favorable to your case, fine. But if it is unfavorable, you may refute it with extrinsic evidence. In many situations, you may even want the witness to give an answer unfavorable to your case, so that you may introduce extrinsic evidence.

- B. Cross-examination Based On Inconsistency Of Testimony With Human Experience.
  - 1. Improbability of testimony
  - 2. What proportions of--whole or part?
    - a. the importance relative to witness
    - b. the importance relative to opponents' case
    - c. the extent testimony varies from reality
    - d. the explanation offered for improbability

Even if you cannot directly dispute what a witness says, you can attempt to show that what the witness said is improbable. Rarely, if ever, will the whole of a witness' testimony be improbable. Were that so, "No questions" might be the cross-examiner's best tactic. By analyzing closely the testimony, however, you may be able to show that PORTIONS of it are improbable. This stresses again the need for careful prehearing planning. If you know at least the outlines of the case against you, you can carefully measure the opposing party's case against common experience.





Usually you can show that some part of the opposing case seems improbable. Although you have done so does not entitle you to close your books, stack up your papers, and look to the other side for a concession statement. The importance of showing the unlikelihood of certain testimony depends on: (1) the importance of the improbability to the rest of the witness' testimony depends upon belief in the testimony which you have shown is improbable; (2) the importance of the testimony to the opponent's case as a whole; (3) the extent to which the testimony varies from common experience; and (4) the witness' explanation, if any, for the improbability.

How does one cross-examine to show the improbability of testimony? No one answer can be given, as the method depends on the nature of the improbability. One method is to develop the improbability explicitly during the cross-examination. In general, you attempt to do this by juxtaposing in one question the two circumstances which you feel make a story improbable. Such a question might be: "Now, despite the fact that you and your supervisor had always had a very good relationship, you are telling us that you got frightened just because he grabbed your arm?" Such a question makes the point of your cross-examination apparent. But it may also give the witness a chance to explain the improbability. The method you use must be chosen on a case-by-case basis.

Another line of questioning uses the primacy-recency theory of memory. The basis of this theory is that if there is a series of similar events, people will remember best the first and last events.

It has probably become evident how much of cross-examination is really based on common sense. If you will take the time to think and prepare, you will find you have more common sense than you may think you have.

### C. Cross-examination Based On A Hope And Prayer

#### 1. Going fishing?





2. Know the answer before asking the question.
3. Leading questions only?

It is this situation which haunts most advocates: the opposing party's main witness has testified and has told a completely believable story which does not seem at all to be at odds with common experience; you have no extrinsic impeaching evidence except your client tells a different story; the arbitrator has turned to you and says "Cross-examine." In this circumstance, you probably have to cross-examine -- if you don't challenge the witness at all, you lose.

In some cases, cross-examiners often "go fishing." The key point to remember is only go fishing if you **MUST** challenge the witness and other methods have proved fruitless.

It is in fishing expeditions that the old advice "DO NOT ASK A QUESTION YOU DO NOT KNOW THE ANSWER TO" and "NEVER ASK ANYTHING EXCEPT A LEADING QUESTION" are the least helpful! How can you lead a witness when you do not know where you want him or her to go? One approach to such questions is to test the witness' ability to observe and recollect. In this approach, the cross-examiner is hoping that the witnesses will testify differently than during direct examination, and thus impeach themselves.

In this approach, an effective technique is "hop, skip, and jump." Here your questions range over the scope of testimony, but out of chronological order. The hope is that the witness will become confused and forget a story that may have been memorized. Thus, the advocate hopes that the witness will change his testimony from the direct examination. However, the all-too-frequent reality is that the fact finder or the advocate winds up just as confused as the witness.





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Do not merely permit witnesses to repeat and amplify on their direct examination!

Finally, one other factor deserves mention here. To some extent, the decision whether to fish or not for a favorable answer must be based on an honest, impartial assessment of your party and its witnesses. Of course, as a general matter, you "believe" in your party and in your party's cause. But the decision to ask a particular question or to cross-examine may turn on how candid you feel your party has really been with you.

#### V. SUMMARY OF RULES OF EFFECTIVE CROSS-EXAMINATION

1. Prepare for your cross-examination.
2. Don't cross-examine unnecessarily; know when to stop.
3. Don't ask a question unless you know the answer.
4. Don't repeat the damaging testimony of the witness unless you can clearly impeach him/her.
5. Avoid too many objectionable questions.
6. Ask leading questions with well-chosen language.
7. Word the question so that the answer is limited to the information you seek.
8. Observe the witness closely for reactions to questions, for conduct while answering.
9. Discover the witness' weakness, relate it to the case; e.g., witness has poor vision. Therefore, couldn't observe incident clearly.

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10. Vary the order of questions so memorized testimony is disrupted.
11. Ask questions at such a rate that the witness does not have time to contrive an answer.
12. Do not cross-examine on true statements unless repetition will help your case.
13. Use impeaching statements, documents, records if advisable.
14. Avoid offensive questions.
15. Expose the interest of the witness in the case.

