

PRESENTED AT

Winning at Deposition: Skills and Strategy

June 28, 2018

Houston, TX

Developing Your Trial Cross through the Adverse Deposition

Tracy W. McCormack

Author Contact Information:

Tracy W. McCormack

The University of Texas School of Law
Austin, TX

tmccormack@law.utexas.edu

Developing Your Trial Cross through the Adverse Deposition

Tracy W. McCormack

The intersection of cross examination and depositions is a strange one. It's more like a highway interchange with lots of lanes and a few exit/entrance ramps just to keep things exciting. In order to be able to successfully navigate both, you have to have a firm understanding of each. First, you have to understand how to take a good deposition of an adverse witness. Second, you must understand how to conduct a successful cross examination. The seminar and materials will guide you on the basics of taking a good deposition and there are numerous books on cross examination. This paper helps you explore how those two very different concepts merge. We've all seen bad depositions that look and feel like a long meandering cross examination. Judges, juries and arbitrators can tell you about the pain of sitting through a cross examination that feels like a long discovery deposition. Deposition and cross examination are the opposite of each other because the end goal is the opposite. Even though we ask questions in both, it is the point and type of question that serves different functions. In a deposition, we are seeking to acquire information; in a cross, we are providing information to our fact finder. In a cross examination we are never looking to learn information. We are only organizing and presenting information we already know to a fact finder who doesn't. Our "questions" aren't really questions at all, they are statements presented in the form of a question—only because the rules don't allow us to tell the fact-finder directly. If we didn't have to have the witness on the stand—we wouldn't! But the only way to develop a good cross examination is to take a good deposition. The way to take a good deposition for cross examination is to resist the urge to cross examine during the deposition. If you are doing cross examination during a deposition it should only be because you already have the answers you needed and the deposition (or this part of the deposition) is serving another function. Just like there is no one rule for cross examination, there is no one rule for how to take a deposition to develop your cross. Instead, this paper will guide you through some strategic considerations as you navigate this intersection.

It's hard to lead if you don't know where you are going.

Imagine you are on your way to the airport with just enough time to catch your flight home. You are tired and you really want to make that flight because if you

miss it you have to wait three more hours for another one. You really hope your driver knows the way and maybe even some shortcuts to get you there faster. You didn't take a taxi and instead chose a ride share. You are not sure but you think the driver missed the entrance to the freeway, but maybe they know a shortcut. In a few minutes nothing looks familiar. You are losing time. You are getting frustrated as you look at your watch. A few minutes more and you are pulling up the GPS on your phone and plugging in the airport, your frustration now edging towards annoyance. You are paying this person to know where they are going. You have other matters to handle. They are wasting your time and your money. You finally reach the airport, late, tired and angry.

The biggest challenge in cross examination and deposition strategy and practice is knowing where you are going. You are the guide leading your decision maker through this case, helping them stay on the path that leads them to the answers they will have to find in order for you to win. This is how your decision maker feels when you don't have a clear path for them to follow. When you stop and start, back up or let the witness wander off on a tangent because you asked a poor question, they find themselves lost, confused and frustrated by your detours with your questions and witnesses.

To make matters worse, you have an opponent who is constantly trying to take the wheel, drive on a different road to a different destination. The decision maker's job is hard enough without you knowing exactly where you are going and the easiest, shortest road to get there.

Even in the deposition phase it is important to know where you are going. If you don't know where you are going in the deposition, your cross examination will show it. If your job in cross examination is to give them the answers to the questions they will be asked to answer at the end of the case, then you have to know the questions in advance. The only way to know what questions they are going to have to answer is to have a working draft of a charge from the beginning. It doesn't have to be perfect and it may change as discovery progresses, but you have to have some version of the actual questions your decision maker must answer in your favor in order for you to win. The charge doesn't just frame your cross, it frames your deposition. The deposition is the foundation for your cross. When you don't have the charge as a framework, your deposition might cover lots

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Developing Your Trial Cross through the Adverse Deposition

Also available as part of the eCourse

[The Essentials of Deposition Strategies](#)

First appeared as part of the conference materials for the
2018 Winning at Deposition: Skills and Strategy session
"Developing Your Trial Cross through the Adverse Deposition"