



# POZNER ON CROSS

BY LARRY POZNER

## Lessons Learned: Bad Advice Edition

### **You can ask open-ended questions when there are no bad answers.**

Sounds safe, but it isn't. There are many bad answers, just not to the question we asked. If the witness does not want to answer that question, the witness often ignores it and answers a question we did not ask. And that answer will be bad for us.

### **"Stop using leading questions. The jury wants to hear the witness."**

A prosecution witness answering "Yes" never gets boring. Use leading questions. The jury will hear the witness agree to the facts you have asserted. We control the narrative, making the witness respond to our leading questions, not by proving that we can cope with the witness's answers to our nonleading questions.

### **"Never ask a question to which you do not know the answer."**

If by "know the answer" one means we can independently prove that fact, then this advice provides unnecessary safety at a great opportunity cost. The better advice: When we lack proof, we may safely ask a leading question when all the possible logical answers are helpful, but not if there are logical answers that are harmful.

Example: We can safely ask the social worker, "You made sure to include in your report every incident of improper touching that the child told you about?"

We safely ask such questions because we correctly gauge that the logical answer is "Yes," and that if the witness illogically answers "No," that answer is also of use.

### **"Call your client. The jury wants to hear his story."**

While the jury probably *wants* to hear the defendant, they do not *need* to hear the defendant for us to win the case. Cross-examination not only challenges certain testimony, but it is also an opportunity to prove facts that we might otherwise try to prove through the client.

Look for the parts of the defendant's story that can be told through construc-

tive cross-examination chapters of prosecution witnesses. Then you can make the decision whether the facts yet to be told are worth the risks you will run by calling the client.

### **Before charges are filed, your client should talk to the police or the grand jury because your case is the exception to the rule.**

Rules became rules because they work. We convince ourselves that we have that one case that is the exception. But we are misled by our belief in the client's story and our belief that the prosecution will fairly evaluate our story. You can better protect the client by being the client's spokesperson and by preserving the client's Fifth Amendment rights.

### **"Reserve your opening statement. That way, you can surprise the prosecutor."**

Surprise is greatly overrated and comes at too great a cost. We surprise prosecutors only at the cost of not educating jurors and the judge. Open as soon as the rules permit. Begin teaching the jurors using our best facts. The holes in the prosecution case remain. The inconsistent statement remains inconsistent. Their investigative things not done cannot now be done. Teach our best facts, and the more the prosecutors try to cope with our evidence, the more they highlight it and probably make their problems worse.

### **"Don't worry. Your (cousin) (best friend) (girlfriend) (co-defendant) will never roll on you."**

Sadly, but predictably, they will. And if you were their lawyer, and the prosecution offered your client immunity, you would advise that client to cooperate. So, you might as well prepare your theory around that likelihood and work on their cross-examinations because you are going to need them.

### **"Your alibi will win the trial."**

Alibis come in only two strengths: (1) so strong that the case does not go to trial, or (2) losing. Once jurors hear alibi evidence, they burden-shift. Their focus is whether they believe the alibi. If they

reject the alibi, they will not reexamine the case to evaluate reasonable doubt.

### **"Stay up all night if you must, but finish writing tomorrow's cross-examination."**

Please. No. Much as I cherish preparation, fatigue cripples our judgement and our ability to hear the full implications of the answers. When you are not going to get the cross-examination entirely written, create the separate pages with their chapter titles so that you can easily understand your goals. Paperclip to the chapter title any documents you will need. Highlight in the document the lines you want to talk about. At your regular bedtime, shut it down.

### **"Winning trials is the measure of a criminal defense lawyer."**

Bull. First: Prosecutors cherry-pick the cases that go to trial. Second: Trial skills are a necessary but incomplete component of our value. Sophisticated plea negotiations that turn felonies into misdemeanors are victories, and victories also include the fact-based negotiations that save clients years in prison, just not as visible or countable. When the offer is worthless or nonexistent, even trying and losing the case has value. Defending the accused is not a sport, and our value cannot be measured by our trial win/loss percentages.

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## About the Author

**NACDL LIFE MEMBER** Larry Pozner is recognized as America's authority on cross-examination. His lecture schedule is at [www.PoznerOnCross.com](http://www.PoznerOnCross.com). His book is *Cross-Examination: Science and Techniques* (Lexis 3d edition 2018, by Pozner and Dodd). Go to [www.NACDL.org/ThePoznerMethod](http://www.NACDL.org/ThePoznerMethod) to order Pozner's lectures for NACDL.

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