

NAA Corner, NAA CORNER—Effective cross-examination in labor arbitration, (Sept. 9, 2026)

By National Academy of Arbitrators Members Charlene MacMillan, Richard Bales, Sylvia Skratek, and Arbitrator Page Todd

The central question is not: “What *can I ask* this witness?” It is: “What *do I need from* this witness?”

Cross-examination is one of the most misunderstood parts of labor arbitration advocacy. New advocates often assume that an effective cross-examination must be long, aggressive, and comprehensive. Some attempt to revisit nearly everything the witness said on direct examination. Others treat cross-examination as an opportunity to argue with the witness, expose every inconsistency, or demonstrate that the witness cannot be trusted.

These approaches often accomplish the opposite of what the advocate intends. They prolong the hearing, repeat damaging testimony, distract from the issues that matter, and give the witness an opportunity to repair weaknesses in the case. An advocate who challenges every answer also risks appearing unreasonable or hostile, particularly when the supposed inconsistencies are minor.

Effective cross-examination is more disciplined. It is selective, purposeful, and controlled. The advocate identifies the few facts that matter, obtains the admissions that can realistically be obtained, and stops before giving the witness an opportunity to explain those admissions away. This approach is available to lawyers and nonlawyer advocates alike. It does not depend on dramatic courtroom instincts. It depends primarily on preparation, judgment, and restraint.

The examples in this article are illustrative composites drawn from labor-arbitration experience. They are designed to demonstrate recurring advocacy problems rather than describe particular cases.

I. Why Cross-Examinations Go Wrong

Direct examination and cross-examination serve different functions. On direct examination, the witness generally tells the story. The advocate uses open questions—“What happened next?” or “What did you observe?”—to focus attention on the witness and allow the witness to describe events in the witness’s own words.

On cross-examination, the opposing advocate generally tells the story through the questions. The witness confirms or denies selected facts. Questions therefore ordinarily should be leading (yes, leading questions *are* allowed on cross-examination), short, and limited to a single fact. They usually sound more like statements than questions:

- You interviewed the grievant on May 4.
- The interview lasted approximately fifteen minutes.
- The grievant identified two employees who witnessed the incident.
- You did not interview either employee identified by the grievant.
- You recommended discharge of the grievant later that afternoon.

Those questions do not invite the witness to repeat the direct testimony or explain the employer’s entire decision-making process. They isolate particular facts that the opposing advocate may use later to argue that the investigation was incomplete.

One of the most common cross-examination mistakes is using direct-examination questions with an adverse witness. An advocate who asks, “Why did you decide the grievant was dishonest?” has given the witness a free pass to repeat and strengthen the employer’s case. The answer may last several minutes and introduce facts the advocate had not anticipated. And if you try to cut the witness short after asking an open question, you will look like a bully who is not letting the witness answer your question.

Cross-examination also goes wrong when the advocate mistakes activity for effectiveness. The fact that a witness testified for an hour does not mean the witness should be cross-examined for an hour. Much of the direct testimony may be undisputed, immaterial, or already adequately addressed by documents and other witnesses. Repeating it on cross-examination merely gives the opposing party’s evidence a second presentation.

Thus, the central question is not: “What *can I ask* this witness?” It is: “What *do I need from* this witness?”

II. Know What You Need Before You Stand Up

Effective cross-examination begins with deciding whether cross-examination is necessary at all. A witness may not have hurt the case. A witness may have supplied favorable testimony on direct examination. The important adverse testimony may be addressed more effectively through another witness, an exhibit, or closing argument. In those circumstances, the advocate should consider saying, “No questions.”

That decision requires more confidence than conducting a lengthy examination. Advocates sometimes worry that the client will interpret brevity as lack of preparation or effort. In reality, a short cross-examination may reflect superior preparation. The advocate who understands the record knows which points matter and which do not. It also sends a message to the arbitrator: this witness did not hurt my case.

In one law-enforcement arbitration involving several grievants, the union’s advocate conducted remarkably brief cross-examinations despite extensive and sharply disputed direct testimony. The attorney did not try to challenge every detail. Instead, the attorney focused on the relatively small number of factual disputes that would determine the outcome. When the arbitrator later worked through the record, the arbitrator realized that the attorney had addressed every point on which additional testimony was needed. The cross-examinations felt short because the advocate omitted everything unnecessary, not because he omitted anything important.

“Destination” Objectives

A useful preparation method is to select two to four objectives for each witness. For each objective, the advocate should identify the precise admission sought. The advocate then works backward from that admission and constructs a short sequence of questions that leads to it.

Suppose a supervisor testified that discharge was necessary because prior corrective efforts had failed. The advocate’s objective should not be the vague proposition that the supervisor “handled the matter unfairly”—the witness will never admit to that. The objective might instead be to establish that the supervisor never implemented the corrective measures on which the supervisor now relies.

The desired admissions might be:

- The supervisor never provided the promised retraining.
- The supervisor never conducted the scheduled follow-up meeting.

- The supervisor never gave the grievant the written expectations referenced in the disciplinary notice.

The opposing advocate then identifies the document, testimony, or prior statement supporting each proposition and prepares a sequence of questions for each point. This process gives the cross-examination a destination. Without a destination, the advocate is merely asking questions and hoping that something useful happens.

Preparation also requires identifying the likely answer to each question. The traditional warning against asking a question without knowing the answer is particularly important on cross-examination. The witness was called by the opposing party and normally has little incentive to help. An advocate who asks an exploratory question should do so only after considering the worst plausible answer and deciding that the risk is justified.

Finally, the advocate should decide in advance where to stop. The objective often is not to obtain the witness's agreement with the advocate's ultimate theory. Again—that won't happen. The objective is to establish the underlying facts from which the arbitrator can draw the conclusion.

III. Ask Questions That Maintain Control

The basic unit of effective cross-examination is the short, leading, single-fact question. Each question should add one fact to the developing point. This structure reduces ambiguity, limits opportunities for explanation, and makes the testimony easier for the arbitrator to follow.

Ask About Specific Facts, Not the Argument You're Trying to Make

Consider an advocate attempting to show that a disciplinary investigation was incomplete. An ineffective question might be:

You did not conduct a thorough investigation because you failed to interview the witnesses identified by the grievant, review the security video, or consider whether the supervisor had given inconsistent instructions, did you?

The witness can disagree with the characterization, contest one component, or launch into an explanation of the entire investigation. In one hearing, an advocate asked an 84-word question beginning with "Isn't it true that...", was somehow surprised when he did not get the unequivocal "yes" he was hoping for, asked the arbitrator to instruct the witness to answer "yes" or "no," and was again somehow surprised when the arbitrator refused to do so.

A more effective sequence would be:

- The grievant gave you the names of two co-workers.
- You wrote those names in your interview notes.
- You did not interview the first co-worker.
- You did not interview the second co-worker.
- The loading area was monitored by video.

- You knew the video existed.
- You did not request the video.
- You recommended discharge without reviewing it.

The advocate should ordinarily stop there. Asking, “So your investigation was incomplete, correct?” invites disagreement and explanation. Whether the investigation was incomplete is the argument. The advocate should save that argument for closing or briefing, when the witness no longer has an opportunity to answer.

Flag the Next Topic for the Arbitrator and Witness

Cross-examination should be organized by topic rather than by mechanically following the chronology of direct examination. Each topic should function as a small story with a beginning, a development, and a final point. Clear transitions help both the witness and the arbitrator understand the shift:

- Now let’s discuss the initial interview
- I want to turn to the security video
- Let’s talk about the discipline imposed on the other employees

The order of topics also matters. Beginning with a relatively easy point can establish a rhythm in which the witness becomes accustomed to agreeing with the advocate’s questions. The strongest or most important point often should come last, taking advantage of the tendency to remember best what was heard first and last.

Leading questions do not always require tag phrases such as “correct?” or “isn’t that true?” A declarative formulation often is cleaner:

- You reviewed the report before signing it.
- You made two handwritten corrections.
- You did not add any reference to a threat.

Tone of voice signals that a response is expected. Repeated tag phrases can become distracting and may make the advocate sound uncertain or argumentative.

The general rule against open-ended questions on cross-examination is important, but not absolute. Occasionally, the missing explanation is precisely what the arbitrator needs to hear.

In one discharge case, the grievant was accused of diverting employer funds. The grievant testified for most of the day about individual transactions, managers who allegedly knew what was occurring, payroll deductions, accumulated leave, and amounts the grievant believed the employer owed. The direct examination provided extensive detail but largely avoided the central questions: Why did the grievant believe an employee could reimburse personal claims by transferring the employer’s money? How did the grievant calculate an entitlement to cash out more leave than the grievant had accrued?

The employer's advocate asked those questions. The questions surrendered some control, but the explanations mattered more than the risk. The arbitrator needed to understand the shallowness of the grievant's justification for the transactions, and these questions elicited precisely that.

This example illustrates the proper way to understand advocacy rules. "Do not ask why on cross-examination" is a useful default, not an inflexible command. The advocate should depart from the default deliberately, after deciding that the potential answer is more valuable than the control being surrendered.

IV. Challenge Testimony Without Losing the Arbitrator

"Mine" for Diamonds in Opposing Witness Testimony

Cross-examination is not synonymous with impeachment. Impeachment means to discredit a witness by proving their statements are false or inconsistent. Some of the most valuable testimony may come from an opposing witness who confirms facts supporting the advocate's case.

In a contract-interpretation dispute, management had changed an operational practice that the union claimed adversely affected the bargaining unit. On cross-examination, management's advocate obtained admissions from union officials that the change applied beyond the bargaining unit and that some union officials personally had benefited from it. The testimony did not destroy the officials' credibility. It did something more useful: it supplied evidence supporting management's interpretation from witnesses called by the union.

In a discipline case, a supervisor testified that the grievant had failed to improve her performance despite repeated corrective efforts. Rather than attacking the supervisor generally, the union advocate established that the supervisor had not provided the promised coaching, had canceled the only scheduled follow-up meeting, and had never given the grievant the written expectations referenced in the disciplinary record. Those admissions became significant in the arbitrator's assessment of just cause.

Material Credibility versus Minor Discrepancy versus Inaccurate Recollection

When a witness's credibility must be challenged, the challenge should be purposeful. Common grounds include a material prior inconsistency, an important omission from an earlier statement, limited opportunity to observe, impaired memory, bias, personal conflict, or an independent motive to favor one side.

Minor discrepancies rarely justify an extended attack. People recount events differently over time, particularly on peripheral details. An advocate who treats every variation as proof of dishonesty may appear unfair and may cause the arbitrator to sympathize with the witness. Before impeaching, the advocate should ask: Does this inconsistency matter? Does it bear on a disputed issue? Will exposing it materially affect the weight of the testimony?

The advocate also should distinguish between a dishonest witness and a mistaken witness. A witness may sincerely believe an inaccurate recollection. Questions about distance, lighting, distractions, elapsed time, or the sequence of events can demonstrate unreliability without accusing the witness of lying. That approach often is more credible and less confrontational, and is much more likely to elicit an admission from the witness that he is less than 100 percent certain about the matter.

Exercise Restraint with Difficult Witnesses and Avoid "One Too Many" Questions

Difficult witnesses require control, but control does not require hostility. When a witness avoids a question, the advocate should begin with the least confrontational technique:

- Repeat the question.
- Slow the pace.
- Use the witness's name or title.
- Say, "My question was . . ."
- Ask, after a longwinded non-answer to an easy yes/no question: "Was that a yes?"
- Acknowledge the explanation, then return to the question: "I understand that you believe the policy was important. My question was whether the grievant received a copy."

If the witness remains evasive, the evasiveness itself may become persuasive. The arbitrator can see that the witness is refusing to answer a simple question. The advocate should not obscure that fact by becoming equally combative. Calm persistence allows the contrast between the reasonable question and the unreasonable response to remain visible.

Strategic restraint also means avoiding subjects that may harm the case. In one discharge hearing, a union advocate effectively established that the grievant had received substantially harsher discipline than employees involved in comparable incidents. The point had been made. The advocate then began questioning the manager about the grievant's prior disciplinary history. That inquiry opened the door to evidence that otherwise might not have been admissible and gave the employer a stronger explanation for the disparity.

The lesson: not every available subject should be pursued. A successful cross-examination can be damaged by one unnecessary topic or one question too many.

V. Labor Arbitration is Not a Jury Trial

Cross-examination in labor arbitration is different from cross-examination before a jury. The decision-maker usually is an experienced arbitrator who understands workplace relationships, disciplinary systems, grievance procedures, and collective bargaining. Dramatic confrontation is less persuasive – and more often counter-productive—than with a lay jury.

Documents and objective records often matter more. Time records, emails, text messages, video, investigative notes, disciplinary histories, schedules, policies, and bargaining materials may establish the critical facts more reliably than extended disputes over witness credibility. Effective cross-examination uses the witness to authenticate, explain, or expose gaps in those records.

The continuing relationship between the parties also matters. The supervisor, co-worker, union officer, or grievant being questioned may return to the same workplace after the hearing. Unnecessary humiliation can damage that relationship without improving the advocate's case. Firm questioning may be necessary, but personal attack rarely is.

Hearing efficiency is another important consideration. Labor-arbitration hearings are paid for by the parties. Repetitive or unfocused cross-examination can extend a one-day hearing into a second day, increase preparation and transcript costs, and delay a decision. An advocate who uses time carefully demonstrates respect for the process and confidence in the case.

Before beginning a cross-examination, the advocate should be able to answer eight questions:

- What precise point do I need from this witness?
- Why does that point matter?
- What answer do I expect?
- What evidence supports the expected answer?
- Can I establish the point through short, single-fact questions?
- What will I do if I do not get the answer I expect?
- Where should I stop?
- How will I use the testimony in my closing argument or post-hearing brief?

Effective cross-examination is not measured by how long the advocate speaks, how uncomfortable the witness becomes, or how many inconsistencies the advocate identifies. It is measured by whether the examination produces the key facts the arbitrator needs to decide the case.

VI. Conclusion: Don't Let the Frog Know It's "In the Pot"

We will end with one final principle: be nice.

Cross-examination is inherently adversarial, but it need not feel hostile. An advocate who raises his voice, argues with the witness, or treats every answer as an attempted evasion usually makes the examination more difficult. The witness becomes defensive, begins parsing every word, and resists agreeing with even obvious propositions for fear of walking into a trap. The examination turns into a battle between the advocate and the witness, and the facts the advocate hoped to establish can become obscured by the dust and smoke.

A respectful, conversational approach often produces better results. A witness who feels heard and treated fairly is more likely to answer naturally, concede undisputed points, and remain in the rhythm established by the advocate's questions. Courtesy does not require surrendering control. To the contrary, the most effective control may be so subtle that the witness does not experience it as control at all.

One of the best cross-examinations we have seen was conducted by an advocate who deliberately kept her voice quiet enough that everyone in the room had to pay close attention. She began with several questions that acknowledged favorable points about the witness and conveyed respect for the witness's experience. She then moved through a carefully scripted series of short questions. Each question asked for a simple fact. Each answer seemed natural and unthreatening. The wording was leading, but the tone was conversational rather than adversarial.

The examination lasted approximately 10 minutes. By the end, the witness had supplied every fact the advocate needed and had substantially undermined the position of the party that called him. Yet the witness stepped away from the stand without appearing to realize how much ground he had conceded. The advocate never raised her voice, argued with an answer, or announced that she had trapped the witness. She did not need to. The witness was like the proverbial frog being boiled alive by slowly heating water, free to jump out but feeling no reason to do so.

This example captures much of what effective cross-examination requires. The advocate had selected a limited objective, prepared a precise route to reach it, maintained control through short questions, and stopped when the

point had been made. The advocate also understood that persuasion does not require aggression. In labor arbitration, where the decision-maker is experienced and the workplace relationships will continue after the hearing, calm professionalism often is more effective than confrontation.

An advocate may occasionally need to be firm. A witness may evade, argue, or refuse to answer. Even then, firmness is most persuasive when it remains measured. Repeat the question. Slow down. Ask for the answer again. Allow the arbitrator to observe which person is behaving reasonably. An evasive, defensive, or aggressive witness is not a persuasive witness. The best way to demonstrate this is through contrast: be nice, even—especially—when the witness isn't.

About the authors. Arbitrator **Charlene MacMillan** brings more than three decades of labor relations experience and leadership to her work as an arbitrator, having served as advisor, advocate, and chief negotiator in the private and public sectors. In addition to being a labor arbitrator and sitting on panels for, among others, the Federal Mediation and Conciliation Service and American Arbitration Association, **Richard Bales** teaches a wide variety of ADR and labor/employment courses. **Sylvia Skratek** is a full-time arbitrator and mediator in the United States and Canada with over 35 years of experience in negotiations and dispute resolution with an emphasis on Labor-Management and Public Policy disputes. **Page Todd** is a labor relations arbitrator and mediator specializing in labor and employment disputes, public sector collective bargaining agreements, and workplace conflict resolution.

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