Cross-Examination in the Modern Era
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In 1903, *The Art of Cross-Examination* by Francis Wellman gave trial lawyers what was to become the leading text on the subject of cross-examination. In 1975, "The Art of Cross-Examination" was the same title for a lecture given by Irving Younger, where he set forth the "Ten Commandments of Cross-Examination." While there is much to commend in the advice given by these two giants in the field, a trial lawyer following these edicts comes away with the sense that much more can be lost from cross-examination than can be gained. For instance, rule one commands that the examiner should "be brief," reasoning that the shorter the time spent cross-examining, the less opportunity for screwing it up. The examiner should limit cross-examination to making no more than three points. Continuing with this same theme, the ninth commands that the examiner limit questioning and never ask one question too many, leaving the argument for the jury. The tenth and last commandment directs that the ultimate points should be made at summation and not during cross-examination. The overriding message is that cross-examination is more of an art than a scientific method, and only the few who are endowed with special abilities can truly perform a good cross-examination. The rest of us should simply try to get it over with as soon as possible before we destroy our case. It is very difficult to square the cautious advice given to generations of trial attorneys with the most famous maxim of all - that cross examination is the best means to establish the truth.

Most seasoned trial attorneys would agree that a successful cross-examination is the single most important deciding factor in the outcome of a trial. The behavioral scientists who study how and why juries make decisions agree that information obtained through cross-examination has greater weight than most other evidence. If these two points are true, and I sincerely believe that they are, then trial lawyers of today must balance the caution advocated by the past with the challenge of using cross-examination to prove their case. This article is a short introduction to a methodology of constructive cross-examination that limits the opportunity for cross-examination to go bad while maximizing the dramatic impact of an effective cross-examination to teach and prove your theory of the case to the jury.

THE AUDIENCE

Cross-examination is a tool of persuasion. Persuasion begins and ends with how the fact finder understands, retains and uses the information you are providing to prove your theory of the case. The human mind is capable of understanding points when they are presented in a particular sequence and in a certain way. First, however, the mind of the juror has to be engaged. It is well known that most people - think of when you were in your high school physics class - will stop listening once the material seems too complicated or disorganized. Even a reluctant listener is easier to engage if the message is well organized and presented in small segments, with each segment proving one particular point. To best accomplish this, the information should be organized going from a general statement and proceeding, step-wise, to a final conclusion. Additionally, this must be done with a limited amount of questions and not over a protracted period of time, because even attentive jurors' minds tend to wander off. The method must engage the minds of the jurors. If the information is not presented this way, as is frequently the case, without tight organization or in a particular sequence, then each individual juror must reorganize all of these facts into a coherent story their own way. It does not require further comment that getting a group of people to reorganize the facts in the same manner is near impossible.

Knowing how jurors process information and make decisions is important to constructing meaningful cross-examination. In 1956, Professor George A. Miller of Harvard University discovered that the magic number seven, plus or minus two, is the limit of most people's capacity for processing information. When constructing a method of cross-examination, we should limit the amount of information conveyed to the jury at any one time in light of most people's limited ability to process large amounts of information. This principle requires that information be broken up into digestible groups, each designed to establish just one point, by limiting the number of fact questions presented to seven, plus or minus two.

FACT-BASED CROSS-EXAMINATION

Litigation involves cases that routinely have thousands of facts. Many of these facts are clearly related and easily understood by a jury, but many are desparate and need organization to make them comprehensible and relevant to resolving the dispute. All too often, cases are presented in a chronological manner, where each fact is presented as a discrete point, is poorly organized, and is not presented in such a way so as to lead to a strong conclusion. Simply

presenting data in one long chronological succession gives up control of the message being presented, and relies too much on the jury reassembling the facts to reach the desired conclusion. It is almost like asking jurors to do a complicated mathematical problem in their head. That same difficult, perhaps impossible, problem becomes easier once you can write it out and visualize it.

It is well established that most people are better visual learners than when they use other senses. Because trials historically have primarily relied upon oratory, perhaps the poorest of the vehicles for learning, an attempt must be made to create visual images using language. To do this, the trial lawyer must first begin to see the case more as a series of visual images and then construct questions that will reconstruct that image in the minds of the listener, the same way that great writers are able to do. Applying this to our method, each series of questions should lead logically, one fact at a time, to the visual goal in hopes of creating an image in the minds of the jurors.

Facts, not conclusions, are the essential building blocks of an effective cross-examination. As Daniel Patrick Moynihan said: "Everyone is entitled to his own opinion, but not to his own facts." The failure to grasp this important rule - and it is significant enough to be called a "rule" - has frustrated many attorneys trying to cross-examine a witness. Effective cross-examiners must develop the skills and ability to discern the difference between facts, conclusions and opinions. Effective cross-examination, one that controls the witness, deals with facts. It is always easier to get a witness to agree to a fact than to get him or her to agree with your conclusion or your opinion. Effective cross-examination is about controlling the information presented to the jury and controlling the witness in order to accomplish that goal. The focus on facts is the key to doing this. Facts often have immunity from adversarial bias, whereas conclusions do not. To use this to our advantage, we must create coherent fact-based cross-examination that will lead to a specific conclusion without specifically requiring the witness to roll over on the stand and admit defeat. If the questions are presented in such a way, there can be only one conclusion, which the jury will understand without additional help.

After the facts are gathered, they are analyzed and broken down into various categories. Every case has large groups of facts that are not contested - facts that do not depend on the credibility of a witness or some other factor to establish. These are "facts beyond change." The best example of this are the facts contained in a document, such as a contract or perhaps a hospital record. Whenever possible, it is good to work with these facts when structuring your cross-examination. The next group of facts relies upon the credibility of a witness or upon an inference based upon some other fact. This group breaks down into facts that are likely provable and those that are either contested or beyond what you can actually prove.

DETAILS

This method requires a greater focus on facts and paying closer attention to details. Most people, myself included, often speak using conclusions, for many reasons. A questioner will rarely get a witness to agree with his conclusion that he was negligent, but that same witness, through controlled questions, will readily concede facts, such as that the road was straight, there were no obstructions to his view, the intersection had good lighting, that there were skid marks left on the road, that the pedestrian was wearing white, that he, the driver, was looking straight ahead, that there were no distractions, that the location of the impact was in the middle of the intersection, etc. Too many lawyers would try to get the witness to admit that he was driving too fast for the conditions, which is a conclusion, instead of taking the time to step by step build the image in the minds of the jurors.

This fact-based method requires closer attention to details. Instead of presenting an important point in a few steps, or questions and answers, that same point is developed in greater detail. While this might seem to some to be contradictory to the points made above about attention spans, the opposite is actually true. First, when information is presented to the witness, and thus to the jury, one fact at a time, devoid of color (and by color I mean adverbs, adjectives and argument), there are fewer objections from your adversary. This serves the dual purpose of keeping your message moving along without interruption and actually speeds up the overall presentation. Often it is these long arguments about the question that take up so much time, permitting jurors to mentally wander off. Moreover, when the question is a short leading one, the answer is likewise short, usually "yes" or "no." At the end of the session, much more information is presented in a shorter period of time. Learning to think in greater detail is an acquired skill. It often requires that an event, or a point, like "he failed his fiduciary duty," be analyzed with more intense focus, bracketed, and subjective bias removed.

ORGANIZATION: THE LOST ART

The next step is to organize all the data in the file in order to create material for cross-examination. Lawyers are trained to work with complex cases, organizing and distilling them down to the essential data. What is typically lacking, however, is further organization into units that can then be turned into an effective cross-examination. This organizational structure can, and should, be started at the beginning of the case, continued throughout the course of the discovery phase, improved after the depositions and finalized for use as cross-examination at trial.

Over the course of many years of being in courtrooms, I have often witnessed even experienced trial attorneys cross-examining without an obvious coherent method. The examinations take place as if it is an argument between two people who are oblivious to the jury. There is rarely a consistent method of questioning that is designed so that the fact finders can easily follow the line of reasoning leading to a conclusion. What follows is a short introduction to such a method that factors in the average human capacity to process and remember information, while improving question organization so that jury can actually remember the information and make the necessary connections to establish your case.

Every case, even simple ones, often involves a series of scenarios. Scenarios are outlines or synopses of the entire case and are composed of a sequence of related events that can often be imagined or visualized. For instance, in a complicated medical malpractice case, there are a number of scenarios that can be identified. Imagine the case as if you were producing a documentary. All movies, indeed all books, have numerous scenarios that are sequenced together to present a story (I do not need to spend time convincing anyone reading this article of the value of the "story.") Once the case has been broken down into important scenarios, keeping in mind that over the course of litigation many more scenarios can be added or deleted, then the larger scenes are broken down into smaller events for more intense analysis. This is where the real work takes place.

The events, topics and issues that make up the larger scenarios are then analyzed to determine which are the most critical for advancing your theory of the case. Obviously, those that are the most important to establish your theory of the case deserve the most attention to detail. This requires more focused attention to developing the facts that best support the theory of the case. I have found it amazing that once I began using this method of greater attention to detail on the important events, issues and topics, I was able to see facts that were there all the time but I had glossed over without appreciating the richness that they could bring to establishing my goals. Once the events are identified, closer analysis of the various issues and topics within those events becomes easier to identify and organize. The facts of the case are analyzed, and often re-analyzed, to identify all the facts that are associated with the particular issues and topics within the numerous events making up the various scenarios. Another point worth mentioning is that most humans, trial lawyers included, tend to think in more conclusory ways. Learning to think in greater detail is often a skill that requires practice, but pays dividends when attempting to create an image in the minds of the listener. This exhaustive analysis of the facts will frequently permit larger groupings of facts to be broken into even smaller groups, which is always the aim. The smaller the topic of discussion, and by that I mean the fewer questions it takes to make the point, the easier it is for the jury to comprehend.

CONSTRUCTING THE CROSS

To develop this point further, it is necessary to step back and discuss several fundamental concepts necessary for a successful cross-examination. The first of these is that by the time the case gets to trial, most of the cross-examination has already taken place at the deposition. Trials are not the place to be conducting discovery. Most of what I am discussing actually takes place during the deposition, long before the information is presented to the jury. If you lose the battle of cross-examination at the deposition, you will likely meet the same fate at trial. The cross-examiner at trial begins with a tight script that he or she rarely need vary from if he or she has done an effective job of cross-examination at the deposition

The essence of this method is to break down the case into a series of separate question groups, or pages. Each group of questions is given its own page. Each page should generally have no more than 10 questions. Each page should be set up as if there is a discrete discussion on a specific topic. The format is always the same. First, there is the visual goal that is being established. Such as, if your goal is to prove that the witness was in a position to have seen the accident, or the witness has a bias, that is the focus of the page. The facts that support that conclusion are arranged going from general questions on the topic to increasingly more specific questions, all with the design to establish a factual goal. There is always a well-thought-out beginning and an end. The cross-examiner is attempting, through words, to create an image in the minds of the jurors. Remember, each of these pages is to be considered as establishing a separate point. If the facts are carefully selected, the conclusion will be self-evident and will not require the witness to actually agree with

your conclusion, which is a logical inference that the jurors will be quite capable of drawing for themselves. Again, think about the facts as if you are shooting just one scene in a documentary. If you pay closer attention to movies, you will notice just how quickly the camera angle changes, creating different effects and inviting the viewers' eyes to capture small images in their minds.

Once these pages are created, using as many facts beyond change as possible, they must be sequenced properly. Remember, as an advocate you are not required to give the jury every single fact in the case to consider. You are a director, and it is your job to select what they will see and hear, always being conscious of what your adversary will be able to present. The proper sequencing of the discrete topics will ultimately be linked together to support your theory of the case.

Another factor to consider when constructing the questions is attention to the vocabulary. By asking only leading questions, the questioner has the advantage of controlling the vocabulary. If open-ended questions are asked, as they frequently are at depositions to explore areas where additional information is needed, it is the witness who gains control of the vocabulary. Once you get an affirmation of a fact or phrase contained in your leading question, that new fact can then be reinforced by the rhetorical device of looping. The new fact is used in the next question, without re-asking the fact, by attaching the looped fact to a safe fact in the next question. While the who, what, when, where and how questions are still important at the deposition, these words should seldom be used during the cross-examination at trial.

When preparing the separate topic pages, the goal of the line of questions is placed at the top of the page. The facts that support this goal are placed into short simple questions, one fact per question, and proceed from general facts to more specific. With practice, writing out the question becomes unnecessary. Simply writing the desired fact will give you enough information to craft a short question. There is a secondary gain as well by simply writing the facts, which is the elimination of visual clutter on the page. All trial attorneys have experienced that unpleasant feeling of looking at a page of questions and not being able to instantly focus on the fact needed. Next to the question should be the source of the fact, which is often the page and line reference of the deposition. Where a fact comes directly from a document, such as an office note entry, that page is copied and stapled to the back of the questions. When facts are presented one at a time, the ability of the jury to comprehend the significance of the fact improves dramatically. Because the jury is hearing these facts for the first time, restricting the questions to one fact gives them more time to absorb the message. Remember, each goal-oriented page must be developed independently, which means that there is a beginning and an end to the sequence of questions. By bringing order to the questioning, keeping the questions short and containing only one fact, without conclusions, even a reluctant juror can maintain focus.

THREE RULES OF CROSS

At trial, there are three simple rules to be followed. First, ask only leading questions. There is an enormous advantage to the questioner being the teacher. Leading questions permit control of the vocabulary, topics discussed, sequence of presenting information, and most of all, control of the witness. Every time an open-ended question is asked, the witness becomes the teacher. To be a good leading question, it must make a short declarative statement, not just suggest an answer, in the form of a question. You are really presenting facts, not asking questions. Second, each question must only present one new fact. This point has been made above, but not only does this improve comprehension by the jurors it also improves the likelihood of getting an affirmative response from the witness. There are advanced cross-examination techniques, such as looping, that permit linking multiple facts in one question, but one fact has already been established by the preceding question. Third, these questions must be organized in such a way that they progress logically to a specific goal. Goal in this context means what particular point the examiner is trying to make.

CONCLUSION

Fact-centric cross-examination has many advantages. Learning to see cases in more detail helps the questioner present facts that create better images for the jurors. Most important, asking questions containing one fact at a time gives the examiner more control over the information, the witness and the juror's comprehension of the goal of the line of questions.