CROSS-EXAMINATION

By: **Timothy J. Fennell, Esq.**
Amdursky, Pelky, Fennell & Wallen, P.C.
26 East Oneida Street
Oswego, New York 13126

TABLE OF CONTENTS

CROSS-EXAMINATION

Submitted by: Timothy J. Fennell, Esq.
New York State Bar Association Young Lawyer Section
Trial Academy held at Cornell Law School, Ithaca, New York
April 3 - 7, 2019

INTRODUCTION

The trial attorney is perhaps the best known to the public of any attorney. Glamorized on stage, the big and small screen and in literature, the trial attorney earns the attention not only by the shear drama of the proceedings in which they are involved, but also by qualities they bring to the courtroom. Those qualities include courage, conviction, quick wits and presence. Nowhere are those traits best exposed than in cross-examination.

Unfortunately though, most attorneys cannot learn or acquire those traits. They are the qualities that law school graduates take stock of when they assess what type of lawyer they want to be. Not that a tax or real estate attorney does not have some or all of those qualities; many do. However, it is the trial lawyer, displaying his or her wares to the public (in the form of a jury) before the watchful eyes of the Court and a client, with every word recorded for review, who lays it all on the line.

Do I ask a question? How do I ask the question? What is important to the jury? These are the questions that every lawyer proposes to his or herself in every trial. How is one to know the answers?

Cross-examination has been called an “art” for many years. Francis Wellman, a prominent New York lawyer, wrote of it at the turn of the last

century in the recommended book, The Art of Cross-Examination. Published in 1903, the book is available online at no cost.

Later, in 1976, Irving Younger, synthesized his thoughts into the Ten Commandments of cross-examination, but still described the process as an "art". Younger, The Art of Cross-Examination, ABA Monograph Series No. 1 (ABA Section on Litigation, 1976)

As a young attorney, it was intimidating to think that only those with talent or a feel could succeed in a courtroom. I was taught that the trial attorney must have an innate sense of when to pounce and when to hold your fire. Yet, twenty-six years later, I still say that although the Star Spangled Banner is a great song, there are many great ways to sing it. No one style is correct. I have seen loud, quiet, passive and aggressive styles. They all can succeed. Sometimes, all of the styles need to be combined to win at trial. The following submission consists of what I believe to be the building blocks of a successful cross-examination. Hopefully, if you apply these to your style, you'll win more than you'll lose and sleep a lot better before and during your next trial.

PREPARATION

"Every battle is won or lost before it is ever fought."
***The Act of War*, Sun Tzu**

A. Theme of the Case.

The mother of every successful trial is preparation. The process starts with the moment you open your file or interview your client. The trial lawyer is always searching and evaluating what the central themes will be. Sometimes there will be more than one theme. The themes may change or develop over the course of discovery and constant attention should be given to this process. The theme(s) that you establish will have a direct correlation to the decisions you make on cross-examination. For example, in a Plaintiff's case against a large corporation, one theme may be "big business versus the little guy". In a defense case where the Plaintiff was severely injured in a car accident that was clearly your client's fault, the theme could be that the Plaintiff is a malingerer or is over-stating the injuries claimed. As we will see later when we address strategies and methods of cross-examination, the themes of the case will be interwoven into the approach taken with each witness.

B. The Witness.

Rare is the case that you do not have advanced notice of the witnesses that will be called against you. Only in small claims matters is discovery really limited. Therefore, preparation for each witness you anticipate being called against you is crucial.

If the witness is an expert in State Court, you will be given limited discovery, if you ask, under CPLR §3101. The names of the medical expert witnesses, however, do not need to be disclosed so the task of preparation is much more difficult than in Federal Court. Often, with the limited information you are provided, it is possible for you or your client to zero in on who the expert witness may be or at least narrow the possibilities down. Once done, you may have thirty or sixty days to chase down transcripts of testimony the witness may have given in other cases; obtain articles written by the expert or contributed to by him or her; verify credentials and talk to counsel who have previously cross-examined the expert.

In the cat-and-mouse game of trial tactics, it is not unusual for opposing counsel to disclose as little as possible in the §3101 response or to divulge multiple witnesses just to keep the other side from being prepared for the crucial cross-examination, which will likely win or lose the case. Many times, the identity of the medical expert is learned at the moment he or she is called to the stand. The practitioner must be prepared to have assistants do an immediate search by computer to determine whether even one flaw in the testimony can be found. Tactical decisions will be discussed later on how you can stretch out time to better assist your preparation when the witness's identity is only learned at trial. The simplest method is still just to Google the expert's name. Any frequently used expert often has a website and advertises. Academic types have their articles published. Medical malpractice insurance carriers often keep a library of depositions and trial transcripts of experts who

have testified around the country. Those can be downloaded and e-mailed at a moments notice.

Of course, in Federal Court and in other expert areas, the New York rule of protecting the medical expert's identity is not available. Additionally, Federal rules allow for the depositions of an expert, which helps to avoid the mad scramble before or during trial in State Court. For this reason alone, most products liability cases are removed to Federal Court by Defendants.

Preparation relating to the lay witness may not be as daunting, but can be as important. Where resources allow, investigators should be engaged to compile background material on each potential witness. If not, visit the witness or at least take the time to call. A folder should be opened for the materials you compile for easy access at the time of trial.

Often non-party depositions are a luxury, but you should encourage your client to pay for the deposition of critical witnesses. Absent the deposition of the non-party lay witness, take time at the deposition of the party to learn as much about each witness to the case as possible. You may learn about whether there is a relationship between the witness and the party. It is not unusual for the party to have spoken to the witness and made comments which may be inconsistent with later testimony. Perhaps, minor background checks on a witness may assist you in your jury selection. For example, if a witness has a military background and you need to confront his or her

credibility, you will then certainly need to inquire about the military background and sympathies of potential jurors.

Similarly, efforts should be given to explore if the witness may elicit sympathy, which may harm your case. Recently, in a DWI defense case in which I was involved, I learned of a potential witness who saw my client weaving in the road and called the police. I contacted the witness and learned that she had lost a family member due to a DWI accident. That item could easily have been a mind field that I walked straight into at trial if I presumed that the witness was a police lover. With the information in hand, I learned to either avoid that matter in cross or try to use it in my client's favor.

C. <u>Venue.</u>

To paraphrase an old line from the musical, "The Music Man", you have to "know the territory". Many of us will never try a case outside our county or judicial district. However, having appeared in over thirty counties at one time or another, I can vouch for the truism.

Some venues are famous or infamous for how pro Plaintiff (think Bronx) or pro Defendant (think Westchester or Jefferson counties) they can be. As a result, how one dresses, acts or talks can be a factor in the preparation for cross-examination. Is the lay witness related to a well-known family that is active in politics? Is the witness from a lesser thought of family known for criminal activity? Does everyone in town know the accident scene as dangerous? How do you pronounce the name of the street or town where the accident occurred? These are all important factors that may affect your case.

More than once I have seen a down-state lawyer over dress for an appearance in Oswego or butcher the pronunciation of Schroeppel (pronounced scruple), a small town in Oswego County. Such errors immediately distract the jury from what might be a very effective cross. If you're going to be in trial for more than a few days, try to find the local diner or coffee shop and speak to the waitresses or locals to get a feel for the venue and what "plays in Peoria".

D. <u>The Judge.</u>

Most Judges now have local rules which are online or available readily. Regardless of how you find them, find them early and follow them to make points not only with the Judge, but with his or her staff. Too many times I see close evidentiary rulings go one way or another based on whether the attorney has irritated the Court. Accommodations of time to prepare for cross are within the Court's discretion and a good relationship may tip the scales to you when asking for a recess between direct and cross or for some latitude during your exam.

Beyond the rules, it is imperative to know the Judge's quirks. Some Judges are sticklers for starting on time and ending at a specific time. Woe to the attorney who is not ready to begin a cross when the Judge is on the Bench tapping his or her fingers with the jury sitting equally impatient and ready to go. Some Courts will routinely stop proof at a certain time on a certain day and if you are in the middle of your crescendo, it will be very difficult to re-create the moment the next day or worse, after a long weekend.

Some Judges do not hear well and if you are quiet by nature, it is important to consider your volume. The last thing you need is to have the Judge constantly admonish you for failing to keep your voice up.

Some Judges are very territorial and do not allow you to leave the podium or touch the jury rail or his or her Bench. Local attorneys will know all of these quirks. Reach out to them early in the case to learn these quirks and your cross-examination will go ever more smoothly.

E. <u>The Courtroom.</u>

Many courtrooms are equipped for technology today, but, obviously, inquiry is well advised prior to trial as to what will be available and what will not. If you are flying solo and expect to Google the expert's name, do not be surprised when the Court room is not wired for Wi-Fi. Similarly, know if you need screens to display your Powerpoint presentation or to blow up exhibits. Is there a chalk board? Do they have pointers? Will you need extension cords? These are all important matters to learn from the Court staff.

Also, you need to see the courtroom layout before the first day of your trial. Learn if the witness will be exposed or protected by a witness box or rail. In many old courtrooms there are high ceilings that trap and absorb sound. This can lead to a change in your style if you are normally soft spoken and like to move to and from the witness. If there is a microphone on a podium that is crucial to being heard by the jury and the witnesses, you need to know that and work it into your approach. You would hate to have your best question not heard by the jury.

Later, I will discuss watching and listening on direct. Some courtrooms may require you to move from your table to do so. Young lawyers hear better than old ones, but the last thing you want to ask is for the Court to order a read-back of a damaging statement made against you because you didn't hear it. Not only did the statement hurt you the first time, but you have the unfortunate need to ask for it to be read back so it can hit you again. Ouch!

During cross, you want to own the courtroom. Some Judges may not allow you to do so, so you only look to lease it for the trial. Regardless, in preparation for your cross, know the courtroom layout so if you need to have several books, depositions or photos available, you will then be prepared to have them accessible to you when you need them so not to interrupt your flow.

F. <u>Opposition Counsel.</u>

As you all know, lawyers come in all shapes and sizes and their personalities are just as diverse. Some personalities change during a trial when the heat is on. Get a feel for opposing counsel to know whether you will be interrupted constantly with objections during cross. If there is evidence or exhibits that can be stipulated to in advance, do so, or at least attempt to do so. Try to engage opposing counsel about the schedule and when a witness may be called or how many witnesses may be called in a given day. Judges and juries appreciate lawyers who streamline the process and grow frustrated when delays occur. Try to appear as if you are doing everything you can to avoid delay, at the same time, while attempting to be polite and organized, you

will also be able to gauge what witness you need to be ready for on cross and what time you may want to use in doing so. Yes, sometimes you need to sacrifice some questions of one witness for better opportunities to cross another.

If opposing counsel is rude or aggressive, consider being more polite. By this I mean asking for permission to approach the witness or the Bench; asking permission to have the testimony read back and asking if the Court can make inquiry of the jury as to whether they can see or hear certain evidence. Watching the jury may clue you in on how they are reacting to opposing counsel and if his or her antics are not being well received.

G. Co-Defendants' Counsel.

In many civil and in some criminal matters, one finds that trials make for strange bedfellows and you may be sitting with other attorneys representing Co-Defendants. Each lawyer has their job to do, but coordination and communication is vital in preparation for cross-examination. Often communication is necessary to determine who will take the lead when cross-examining a certain witness. Courts are usually receptive to Co-Defendants' requests to examine a witness out of order if that particular witness is focusing on their particular client. When time is critical in preparation, good communication between Co-Defendants' counsel can avoid wasting effort in tracking down transcripts or articles.

Working together, Co-Defendants can take two or more shots at the apple or effectively reiterate important points made on cross. Savvy

Plaintiff's attorneys often consider this potential problem when choosing Defendants to sue or when to settle out against lesser involved parties prior to trial.

In one medical malpractice matter in which I was involved, the Plaintiff left three Defendants in for trial. He attempted to call his expert late in the day in an attempt to limit the cross-examination time of the Defendants and to allow the expert's testimony to sink in to the jury's mind over the weekend. The Co-Defendants effectively argued that they would take collectively more time than was left in the Court's schedule to cross-examine. The Judge agreed and decided to not hold the jury late. This allowed the defense valuable time to prepare and destroy the expert the following day by locating a transcript where he had contradicted himself. If the three attorneys were not working closely together, that case may have been lost.

Good relations between co-counsel will smooth your preparation. If co-counsel tells you that he or she will not cross a witness in advance, you then know to be ready or at least discuss why counsel is passing on that opportunity.

H. <u>The Client.</u>

Ethics dictate that your client be informed and involved in all phases of a trial. Some clients demand to be more involved than other or even want to play lawyer and tell you what questions you should ask. Prepare your client for what will likely be his or her first venture into the courtroom. Experienced counsel knows how to look disinterested when the direct

testimony is killing your client, but your client will not feel the same. Counsel your client to write notes down during direct so not to interfere with your ability to listen. Make sure your client knows to not make emotional reactions to direct testimony. Make sure your client knows how critical the decisions you will be making at this point in the trial are and though his or her input is appreciated, they will have to defer to your training and experience. The last thing you want is to finish an effective cross and then have your client call you to the table and want you to ask three more questions. In preparation for your trial, review this with your client so that it is clear who is in charge while being mindful of your ethical duties. In criminal matters, the first Appellant point (or more likely, the first grievance point) will be the client claiming ineffective assistance of counsel and stating "my lawyer didn't listen to me". Be mindful of this, but also control your case.

I. **The Charge.**

Although the charge to the jury is usually not available until just before summations, the prepared trial attorney will have a good idea of what the jury will hear. The boiler plate charges regarding witness credibility, interest and bias are all themes you can try to incorporate into your cross. Of course, the jury will listen carefully to the Judge and if your cross brings up the items they just heard, all the better for you. If the case involves negligence and the reasonable man standard, then incorporate "reasonable" into your cross-examination questions. In a criminal case, the same would go for

"reasonable doubt". The Pattern Jury Instructions (PJI) are an invaluable guidebook to preparation, especially for cross-examination.

AT TRIAL

Getting Ready for Cross-Examination During and After Direct.

We have discussed developing themes for your trial as part of preparation. It is beyond the scope of this presentation to delve into jury selection and opening statements, but, needless to say, as the trial commences, the themes you are going to address in cross need to be explored and promoted during those important stages of the proceedings. There are no trials where credibility is not an issue and, accordingly, the jury needs to be prepared for that theme.

On the defense, you need to insure that the jury will withhold judgment until all the proof is in and until they hear the charge. Also, the jury should be told that they should listen to direct and to the cross-examination before fully assessing a witness' credibility. If you know that a witness has changed a story, then key the jury in to that witness and ask them to listen to that particular witness' testimony. Of course, if you have discovered through work product a fault in a witness' story, you may hold your fire and not tip the jury off so to have the benefit of surprise to both the witness and opposing counsel.

As a Plaintiff, one theme might be that the Defendant's examining physician only did so for a brief time compared to the numerous times the treating physician did so or, perhaps you start incorporating the theme of the Defendant being a large corporation in relationship to your badly hurt client who has limited resources.

Once direct begins, one needs to decide quickly where to sit in the courtroom. Many courtrooms have obstructed views of the witnesses. Opposing counsel may be using exhibits that are out of your view. If you need to move, make sure the Judge is comfortable with you doing so and you and co-counsel fit where you are going. Moving draws attention to both the witness and the exhibits being offered. Move only if you need to. Many witnesses can be ignored to some extent from your visual observation. If you know you have a witness who is of no consequence to the case, take that time to watch the jury, but always listen to the witness just in the event something comes out that is inconsistent with what you assumed you would hear.

If you cannot hear the witness, ask the Court to instruct the witness to speak up early in the process and not later at the crucial point of the testimony.

An offer of an exhibit into evidence may also lend an opportunity for voir dire. Although obviously voir dire does not allow you cross-examination, but it may be a chance to test the witness on his or her senses, which may be consistent with the theme that you have established.

During the direct of an important witness, in addition to watching and listening, you will be compelled to take notes. None of us are accomplished stenographic experts and the challenge to record germane points made by the witness is significant. If you are properly prepared, there should be few surprises. However, experience has shown that every witness is ready to express a view in a unique way. Record the significant quotes that pique your

attention while attempting to form an outline of points you are considering for cross. The Court reporter can always provide a full transcript of key testimony you need to highlight for summation. Your effort should be constrained to picking out only comments that can be incorporated into your cross. Miss-quoting the witness during cross can lead to needless quibbling or worse, to the witness explaining again what he or she said and the jury thinking you are trying to be tricky.

Immediately after direct is complete, check the clock and decide how best to proceed. If you are at the end of the day, consider whether the Judge will limit you on time. If a short delay would expedite the cross-examination by helping you to prepare, give thought to a request for a brief break. For example, "Your Honor, unfortunately, I require a quick bathroom break. Can we have five minutes?" Or, "Your Honor, if I could have a brief break to organize my thoughts and speak to my client, then I think the cross will go much faster".

If the witness is an expert, ask immediately to view his or her file during the break. The expert file is often a gold mine of important information if not culled. Many times an expert may claim terms of payment are unclear to him or her, but there in the file is an e-mail requesting payment. I have found letters from clients to their doctors. I have found notes from nurses to the physician that were not produced as part of the official medical chart. If the doctor or expert does not bring a chart, consider a question on cross that I find particularly damning, "Did anyone tell you not to bring your file here today?"

Plaintiffs often need latitude to schedule an expert and you may need the same latitude in your case, so be reasonable. If asked to consent for an expert to testify before foundation is laid, subject to the proof being tied up, ask opposing counsel for the courtesy to call the witness at a time and on a day when you have sufficient time to fully cross-examine and let the Court know of your consent and concern. No one likes to pay an expert to come back a second day so opposing counsel should be receptive.

Tactically, consider no delay and the effect of jumping up to confront the witness immediately upon the conclusion of direct. The jury may have just been sold a bill of goods and you need to clean the air. The sooner, the better. A break may only allow the cement to cure. When the Court asks you if you want to cross, you may stand up stridently and announce "absolutely" and move right into your cross. This is the feel you get from experience and what fits your case changes witness to witness and trial to trial.

If a prolonged cross is anticipated using materials or depositions, it is best to have those thoroughly organized and at your hand so not to interrupt the flow or distract the jury. If you do not have the luxury of co-counsel or a paralegal, you may enlist staff or an intern who knows the file and can summon the document immediately when you need it. If you need a podium for your notes and opposing counsel has left it where you don't want it, decide if it is worth moving it to where you need it. Always ask the Court for permission in this regard.

Direct examination is best performed by the attorney standing in a position where the witness is allowed to speak directly to the jury without counsel in sight. Cross-examination, on the other hand, is best when the witness directs the answer to you with the jury in your view. A diagram of the courtroom set-up described is set forth below.

Bench Witness

Cross Jury

Defendant Plaintiff Direct

The above position for cross allows you to move forward as you make a point either to the witness or to the jury. Occasionally, the witness is seen eyeing the opposing counsel or party. By not being fixed to the podium, counsel may move to block that eye contact. This can be very disconcerting to an already nervous witness and could push the witness over the top.

In many cases, exhibits already in evidence may be used on cross-examination. Coordinate the exhibits you need into your outline so that they are available and you can display or publish them as needed. Placing a blown up photo or record in front of the jury that is un-related to your questioning can be very distracting. Similarly, savvy opposing counsel will often leave favorable exhibits in view of the jury after direct. Perhaps it is a photograph of a deceased Plaintiff; a graphic description of an injury or the chalk board recordings of the economist detailing significant financial loss. Before cross

commences, take ownership of the courtroom and have those items taken down or moved outside of the view of the jury. Make the courtroom appear so this cross-examination of the witness is the only thing they need to be focused on and, when you start, it will only be you and the witness before the jury. Only display your exhibits when you need them and not any earlier.

In the time between direct and cross, keep an eye on the witness. It is not unusual for the witness to seek refuge by talking to opposing counsel. Non-party lay witnesses have often not seen the party for whom they are testifying in some time and will naturally gravitate to that party to kibitz. This can be an opportunity to open your cross by asking the witness what they did during the break or who they talked to. Experienced opposing counsel will seek to avoid the witness during the break or make sure that the interaction is limited to truly small talk. As we will see later, exploring the bias of a witness on cross is one of the goals which needs to be considered. Who they talk to during the break may highlight that bias quickly.

Lastly, in the case of a well prepared expert, if you detect any interaction between the expert and opposing counsel, then consideration must be given to ending that interaction immediately. Opposing counsel may have detected a less than optimum answer on direct or an error on a key point that the witness totally blew. It is not out of the realm of expectations to think that the opposing counsel will attempt to clarify that matter with the witness during the break (commonly referred to as wood shedding the witness) so that when you begin your cross on that matter, the witness is quick to apologize to the jury

and attempt to correct the miss-statement. The moral of the story is that even though you may have asked for the bathroom break, don't spend your time there. A trial has no breaks.

THE MOMENT HAS ARRIVED

Method and Skills of Cross-Examination.

A. <u>The Silent Cross.</u>

The two hardest decisions on cross are knowing if to cross and when to quit. I view the decision not to cross as more of a method and the decision when to quit as more a skill which will be addressed later in the presentation. Although opposing counsel is assumed to have assembled the case in a way not to waste time and present witnesses who actually help the other side, occasionally the proof is not contentious and can be ignored or even supported. For example, a witness that testifies what the temperature was outside in a slip and fall case with certified weather records may not be crossed. Witnesses that may have been at the accident scene but had a poor view or little to say may be called by the Plaintiff just to show that they presented the witness and didn't hide them. Sometimes witnesses that are "under the control of a party" need to be presented even though they have very little to say. Resist the urge to cross those witnesses that don't hurt you. When asked by the Court whether you wish to cross, consider responses such as "Your Honor, I see no reason to question this witness" or "my client has no quarrel with this testimony".

Even if the witness does hurt you, sometimes you can't avoid the pain. If the witness is unimpeachable by his or her qualifications or because in preparation you know that you are not going to shake the witness from the story, you need to resist the urge to cross. One's ego can get the best of you

and the urge to hear yourself talk is sometimes too strong. Your client can be in your ear asking why you aren't doing something. This is when I think about the Serenity Prayer, which goes as follows:

> Lord, grant me the serenity to accept the things I cannot change; the courage to change the things I can and the wisdom to know the difference.

B. <u>Be Brief.</u>

Professor Younger's first commandment of cross-examination was to "be brief". His recommendation was to limit cross to your best three points. See Younger, *The Art of Cross-Examination,* ABA Monograph Series No. 1 (ABA Section on Litigation, 1976). This advice always seemed to be very difficult for me to apply. What is meant by brief? The witness has been on the stand for three hours. Is brief an hour or ten minutes?

Picking your best three points is less abstract, but, again, if you just endured three hours of assault, there may be ten matters to confront not three. Regardless, Professor Younger's point is important and merits its lofty place in the list of Ten Commandments.

C. <u>Don't Reiterate.</u>

One of the best ways to be brief during cross is to avoid reiteration. Several times I have already cautioned you as to avoiding the accidental sin of reiteration; chiefly, when a request is made to repeat damaging testimony that could not be heard. In addition to the accidental sin, counsel needs to avoid the intentional sin of reiteration as a style or method of cross-examination.

Too often I see young lawyers take each point made on direct and ask the same question on cross, hoping to obtain a different answer, but usually only getting the same answer with some additional pizzazz.

For example:

> CE: Mr. Jones, a few minutes ago on direct, you told this jury that you saw my client speeding through a red light just prior to crashing into the Plaintiff's car. Did I hear you correctly?
>
> W: Yes, that's exactly what I said.

The better approach as you address the witness' observation might be:

> CE: Mr. Jones, let's talk about the accident that you say you observed. Isn't it true that you told the police that there was a large truck between you and my client's car when you made your observation?

Some attorneys obviously feel that if they repeat what the witness said to the jury in a sarcastic tone or by reacting to it with skepticism that the jury will adopt your doubt. This is highly unlikely. Tone and reaction have their place in cross-examination but do not mistake the skill of using your voice for a method of cross-examination. Jurors expect when you rise to cross that you have something to establish. They are, for the most part, busy people who do not want to be bored by hearing everything said one more time. If you want to lose a jury quickly, practice repetition and reiteration.

D. Scope.

Generally speaking, your cross-examination should be restricted to those matters that were covered on direct. State Courts usually allow some latitude in this regard. Federal Rules of Evidence 611 covers the issue directly for practice in Federal Court. In Federal Court, you may find your cross-examination limited more so than in State Court because of this Rule. In State Court, be prepared to respond to the objection of "Your Honor, this is beyond the scope of direct", with a plea to the Court that you will "tie it up soon" or that you will be able to find some string that you can explain to the Court will connect your line of questioning to what was said on direct.

If your goal is to discredit the witness with an out-of-court statement or incident, you should appeal to the Court that this is "cross-examination" and that your inquiry goes directly to the credibility of the witness' testimony.

Listen carefully to the Judge's response. As previously stated, you have hopefully built up a number of brownie points with the Court in your pre-trial conduct and this is where it all pays off.

The same type of response relates to the "relevance" objection. No trial attorney ever intends to address anything that is not relevant, at least to him or her, but some matters are more relevant than others. Know when the Judge has reached his or her limit of patience. It could be a long trial and you do not want to have the jury see you constrained by the Court or to be accused of not pursuing relevant inquiries.

Occasionally, you may find the witness that you are preparing to cross is one that you were going to call on your case-in-chief. Often when this occurs, it is opposing counsel calling the Defendant. Whether a party or non-party, immediate consideration needs to be given to the scope of the cross-examination. If opposing counsel has not addressed on direct items you want to get into, the first concern then is whether the Plaintiff has laid a trap for you. If you are confident from preparation that the witness will respond favorably to the inquiry, then proceed with caution and, if met with an objection, acknowledge to the Court that you are making the witness yours. Of course, you will lose the valuable tool of leading the witness and you will be bound by the answers given. You need to be very confident where your examination is going. The alternative is much safer. Consider letting the witness go on a particular matter and re-call him or her on your case when you have had a chance to speak with the witness again out of Court and confirm your points and, perhaps, learn why opposing counsel did not ask about all of the facts you expected.

When the Plaintiff calls the Defendant on direct, it is very tempting to want to take the opportunity to lead your client and attempt to rebut any damage Plaintiff has made lest it be absorbed by the jury. Most often, however, it is preferred to hold the exam of your client until your case. This can be a very difficult decision. In shorter trials with fewer witnesses, the tendency may be to cross-examine your client immediately and proceed beyond the scope if the Court allows you with a claim that you are trying to be efficient and save

time. In a longer trial, where days or longer may pass between the Plaintiff's case and the Defendant's, the inclination would be to only cross-examine your client on a few limited matters and then re-call your client in your case at a point that will be immediately prior to your summation. There are no hard and fast rules here. Experience and feel will assist you when deciding on the scope of your examination.

GOALS OF CROSS-EXAMINATION

A. Highs and More Highs.

Any accomplished trial attorney starts a cross-examination with the goal of beginning on a high and finishing on a high. Of course, the examiner would like to hit only highs in between. One can try and try, but never achieve the perfect cross. I suppose it is similar to the surfer's pursuit of the perfect wave or a bowler's search for a 300 game. Even the best prepared attorney will never attain perfection on cross-examination.

One reason, is that opposing counsel must be given credit that they are preparing each witness for direct examination and being told what to expect on cross. Discovery has usually taken away most items of surprise. There are a few "Perry Mason" moments left in the trial business. Accordingly, just as the golfer must be expected to hit bad shots from the rough, the trial attorney must be ready to scramble to obtain your par.

Preparation should lead you to know where you want to start with a witness and where you want to end. As the saying goes, "s—t happens" and it does during a trial as well. Whatever happens on direct may require you to re-assess your priorities. What you thought would be your first area of inquiry may fall down the list. Before you know it, you are at a point where the point with which you wish to finish needs to be brought up and now you are searching for your finishing "high". Watching a skilled trial attorney handle all these balls in the air at once is a thrill. Unfortunately, unless you are on the

inside and get to speak to the cross-examiner both before and after, you will never know whether the method was planned or assembled at the moment.

As you listen to the answer given by the witness on cross-examination and watch the jurors' response, assess whether the "high" you are shooting for has been hit. Unfortunately, there is no scoreboard in the courtroom. Only you decide if you have hit a home run or struck out. If you are too wrapped up in your questions or, worse, are still looking at your notes and missed the reaction of the jury, you are doomed to mediocrity.

Later we will discuss the skill of knowing when to quit. If you are bent on following your notes or cross-examining in the reverse order of direct, your cross may then resemble a roller coaster; you start low and finish low. Hopefully for you, the thrills of the highs in between the lows will be good or you will bore the rider. Think "Space Mountain" and not "Dumbo" when it comes to the method of your cross.

B. <u>Discredit the Witness.</u>

Unless you have decided on the "silent cross-examination", the goal of most every cross-examination is to discredit the witness if possible. The four areas that should be considered are:

1. Bias or Relationship: As a general rule, most witnesses in trials know the party for whom or against whom they are testifying. If the witness is not a family member or friend, then perhaps he or she is a co-worker or has some other connection that bears examining.

Rarely will a witness concede to actual bias such as the witness conceding that he or she would "do anything" to help the party for whom they are testifying. However, the goal of the examiner must at least be to get the jury to understand the relationship between the witness and the party or witness and case and then explore how far the witness would go to support either. Most parents or best friends can be lead readily to the precipice without much effort. While the witness might concede that he or she might "do anything" for the party, they often will protest that they would "never lie". If you get the witness to concede the former, the later is really of no consequence. You have made your point to the jury. This may be your only point with the witness on cross-examination. If you are able to get the witness to jump off the cliff and admit prejudice, substantial consideration must then be given to sitting down. How can it get any better?

2. Interest in Outcome: The interested witness has something to gain in the outcome of the matter at bar. The obvious interests are financial gain or loss in a civil matter or avoiding incarceration in a criminal matter. The Court will certainly charge the jury about interested witnesses so it is important to incorporate as a goal in your cross, an attack of the interest of the witness. For example:

> CE: Ma'am, you are the Plaintiff in this matter. Is that correct?
> W: Yes.
> CE: As the Plaintiff, you filed the Complaint against my client, Dr. Malcolm Practice claiming that you were injured at his hand. Is that correct?

W: Yes.
CE: Now, ma'am, is it also true that you are here for the reason that you want substantial monetary damages from my client?
W: Well of course, yes.
CE: And didn't you tell Dr. Practice's nurse after the surgery that you were going to sue him for every nickel he has?

Or,

CE: Miss Demeanor, you realize that the charge on which you are here today may result in a sentence by the Court of jail?
W: I do.
CE: Can we agree that you're goal in this case is not to go to jail?
W: Absolutely.
CE: (Where proof of prior convictions have come in) Would it be fair to say that the last place you want to return to is prison?

Occasionally, interest in the outcome is less apparent and can only be learned of through preparation and investigation. Did the witness loan money to the party during the course of the trial? Would adverse publicity make the business of the witness and the Defendant suffer? Has the expert's theory rewarded him with handsome fees in support of similar cases and a loss might end his gravy train? Scratch below the surface and you might have the opportunity to totally discredit the witness.

3. Error of Senses: I thought at one point in my career everyone had seen "My Cousin Vinny", but it is now approaching twenty years since Joe Pesci asked whether the laws of physics were suspended in one

witnesses' kitchen and when he asked another when the last time she had updated her eyeglass prescription. If you have not seen the movie, rent it tonight. It is a testament to the benefits of preparation and a cross-examination of a witnesses' senses.

When you face the truly disinterested witness and are unable to attack their relationship or interest, then always weigh whether the testimony offered was simply in error. We are all human. People swear they remember facts all the time, only to have a friend or relative who is also a witness correct the story. In my case, my wife often corrects me when re-telling a story, even though she wasn't there the first time. She has just heard it so many times that she picks up where I have dropped a fact or changed one.

Who among us has perfect re-call? Who has perfect eyesight? Perfect Hearing? Time and distance are always difficult to assess.

If a witness wants to claim perfection, assess the jury's reaction and determine if you have put a dent in the witnesses' testimony only because he or she has departed from the human condition where no one is perfect.

If the witness concedes imperfection, again consider to end the attack. Do not frame the witness so that the jury sees itself on the witness stand. When they start feeling sorry for the poor soul who is just trying to tell the truth and you have relentlessly attacked their senses, you may have gone over the top.

4. Impeachment: Beyond the witness making a mere error in judgment, is the outright lie in Court. Other presenters will cover this topic in more depth. Impeachment is an art form unto itself and careful and thorough understanding of the rules and skills required is commended to all trial attorneys. Many trials come down to the battle of the experts. If the opposing expert survives without you impeaching some portion of his or her opinion, your chances of succeeding at trial are poor. Just pray that your expert comes out better then theirs.

C. <u>Bolstering.</u>

Some witnesses afford you the opportunity to elicit testimony on cross-examination that actually helps you. In that case, care must be given not to discredit the witness on one point and bolster the witness on another. Look to see if the witness will concede favorable points. For example, the witness may have testified on direct that although the Defendant ran the red light and struck the Plaintiff's car, the Plaintiff had just passed the witness going thirty miles per hour over the speed limit. If more than one witness will establish that the light was, in fact, red for your client, then why attack this witnesses' perceptions when the Plaintiff's reckless speed may lead to a favorable comparative negligence verdict? Your theme might be damage control and your goal may be to keep the jury from rewarding a driver who was just as bad as your client. In this case, you might want to bolster the witnesses' observation of the speeding Plaintiff.

Likewise, if you are a Co-Defendant and a witness focuses mostly on another party, consider the possibility of soliciting from the witness on cross that he or she has nothing bad to say about your client. Of course, this goal must be seriously weighed against the method of the "silent cross". Opposing counsel may have set a trap for you or they may have simply forgotten a question in the heat of battle. Preparation will tell you whether the gain of seeking the concession in this regard is worth the risk.

Compare:

> CE: Sir, I couldn't help to note that in listening carefully to your testimony that you failed to identify my client at the scene of the assault on the victim. Is that true?
> W: Who is your client? If it's that fellow right there, then I miss-spoke. He was definitely there.

To:

> CE: Sir, on direct when we spoke a few weeks ago, you confirmed that my client, Jesus Innocent, was not one of the men you saw strike the victim. Is that correct?
> W: That is correct.
> CE: Thank you, Your Honor. I have no more questions.

If you cannot discredit, always consider bolstering.

SKILLS

A. Lead the Witness.

The greatest advantage of cross-examination is the ability to lead the witness. The skillful trial lawyer will not give up that advantage unless the obvious is so well established that the witness must give the answer expected. Although certainly the cross-examiner wants to maintain control of the witness and obtain answers limited to yes or no in most circumstances, try to avoid asking questions the same way all the time. Ending every question with "is that correct?" is safe, but could be boring to the jury. The same could be said with starting each question with "yes or no" or "isn't it a fact?"

Some witnesses are easily led. They are nervous or new to the courtroom. They are very willing to agree with many things that you suggest, as they may trust you, especially if you have built that trust during preparation or by building up to a point in your cross with matters that are easily conceded. For example:

> CE: Hello, Mrs. Brown. We have met a few times now out of Court to discuss this case.
> W: Yes, counselor.
> CE: On those occasions you have always told me the truth to the best of your ability. Have you not?
> W: Absolutely.
> CE: Then we can agree now that you are trying your best to answer my questions in the same way. Right?
> W: Oh yes.
> CE: So pardon me if I need to ask you a few more questions about the accident. Would you agree, Mrs. Brown, that our memories tend to fade over time?
> W: I can't argue with that, counselor.

CE: And can we agree that our memory of an event is usually better right after then compared to some years later?
W: Oh, no doubt.

Here you have led the witness, been gentle and kind, established credibility with the jury and touched on a theme that memories fade over time. As you attempt to discredit Mrs. Brown's memory of an important item on direct that either the witness forgot to mention or opposing counsel chose not to bring out, you have maintained the high ground and not bored the jury or put the witness on the defensive with a staccato attack.

Similarly, on occasion you want the witness to talk so to give him or her some rope to hang with. A good example might be the expert who is a frequent flyer in the courtroom.

CE: Sir, this is not the first time you have been paid to testify for attorney Able. Please tell the jury just how many times you have testified for Mr. Able.

or,

CE: Sir, you just told the jury that you were being compensated for your time today. Would you tell us just how much it is per hour that you are charging for your testimony?

Both are inviting questions and do not fit the usual cross-examination format of leading the witness. Use the leading format to your

benefit and do not abandon it unless you have considered the alternatives thoroughly.

In the same vein as leading the witness, the skilled attorney must also avoid asking the witness, "Why?" I trust we all at least know not to ask the witness why he or she did something or to explain the answer that was just given. The perils of the question seem so obvious that I hope the brevity I'm giving at this point is sufficient. "Why?" is best asked in preparation or in discovery and never at trial. Only one war story will remove any doubt from your minds in this regard.

While prepping for the defense in a fire loss case years ago, I was told that our most important fact witness was a man who was taking a hot shower at noon on a Sunday when the Plaintiff claimed that my client's power line had failed and caused his barn to burn. The witnesses' statement was clear enough that he had been taking a long, hot shower and that the power was intact so that his heat pump was working. This showed that the power on his circuit (the same as the Plaintiff's) was intact at the time of the fire. Curious as to why the Plaintiff would call this witness, I went out and met with the man and asked him why he was taking such a long, hot shower on a Sunday at noon. The man was obviously not right in the head. Much to my shock, he announced that he was showering because he had just finished fornicating with a chicken. Needless to say, when I cross-examined the witness at trial and elicited the favorable testimony that I needed, I did not ask him why he was taking a shower.

B. <u>Simple Language.</u>

Many of you have heard of the KISS method. It stands for Keep It Simple Stupid. During cross, it is important to keep your questions to the level of the jury and the witness. After all, the jury is the audience you are seeking to communicate with and impress. The witness needs to understand your questions so to provide relevant answers. Avoid legal jargon and save it for the next contract that you write. For example, consider the following:

Wrong,

> CE: Sir, is it not a complete and utter fabrication that the Defendant misappropriated any of the chattel from his former place of employment?

Right,

> CE: Sir, isn't it true that you did not see my client take anything from the safe at the restaurant?

Wrong,

> CE: Doctor, on direct examination today, isn't it true that you testified that the Plaintiff's foramina appeared narrowed at the third vertebra on the computerized tomography?

Better,

> CE: Doctor, it is correct that you saw on Mrs. Hurt's cat scan that she had clear evidence of pre-existing arthritis in her back?

C. **Control the Witness.**

A skill that can be mastered and is necessary on cross is that of controlling the witness. Many witnesses, especially experts, want to explain and talk through their answers. They are well prepped to avoid being trapped in the yes or no corner and are constantly looking for an opening to wander and cozy up to the jury. The trial attorney must be able to keep the witness under his or her thumb. Often, simple commands can do the trick. For example,

> CE: Sir, I am sure you would like to say more on this, but I am looking to see if you can answer my question. Attorney Able can ask you more if he so chooses.
>
> or,
>
> CE: I see you are unable or unwilling to answer my question. Let me re-ask it and make sure there is no confusion here.
>
> And, if this fails,
>
> CE: Your Honor, may I respectfully ask the Court to instruct the witness to answer the question?

In this regard, avoid letting the expert turn the tables on you. If you ask the witness if he or she can answer a question yes or no and the expert

says “no I can’t, may I explain something to the jury which will help both you and them understand better?” You need to regain control quickly without letting the jury think that you don’t want to hear the explanation or let them hear it. Consider responding, “No, sir. That will not be necessary at this time. If you are unable to answer my question yes or no, then simply say so and we will move on to another question without wasting the jury’s valuable time.”

Be respectful and polite when controlling the witness. Do not speak over the witnesses’ answer. This will annoy the Court reporter as well as the Judge and jury. Timing and courtesy will win points for you and still allow you to maintain control over the examination. Bullying the witness is rarely successful.

D. <u>Use Small Steps.</u>

The skilled trial lawyer understands that a simple question and a simple answer may produce the desired result in a transcript, but taking smaller steps and leading up to the answer desired can leave a more lasting impression on the jury and, therefore, is more desired. Consider,

> CE: Professor, isn’t it true that your opinions have never been supported by others in a peer review publication?
> W: That is correct at the present time.

as opposed to,

> CE: Professor, you are familiar with the phrase “publish or perish” in the academic world?

W: Of course.
CE: By publishing, do you submit your thoughts and theories to your peers in the academic world?
W: Yes, that is true.
CE: And in our technologically advanced society, you have the opportunity of having your colleagues from around the world review your work by publishing, correct?
W: Yes, that is also true.
CE: Obtaining your colleagues' reviews and feedback about your work is a way of finding whether those opinions are supported by other experts in your field?
W: Yes.
CE: Is it not true that others in your field make presentations at meetings and conferences of their opinions and work to obtain feedback?
W: Yes, that is also true.
CE: And at these conferences you are able to discuss with your colleagues your opinions and theirs?
W: Yes.
CE: No you have been involved in this particular case for at least three years?
W: I believe so.
CE: And sir, have you ever, once, during these three years, published your theory in a trade publication or scholarly journal?
W: No, I have not.
CE: Have you ever once in these three years stood in front of your peers at a conference to disclose your work and opinions?
W: No, I have not

Clearly, the jury has a much better understanding of the peer review process and the witnesses' failure to obtain the accolation of other trained experts in the field by your taking these small steps.

E. Handling Objections.

Inevitably during your cross-examination, you will be faced with the objection of opposing counsel. How you handle the objection and react to the Court's ruling is critical. Remember, the jury may not have decided

whether you or your opposition has the upper hand. Early in the trial, objections made by opposing counsel will be listened to thoroughly by the jury and given presumed respect. Be ready to respond politely without demonstrative body language, even if counsel objects in the middle of your question. It is always possible that counsel is trying to throw you off your game. Be ready for the tactic. If an objection is made during a question, politely ask that you may be able to finish your question before the Court rules on the objection. That way, if the objection is overruled, you will have brought attention to your question again. If the objection has merit, concede the result by thanking counsel for the objection and tell the Court that you will be glad to rephrase the question or start over.

We have already discussed being mindful of the Court's rulings. If you are at a critical juncture of your cross-examination and counsel has successfully interrupted you with an objection that limits your scope or plan, you may then want to ask the Court for permission to approach the Bench where you can attempt to persuade the Court outside the presence of the jury of the importance of your effort without setting yourself up for failure in front of the jury.

Occasionally, you may need to make a record of the objection and the ruling. Although this does interrupt the flow of the proceedings, you may want to consider whether going on the record you would be better able to convince the Judge to respond to your view. If you know from pre-trial rulings that the Court will not change their mind, consider making your record before

your cross-examination at a break of immediately after outside the presence of the jury.

Finally, if the Court starts giving you hints in their rulings such as, "let's move on, counsel" or "we have heard this line of questions and answers several times now, counsel. Do you have anything new?" The Court is telling you they understand the issue. Often the Judge is reading the jury for you and telling you that you have made your point. Again, keeping one eye on the jury will be helpful. If they are shaking their heads when the Judge says "let's move on", then move on.

F. <u>Repeating the Question and Answer.</u>

The skillful trial attorney knows when to ask the witness to repeat an answer or to ask for a read-back of a response. This can be used to highlight a particular answer, especially when the witness is loath to respond the way you wanted. Often the witness will mumble an answer that is unfavorable or lower his or her voice. Trial counsel should not be afraid to ask the witness to "please repeat that, I am not sure I heard what you said" or to ask the Court "Your Honor, may I have the answer read back, as I am not sure I heard it correctly?"

Sometimes, if timing is to your liking and you have just hit a high note and the Court calls for a break, you may want to consider starting the next session by asking the Court and the Court reporter if you could have a read back of the last few questions and answers to help you find your place.

This gets the jury to return immediately to your moment of success and puts the witness back in an uncomfortable position where you last left him or her.

G. <u>Watching in the Courtroom.</u>

Throughout this presentation I have counseled the reader on being mindful of all that is around you during cross-examination. Obviously, being observant in the courtroom is not limited to cross-examination and seeing is not always believing. Many of us have unsuccessfully watched a jury for weeks and thought we knew where it was going, only to be surprised at the ultimate outcome of the case. However, jurors are human too. Some jurors will smile at you and scowl at your opponent. Some will be up on their seat listening to your cross and sitting back with arms folded during the direct. If the jury is allowed to take notes, you should watch who is taking the notes and when they are writing. I, for one, like the jury taking notes. I think it allows for a window into their souls. This is rarely used in upstate New York, but consider asking for this tool in your next trial. The process allows the jurors questions to be fielded by the Court and counsel at the end of the examination. All of the parties concerned get to immediately know whether your best work was fully understood by the jury as a whole. They also tell you what they think is important, which may not be what you think is important.

Observing the witness is also critical. I counsel all of my witnesses to keep their hands folded together on their laps during testimony. Watching a witnesses' hands fidget is a simple way of knowing how nervous they are. Listening to their voice certainly is a way of hearing the stress they are under.

Are they sweating? Are they turning red? Are their eyes darting away from you and the jury when they answer? Be mindful of all these signs, as they may give you the ability to turn up the heat much earlier than you planned or to incorporate you observation into a question, such as,

> CE: Sir, would you like some water? Are you nervous? Please relax, as there should be no concern in telling the truth.

H. **Tone of Voice.**

Raising or lowering one's voice is an effective skill in cross-examination. Be careful not to yell or unnecessarily boom at a witness. If you lower your voice, make sure it remains audible to the jury and the Court reporter, at least. If accused by the Court of unnecessarily raising or lowering your voice, make sure you apologize immediately to both the Court and the jury and endeavor to avoid the sin in the future.

Inflections in your questions are also helpful. When questioning the judgment or observation of a witness a tone of skepticism can be inserted. Often, the witness will pick up on your skepticism and may question their judgment for the jury. For example,

> CE: Sir, you indicated on direct that your observation of the car was that it was going about thirty miles per hour before the accident. Is that your best estimate? (Skeptic tone inferred)
> W: Well, he might have been going between twenty and thirty. I really don't know. I'm not a very good judge of speed.

I. **Attitude is Everything.**

We have discussed the goal of owning the courtroom. This may include the way you carry and present yourself in the courtroom to the jury and witness. Obviously, you want to have confidence, but not at the risk of offending others. For example, in a wrongful death case or where the Plaintiff has been seriously injured, it is of no use to ignore the elephant in the courtroom. Consideration should be given to approaching a witness such as a family member in the death case early in your cross-examination and saying,

> CE: Mrs. Jones, let me first say on behalf of my client, we are truly sorry for your loss, but you understand that I must ask you a few questions.

In a serious case, the attorney should take a serious tone if you are the Plaintiff. Often, I see Plaintiff's counsel joking or smiling at down-time during the case. Occasionally, opposing counsel cannot resist a pun or joke during the examination of a witness. If you are asking the jury to take the case seriously, make sure that you keep the tone that you desire during your examination. On the other hand, you may want to consider changing the tone of the case. Again, be mindful of the Court and jury. Some Judges take to the Bench and like to start the morning with some quip or light observation about the weather or the big game the night before. If you see the jury respond to this, you may want to pick up on this during your examination and work into the start of your cross something about how terrible the weather is. This can

help you distinguish yourself from the out-of-town witness or attorney. If the jury knows that the flag on the snow pile in Oswego does not reach the ground until July 4th each year or that Syracuse is the number one ranked basketball team in the country, you will then have made a friend when you weave those items into your examination. You will see from the jury who is nodding and who is not. Know your friends on the jury and attempt to play to them. If the jurors appear to be laughing and joking outside of the courtroom, they may not be taking the case as seriously as the Plaintiff's counsel may want them to. This can be a good sign. It could help you when you make objections, on cross or in your summation.

J. Don't Sweat the Small Points.

Some attorneys cannot resist chasing the witness down on small, inconsequential errors in their testimony. Technical defects such as impeaching the witness on a deposition answer where the witness said that the car was going twenty-sight miles an hour instead of twenty-nine on direct is not worthy of pursuit.

Similarly, avoid arguing with the witness. If you are confronted by an angry witness that argues with you and is ready to pick a fight, seek to harness the witnesses' anger and use it to your benefit. If the witness insists that he or she answered a question on direct a certain way and you disagree, look at the jury and see if they have decided the matter in your favor. We have previously addressed getting the witnesses' quotations correct. This is when you may pick an argument with a witness when you miss-quote them.

If the witness is bull-headed and cannot be led, consider letting the jury see the witness for who he or she is. An opinionated, biased, intractable human being. We all know people like that and the jury can certainly assess the credibility of such a witness readily.

K. When to Fish.

Of course, every rule has its exceptions. When we previously discussed never asking the witness "why?" the perils of the response were made clear. However, every trial attorney has had or seen when intuition and feel lead you down the path where you ask one or two more questions than would normally be prudent. I cannot provide you any rule here. This is clearly one of the skills that are innate. Using another sports analogy, it is akin to the batter guessing that the pitcher is going to throw a curve ball in a key situation. If the batter guesses wrong, he looks silly. If he guesses right, then it could be a home run. Trial lawyers are often referred to as gunfighters. It is a high risk and high reward business. Unfortunately, though, ones reputation is often built on the last verdict you took.

If you fish, no when to cut bait. As we have discussed, watch the witness and see what makes him or her fidget. Perhaps you have struck a nerve with a question. You may want to probe further to see if the nerve keeps reacting. Perhaps it is a glance from the witness to opposing counsel or to someone in the audience.

Fishing should not be a desperate ploy. It should be based on something you see or feel. If opposing counsel has fished and come up empty,

it will certainly be something that you would take advantage of in your summation. Use all your tools and skills so that when you start to fish, you are in an area where the fish are biting.

L. <u>Know When to Quit.</u>

As the old Kenny Rogers song goes, "Know When to Hold 'Em and Know When to Fold 'Em". Earlier, when discussing the "silent cross", I wrote that as important to deciding when not to ask a question, is the decision of knowing when to stop asking questions. We have discussed trying to finish on a high if at all possible. Sometimes all has gone wrong and you are bleeding in front of the jury. The witness has beaten you to a pulp. That cross-examination was a disaster and one to forget. Now it's time to move on. Do not make matters worse by asking more questions.

We have also discussed knowing when to quit in consideration of seeking to have the witness bolster your case. If you have uncovered a gem of a response during cross, consider the effort to polish and cut the gem in front of the jury versus just letting it be what it is, a gem. Consider,

> CE: So you didn't hear or see anything that my client did during this transaction?
> W: I don't think so. I don't recall.
> CE: Are you certain about that?
> W: Yeah, pretty certain.
> CE: So you didn't hear anything (booming voice) at all?
> W: Well, nothing except for when your client said that he would meet the Co-Defendant later to split up the loot.

Remember, as we discussed, the witness is often nervous and new to the courtroom. Many of us have tried to prepared witnesses who are less than high school graduates or have diminished mental faculties. The answer you get the first time might be the best one you get so dipping into the well three times may not produce a better response, in fact, it may turn on you one hundred and eighty degrees.

In a true story told to me by a friend, he was cross-examining the Defendant's expert physician and noticed during direct that the witness had taken five years to complete medical school and not the usual four. He fished successfully and learned that the witness conceded under oath that he had cheated during his first year of school and was asked to leave. Instead of leaving the golden nugget alone and moving on, he couldn't resist and asked the next question,

> CE: So, doctor, after you were thrown out of medical school for cheating, what did you do?
> W: Well I re-evaluated my life and realized that shortcuts were never the answer to anything. I studied and re-applied to medical school and was admitted the next fall and graduated with honors.

The nugget just became a little tarnished with the answer.

CONCLUSION

When I started in practice, which does not seem all that long ago, I heard from the old-timers that trial attorneys would cut their teeth on the small cases and learn in the courtroom their stock in trade. However, as time has progressed, trials have become more and more expensive. Clients consider less risky arbitrations or mediations to resolve their conflicts. Many cases are tried if not the week before trial, then at the courthouse steps or after jury selection. As a result, the opportunity to practice is greatly reduced.

When I was in college, I had an internship where the lawyer I was working for told me to go over to the courthouse and try to find a trial to watch. Although there are not as many civil trials to watch as there once was, there are still a number of criminal trials on any given day.

Clients rarely want you to practice on their case. In the absence of trials, it may be helpful to hone your skills at depositions. Even if you do not have a jury trial, consider using some of these skills when available in a non-jury setting, perhaps in Family Court or Small Claims Court. Watch what works and what does not.

The young attorney will have a harder go of it than his older peers. If you are not able to participate in moot court competitions at law school and want to jump into the courtroom, you may have to jump right into the deep end. However, I certainly recommend that if you can find a trial to sit in on as co-counsel or to find a trial attorney in town that has a case coming up and would

allow you to shadow him or her, you do so. Even if you cannot do that, put some popcorn in the microwave and rent “My Cousin Vinny”.