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I. INTEGRATION OF GOALS ON WITNESS EXAMINATION

A. CONTROL IN CROSS EXAMINATION

No skill of the trial advocate epitomizes adversarial confrontation as dramatically or significantly as that of cross-examination. An ancient legal maxim states that there is never an outcome of a cause contested that is not mainly dependent on the advocate's skill in cross-examination.

Over the centuries of testing the veracity of witnesses by cross-examination, from Socrates' masterful questioning of his accuser Miletus through the trials that fill courtrooms today, the skills required of the advocate have developed into principles that can be learned, practiced, and mastered by the diligent advocate. The timeless nature of the adversarial skills required of the cross-examiner was recognized by the eminent New York trial lawyer, Francis Wellman, 90 years ago in his excellent treatise on the Art of Cross-Examination:

> It requires the greatest ingenuity; a habit of logical thought; clearness of perception in general; infinite patience and self-control; power to read men's minds intuitively, to judge their characters by their faces, to appreciate their motives; ability to act with force and precision; a masterful knowledge of the subject matter itself; and extreme caution; and, above all, the instinct to discover the weak point in the witness under examination.[1]

Consequently, cross-examination is the most difficult of the adversarial skills to acquire. Once mastered, however, it is also the most significant skill, since it is from the crucible of cross-examination that truth most often emerges. As with all significant skills, mastery of the basic principles and techniques must combine with hard-earned experience to mold the neophyte into a seasoned cross-examiner. The purpose of this chapter is to present an overview of several principles and techniques of cross-examination that have been passed to our generation from the master advocates who have preceded us.

B. SILENT CROSS-EXAMINATION

There are many instances when the most brilliant cross-examination consists of "Thank you, your Honor, but it is not necessary to cross-examine this witness." A skilled advocate will recognize those instances and overcome the compulsion to cross-examine every witness. The categories you should carefully consider for the silent cross-examination technique include the scope of cross-examination permitted under the rules, the harmless witness, the unimpeachable witness, avoidance of the baited trap, avoidance of unnecessary reiteration, and avoidance of improper motives to cross-examine.

1. Scope

The seminal point in preparing and conducting cross-examination is a clear understanding of the rules controlling the scope of permissible cross-examination in the particular court in which the case is to be tried. A significant disparity exists between the restrictive federal rule and the common law rule regarding the scope of permissible cross-examination. The common law rule, which is retained in many state courts, regards cross-examination as the acid test of the truth and affords the parties a wide latitude in the cross-examination of an adverse witness. This rule permits counsel to question the witness on any subject relevant to the dispute and does not restrict the scope of cross-examination to matters on which the witness was questioned on direct.

The restrictive rule, usually referred to as the federal rule, greatly reduces the effectiveness of cross-examination as an adversarial weapon by limiting the scope of cross-examination to the same subject matter as the direct examination and matters relating to the witness's credibility. This rule requires the cross-examiner to call the witness as part of his own case if he wants to range farther afield. The resulting loss of the right to ask leading questions on the new subject matter greatly reduces counsel's opportunity for an in-depth cross-examination in the professed search for "the whole truth and nothing but the truth." As adopted, Federal Rule of Evidence 611(b) provides:

> Scope of Cross-Examination
> Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The Court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.[2]

Additionally, Federal Rule of Evidence 611(a) gives the court wide latitude in controlling the mode and order of interrogating witnesses and presenting evidence "so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

The restrictive federal rule requires the cross-examiner to assess the damage done by opposing counsel during direct examination and weigh even more carefully the critical decision of whether to cross-examine. A cross-examiner confined by the restrictive rule risks re-emphasizing the harmful effects of the direct examination without the opportunity for a collateral attack to discredit or impeach the witness.

2. The Harmless Witness

When a witness has not hurt your case, there is little to be gained and potentially much to be lost by cross-examining that witness. The witness who was ineffective during direct testimony may recoup during cross-examination and offer testimony that is even more damaging to your case because it emerges on cross-examination. Additionally, by cross-examining, you give opposing counsel the opportunity to redirect, rehabilitate the witness, and elicit adverse testimony. The potential for scoring points during cross must be weighed against the potential for losing points on redirect. And when you consider that opposing counsel on redirect will be dealing with a cooperative witness, cross-examination of the harmless witness becomes an option to avoid.

3. The Unimpeachable Witness

You will encounter witnesses who are totally unimpeachable, who are giving factual accounts and honest testimony, and who are not subject to any legitimate cross-examination. If you can elicit no evidence on cross-examination to either bolster the plaintiff's case or hinder the defendant's case, do not give the unimpeachable witness the opportunity to reiterate the damaging testimony, either on cross or redirect.

4. The Baited Trap

When an opposing witness fails to testify on direct examination to a known, important fact that is detrimental to your case, you should be alert to the possibility of a baited trap. Opposing counsel may have chosen not to elicit the evidence on direct examination to allow the testimony to emerge during cross-examination, thereby giving it more impact and allowing the witness to score points against you. The theory is that such evidence, emerging adversely to the cross-examiner, will have a greater impact on the minds of the jurors than if elicited during direct examination.

You can deny your opponent this planned impact by either (1) avoiding the subject matter or (2) if otherwise appropriate, choosing not to cross-examine, thereby also denying opposing counsel the opportunity to elicit the evidence on redirect.

5. Unnecessary Reiteration

If, on examination by opposing counsel, a witness has testified unfavorably to your opponent, you will be strongly tempted to elicit the same testimony on cross-examination to reiterate it for the jury. This should be avoided since such cross-examination allows the witness to explain and thereby reduce or eliminate the effect of the adverse testimony. This is particularly true if there has been a recess between direct and cross-examination during which opposing counsel can tell the witness how to explain away the adverse testimony. Such repetitive cross-examination is wholly unnecessary--and precarious. The jury has heard the evidence; the testimony is in the record and can be typed by the court reporter and read to the jury during summation with the full impact and sanctity of "sworn testimony reduced to writing." Don't attempt a reiteration: it has minimal value, and you risk having the valuable summation material nullified by the witness's explanation. While it is true that opposing counsel may try to elicit an explanation on redirect, this effort will appear contrived and will not have the same ring of truth as the witness extricating herself on cross-examination.

6. Improper Motives for Cross-Examination

Avoid deciding to cross-examine to please your client, to attack a witness, or to maintain your aggressive posture in the eyes of the jury. Examination without a proper motive will justifiably rebound against you and will often alienate the judge and jury, all to the detriment of your client's case. Make your decisions on cross-examination tactically, based on a positive decision that testimony can be elicited from this witness that will either

bolster your client's case, diminish the opponent's case, or predicate summation. If these goals are not well served, you should seriously consider silent cross-examination, that is, "It is not necessary to question this witness, your Honor."

II. CROSS-EXAMINATION

A. GOALS OF CROSS-EXAMINATION

During direct examination, you must listen carefully to fully comprehend the substance of the adverse witness's testimony, watch the witness closely--particularly the eyes--and listen to the way the witness expresses himself. Attention to detail during direct examination is often the key to successful cross-examination.

If, during direct examination, you determine that cross-examination is necessary, conduct a quick damage assessment from the perspective of the jury--keeping clearly in focus that the jurors are the sole judges of factual disputes, the credibility of the witnesses, and the amount of damages to be awarded. Approach cross-examination with three principle goals: to prejudice the opponent's case, to bolster your case, and to predicate your summation.

1. Prejudice Opponent's Case

Three primary approaches to prejudicing the opponent's case on cross-examination are to discredit the witness, to highlight error or confusion in the witness's story, and to bolster your case.

a. Demonstrate Bias of the Witness

As part of the preparation for trial, you should investigate the background of every potential witness to discover information that may be useful to mitigate the impact of the witness's testimony. Depending on the veracity and integrity of the witness, your attack may range from demonstrating a bias of the witness to total impeachment. In most jurisdictions, pretrial discovery of information with which to reduce or destroy the credibility of potential adverse witnesses is permissible. Under these procedures, surprise witnesses should be a relic of the past. However, you should directly attack the character of a witness only when the evidence is conclusive, and then only as a last resort. An attack on character is, by far, the most dangerous form of impeachment. The backlash resulting from a failed impeachment attempt can damage your case.

A less dangerous way to discredit the witness is to elicit facts that demonstrate bias or prejudice, for example, if the witness is a relative, close friend, co-worker, or professional colleague of the defendant. Establishing any type of pecuniary interest in the outcome of the litigation will diminish the witness's credibility in direct proportion to the amount and type of the witness's financial interest. Simply stated, seek to elicit anything that casts doubt on the witness's objectivity.

Questioning a witness about bias is a double-edged sword. A grueling examination on the witness's relationship to the opposing party that fails to establish bias may augment, rather than diminish, the witness's credibility. You must seek a balance between timidity and reckless aggression during cross-examination, being mindful that most of the wounds you can suffer during cross-examination are self-inflicted.

b. Highlight Error or Confusion

The most common objective of cross-examination is to diminish the witness's reliability by highlighting errors or confusion in the testimony. You can accomplish this objective by emphasizing inherent improbabilities in the testimony, conflicts with common sense, internal conflict and confusion within the testimony, the witness's limited access to the facts, and, most importantly, prior inconsistent statements or testimony given by the witness.

At no point in cross-examination is your preparation more important than when you attempt to impeach a witness by bringing out prior inconsistent statements. Most modern rules of civil procedure provide ample opportunity to discover statements such as depositions, signed statements, sworn statements, sworn answers to interrogatories, and prior testimony in other proceedings. Before the trial, you must personally read all prior statements of the witness and cross-index every deposition by name and evidentiary topic. Thus prepared, you can listen very attentively during direct examination of the witness and readily recognize conflicts in testimony when they occur.

When the witness is passed for cross-examination, carefully consider the most auspicious time for

impeachment. Then take the witness back over the testimony given during direct to fix the point of impeachment clearly in the minds of the jurors. Ask the witness whether he has ever testified any differently. The witness may then respond with "yes," "no," or "I don't remember." If the witness says yes, you may ask the witness about the time and place of the testimony and its nature (for example, sworn testimony has the same effect as testimony in open court, and it is given under the same oath the witness took before testifying inconsistently on direct examination).

At this point you must carefully consider the relationship between the witness and the jury. With a witness who has made a mistake and freely admits it, your object should be to discredit rather than to destroy. Your attempt to pounce on the witness with such questions as "You were sworn to tell the truth both times and you gave different testimony, so you've lied under oath, haven't you?" may result in disaster. Americans love an underdog, and so do American juries. Jurors occupy a position in court much more closely aligned to that of the witness than to that of the attorney, and they will forgive the witness for what appears to be an honest and admitted mistake. Your unsuccessful "attack" on the witness will invariably lead the jury to side with the witness at great expense to your client and case.

Consider first that opposing counsel is aware of the prior sworn testimony and should have prepared the witness to respond to the cross-examination. This will explain a witness's open admission of having testified differently. In this situation, the witness and counsel have probably prepared an acceptable reason as to why the witness is testifying differently: "Since I testified on deposition, I have learned additional factors that cause me to testify differently here today. These factors include . . . ." At this point, since you asked the open-ended question of whether the witness lied under oath, the witness may detail all of the reasons why she changed her testimony.

It is essential to learn to distinguish between discrediting and impeaching a witness. It is part of the art of cross-examination to determine how far to go in attacking a witness who has given inconsistent testimony. A few factors that you must consider include the overall effect the witness has had on the jury; whether the witness is a party, a hired expert, a partisan, or a neutral observer; and the significance of the evidentiary point on which the witness is being discredited. Common sense dictates that an impeaching statement must be on a matter of substance. The court and jury have little patience with a lawyer who attempts to discredit a witness by bringing up immaterial, minor inconsistencies. The rule is impeach; don't quibble.

The technique of cross-examining through prior inconsistent statements is particularly valuable when confronting opposing experts, especially hired guns or in-house experts in products liability cases who travel the country testifying similarly in case after case. Before trial, you should make every effort to gather all prior testimony of such an expert, as well as all books and articles authored by the expert. Once you have accumulated this material, you must read it all thoroughly. Successful cross-examination of an expert using the expert's own articles or prior sworn testimony as weapons is another of the art forms of the skill of cross-examination.

c. Impeach the Witness

If the witness, confronted with your question "Have you ever testified any differently?" answers "no," the stage is set for the most interesting and dramatic aspect of the trial: the verbal jousting between you and the witness as you attempt to impeach the witness. However, unless you handle the situation properly, the witness may escape impeachment and leave you looking foolish in the eyes of the jury, thereby damaging your client's case. Your absolute control over the questioning is essential to impeachment. The complete avoidance of open-ended questions is crucial. In the ideal scenario, you will control the witness through a series of carefully crafted questions that, as the jury watches, lead inescapably to the lie emerging from the witness's lips.

When the witness responds "no" to the inquiry as to whether he has ever testified any differently, you must meet the predicate for impeachment by identifying the time, place, and circumstances of the prior inconsistent statement. At this point, you should approach the witness and stand next to the witness box so as to cause the witness to turn and directly face the jury. Then inquire, "Mr. Jones, on this previous sworn testimony I asked you the following question, `What color was the light as you entered the intersection?' Please read to the jury your answer under oath at that time." Hold the deposition in front of the witness so that the witness is looking down to read the answer, and the jury has the opportunity to look directly into the witness's eyes as he repeats the prior sworn inconsistent testimony. You must retain control at this point by allowing the witness to read only the specific answer from the deposition and not give any further explanation.

If this is done properly, the jury is now fully aware that the witness has given prior inconsistent sworn testimony, and the witness is successfully impeached. At this point, many impeachments are lost by counsel asking one question too many: an open-ended question or an attempt to reiterate the impeachment material, either of which may allow the witness to explain the inconsistencies and nullify the impeachment.

One impeachment, on a major point, is all that is needed to destroy the witness's credibility in the eyes of the jury. After the witness has read the impeaching material from the deposition, you should remove the deposition, leaving the impeached witness directly facing the jury. You should pause and look further at the deposition as if reviewing the material; leave the witness for as long a pause as possible after the impeachment with the jury looking directly into the witness's eyes. Then return slowly to counsel table and retrieve other materials for questioning, taking as long as possible before the next question, possibly inquiring of the court, "May I have a moment, your Honor?" Judges resent witnesses who lie under oath in their courts and will generally be very cooperative at this point. This leaves the impeached witness on the hot seat under the intense scrutiny of the judge and jury with no place to hide.

The entire courtroom is now focused for your next question of this impeached witness. The pause after impeachment, in addition to allowing the jurors to fully appreciate the significance of what they have observed, piques their interest as to the next line of inquiry. It is absolutely essential, to maintain control of the witness and to protect the impeachment that has occurred, that two things occur in the next line of questioning: (1) you should move completely away from the topic on which the witness was just impeached, and (2) you should maximize the witness's loss of credibility before the jury by cross-examining the witness on the most important outcome-determinative issues in the case. The reason for moving away from the subject of impeachment is so that the witness has absolutely no opportunity in subsequent questions to regroup and explain away the basis of the impeachment. The reason for moving to the most outcome-determinative issues in the case on which this witness is able to testify is that the jury's interest is at a peak and the witness's credibility is in a valley. Therefore, you should be able to maximize the effect of impeachment by controlling the further examination of the impeached witness and eliciting favorable testimony on the outcome-determinative disputes. The witness may testify more favorably on the outcome-determinative issues for fear of being impeached again. If the witness refuses to cooperate with you and shades the testimony in favor of your opponent, the jury will not accept the testimony since the witness was just impeached.

Be aware that total impeachment of a witness is rare. Therefore, the lesser goals of discrediting the witness, highlighting confusion, and showing bias or the inability of the witness to testify accurately may be the small victories that cumulatively weaken the jury's faith in the witness's testimony. While total impeachment is desirable, you should not overlook the importance of the cumulative effect of numerous small disparities, as long as they are directly relevant to material issues in the case.

2. Bolstering the Plaintiff's Case

Not all cross-examination is directed toward discrediting or impeaching a witness. As you prepare for the cross-examination of each witness, carefully consider every evidentiary subject on which the witness is qualified to testify that will materially bolster the plaintiff's case. You must view adverse witnesses not only as objects of confrontation and impeachment but also as potential ratifiers of important aspects of the plaintiff's case. At the outset of the cross-examination you should, whenever possible, secure positive agreements, enhance the credibility of the plaintiff's witness, and verify the plaintiff's theory of the case through adverse witnesses.

a. Secure Positive Agreements

Frequently there are many strong points in the plaintiff's case that cannot be denied by the opposing side. When preparing for cross-examination of each adverse witness, include each line of questioning that clearly bolsters the plaintiff's case and that cannot be denied by the defendant's witnesses. For example, if the plaintiff is catastrophically injured, such as a paraplegic, the witnesses for the defendant (the defendant doctor in a medical negligence case) cannot deny the nature, extent, and permanence of the injury; the plaintiff's physical pain and suffering, mental anguish, physical disability, loss of consortium, loss of society and companionship; or the extensive future lifetime disability the plaintiff will suffer.

In a common law jurisdiction, or if opposing counsel raises the subject on direct in a restrictive or federal

jurisdiction, each witness called by the defense may become a damages witness for the plaintiff. For example, a defendant doctor called on the medical causation or negligence issue in a medical negligence case can become a powerful witness for the plaintiff on each of these damages issues. The more reluctance the doctor demonstrates in offering such favorable testimony, the more impact the testimony will have on the jury. This type of cross-examination, besides bolstering the plaintiff's case, predicates a persuasive argument in summation: "Even the defendant's witnesses cannot deny the devastating nature of the permanent injuries suffered by the plaintiff."

This is where the distinction between the restrictive federal rule and permissive common law cross-examination becomes highly significant. The foregoing cross would not be allowed under the federal rules unless the doctor testified regarding plaintiff's damages on direct. Therefore, you must listen attentively during direct examination for the opponent to "open the door" for areas of cross-examination.

Under the common law rule, the witness may be examined on any issue relevant to the case. Many lawyers believe that the common law rule leads the witness closer to "the truth, the whole truth, and nothing but the truth." The common law rule can provide a no-lose situation for the cross-examiner: either the adverse witness ratifies the strengths of the plaintiff's case on cross-examination or the witness denies those matters that can easily be proven and reduces her own credibility in the eyes of the jury.

b. Enhance the Plaintiff's Witnesses

Consider whether adverse witnesses can be used effectively during cross-examination to enhance the qualifications, integrity, and credibility of the plaintiff's witnesses. For example, if in an orthopedic-injury case the defendant's medical witness is a non-board-certified general practitioner and the plaintiff's medical witness is a board-certified orthopedic surgeon, the defendant's general practitioner will of necessity acknowledge that the board-certified orthopedic specialist is more qualified both to treat and to testify about the plaintiff's treatment.

The general practitioner can be called on to give a thorough explanation of board certification: how it is acquired, how it is a recognition by a body of medical peers as to the skill and expertise of the orthopedic surgeon, how it represents a level of skill far greater than the mere designation of medical doctor, and how this is the particular area of medical expertise that is required for the treatment of the plaintiff. If the fact has been established on deposition before trial, the general practitioner may also testify as to the orthopedic surgeon's high standing and general reputation in the medical community as an outstanding specialist in the treatment of the particular type of injury with which the plaintiff is afflicted. This type of enhancement of the plaintiff's witnesses through effective cross-examination of the opposing expert sets up a very effective summation: you will be able to compare the conflicting testimony and qualifications of the two doctors.

If the general practitioner refuses to acknowledge that a board-certified orthopedic surgeon is more qualified to treat an orthopedic injury than a general practitioner, the jury will view this response as indicating bias and will doubt the credibility of the general practitioner. Properly utilized, this can be a win-win line of questioning for the plaintiff.

c. Verify the Plaintiff's Theory as a Reasonable Alternative

Another cross-examination technique used to bolster the plaintiff's case is having the opposing experts acknowledge that the plaintiff's theory is a reasonable alternative theory. It is not necessary that the experts admit that the plaintiff's theory applies to this case as long as they will acknowledge that the plaintiff's theory is viable. The plaintiff's experts then provide the testimony that the plaintiff's theory is the correct theory in the case and the plaintiff's summation is once again enhanced by admissions from opposing witnesses.

d. Predicate the Plaintiff's Summation

Eloquent summations are the progeny of diligent preparation and effective witness examination. No jewel shines more brilliantly in summation than the diamond that emerges successfully during cross-examination from the black coal of adversarial confrontation.

You must plan the examination of witnesses with the understanding that testimony elicited on cross-examination is more memorable to the jury and carries more weight than direct testimony. Jurors will cling more diligently to the conclusions they reach on their own than to those that were spoon-fed to them on direct. Therefore, given the choice between proving an important fact on direct examination of a plaintiff's witness or allowing it to

emerge during cross-examination of the opponent's witnesses, consider that the jurors are more attentive during cross because of its adversarial nature and will give more weight to such testimony. You may then reiterate the evidence through direct examination of your own witnesses and remind the jury on summation that the evidence was elicited first from the adverse witness. It is extremely effective on summation to remind the jury that several defense witnesses gave various testimony that bolstered the plaintiff's case, recognized the qualifications and integrity of the plaintiff's witnesses, and verified the plaintiff's theory as a viable alternative theory in the case.

B. PLANNING AND PREPARATION OF CROSS-EXAMINATION

Extemporaneous brilliance on cross-examination increases in direct proportion to extreme diligence in planning and preparation. A good cross-examination is seldom the result of chance. The more spontaneous a cross-examination seems, the more likely it is that counsel carefully planned the examination well in advance of trial.

Cross-examination of a witness generally falls into two categories: offensive and defensive. In an offensive cross-examination, you can establish salient points that advance your client's case. A defensive cross-examination is usually directed at blunting the effect of adverse testimony and at diminishing the opponent's case.

One technique of cross-examination is to write out every question in advance. This may be a worthwhile tool to give self-confidence to the neophyte, but, with experience, a more flexible approach is to select the subject matter to be covered and the points to be made under each subject and to use them as a checklist. The totally scripted cross-examination appears stilted and makes it more difficult to immediately accommodate the information derived from the witness during the examination. The ability to assimilate the line of questioning to maximize use of information received in answers is a vital skill of the master cross-examiner that derives from careful planning and experience under fire.

As part of your preparation of the offensive cross-examination, prepare a complete list of subjects about which the witness cannot avoid giving favorable testimony for the plaintiff. These might include, in a serious injury case, acknowledgement of the nature and extent of the plaintiff's injury and acknowledgement of the extensive damages suffered by the plaintiff.

The offensive cross-examination serves several major purposes. It bolsters the plaintiff's case through the use of defense witnesses, breaks the rhythm of the favorable testimony with which defendant's counsel probably concluded the direct examination, and catches the defendant's witness--who is expecting a hostile cross-examination--off guard by beginning with areas in which the examiner and the witness are in agreement. Also, by beginning with a series of admissions by the defense witness, you attain a big opening on cross-examination and immediately gain control of the witness and the courtroom. This is consistent with the rule of primacy.

C. CONDUCTING THE EXAMINATION

The three most important aspects of conducting cross-examination are control, control, and control: of the witness, the evidence, and the entire scenario in the courtroom. The rules of primacy and recency state respectively that the jury will believe the credible testimony they hear first and remember the longest that which they hear last. Therefore it is essential in planning cross-examination to ensure a strong opening and finish on the strongest point possible. Technique is crucial. Open-ended questions such as "why" or "please explain," which allow the witness to gain control of the answer, must be avoided. Reiteration of the witness's testimony on direct is disastrous and should also be avoided. Repetition of each answer as a preface to the next question breaks the rhythm of the cross, and you must be careful not to fall into such habits as beginning each question with "now, let me ask you this question . . . ."

1. Primacy--Use a Strong Opening

Consistent with the rule of primacy, you should seek a strong opening in your cross-examination; that is, you should begin cross-examination with a point on which you are certain you can score. You may accomplish this by eliciting testimony to bolster your case from the list of points with which the witness must agree, as discussed above. Beginning cross-examination of the witness on the last matter covered in direct is generally weak and inefficient. This subject matter is clearest in the witness's mind, most logically related to the body of the witness's testimony, and, if mishandled, will merely appear as a continuation of the direct examination rather than as the dramatic change the cross-examiner should seek to achieve. If there is a line of questioning with which you can obtain several agreements from the witness to bolster your case, pursue this line before discrediting or impeaching the witness. It is a quantum leap to ask the jurors to reject the witness's testimony that is favorable to the defendant because the

witness has been discredited and then to ask them to accept the witness's testimony that bolsters the plaintiff's case.

2. Use Signposts

Ideally, in preparing cross-examination, you should frame the individual questions in the context of their relationship to a specific dispute or issue that the jury will be called on to resolve. You may establish the context of the question with the jury by using signposts during cross-examination to indicate the issues to which questions relate. A signpost is an indicator at the beginning of a question or series of questions that shows the jury the direction you are taking and the issue to which the question relates, such as the following:

Doctor, with respect to the physical pain suffered by Mr. Jones, the muscle spasm that you felt in Mr. Jones's back is an objective sign of the presence of pain, isn't it?

The signpost "with respect to the physical pain suffered by Mr. Jones" alerts the jurors that the following question will relate to their duty to assess the amount of damages to be awarded to compensate Mr. Jones for the physical pain arising from the injury. During voir dire examination and opening statement, the jurors will have been educated that their role in the trial includes assessing damages for physical pain and suffering. The signpost provides the jury with a framework for understanding the significance of the question and answer. Signposts are particularly useful in helping the jury follow the flow of the testimony when you shift from one subject to another.

Obviously, if it would be advantageous to you for the witness not to follow shifts in direction of the cross-examination, signposts should be avoided.

3. Be Brief in Cross-Examination

Numerous legal maxims have evolved through the ages that lead to one overall proposition: brevity in cross-examination is important. Ask no unimportant questions on cross-examination. A question that does not advance your case hinders it. As cross-examination begins, you have the renewed attention of the jurors, who are hoping for an interesting confrontation. However, being granted the gift of a hopeful jury's attention, you must retain that attention by asking poignant, significant, and relevant questions, and by scoring points consistently during the examination. A cross-examiner is only as good as her last series of questions. The jury will not remember a great deal of the testimony of any one witness. The typical personal injury lawsuit lasts several days, and jurors remember only the high spots of the testimony of any witness. Therefore the cross-examiner should, if possible, limit cross to those few points or areas that are critical.

Some cross-examiners hide the key questions by presenting them in the midst of a lengthy cross-examination. They hope to camouflage important questions in the midst of many unimportant questions. While you may surprise the witness with this tactic, the value of the admission may be lost on the jurors, who by the end of cross-examination will have become confused, bored, or totally anesthetized.

Under some circumstances, you have no choice but to conduct a seemingly endless cross-examination in an effort to elicit significant admissions. When this occurs, if you believe that significant admissions went over the head of the jury, have the court reporter transcribe the pertinent portions of the testimony. With this transcript, you can convert the seemingly insignificant admissions into a weapon during summation. This way there can be no question in the minds of the jurors as to what was actually said by the witness.

4. Recency--Time the Examination Properly

Recency, the principle that the jurors will remember longest that which they hear last, has multiple applications during trial. You should end each cross-examination on a very strong point. However, it is also important to finish each coffee and lunch break, each day's testimony, and the case as a whole with very significant points. Thus, you must be constantly aware not only of the content of cross-examination but also of the timing of the questioning. It is imperative that you not end the cross-examination lamely on a matter of little concern. At all cost, avoid closing cross with the witness in control and you discomfited. If you reach a climactic point--such as impeachment of the witness or the witness's admission of a vital point--weigh the significance of the remaining material against the importance of an immediate strong finish, with the clock as one factor in the equation.

D. MAINTAINING CONTROL

1. Use Leading Questions

The leading question is the primary weapon in the arsenal with which the cross-examiner controls the witness. Since witness control in the sine qua non of successful cross-examination, effective use of the leading question is a vital skill. The leading question allows you to couch each question in terms of your theory of the lawsuit and, when properly framed, limits the response of the witness.

2. Avoid Overuse

Avoid overusing leading questions. If you use too many, the jurors may get the impression that you are testifying rather than the witness. Also avoid the appearance that, because you will not allow the witness to fully answer the question, the witness is being treated unfairly. Explain to the witness that his counsel can permit him to fully explain his answer during redirect examination but that it is important on cross-examination to follow the rules and simply affirm or deny your questions.

3. Elicit "Yes" or "No"

The leading question contains within itself the answer that the examiner seeks, thus requiring only a ratification from the witness. Leading questions should be couched in terms of the examiner's theory of the lawsuit so that an affirmative answer advances the plaintiff's cause. For example, the leading question, "as you approached the intersection the signal light was red, wasn't it, Mr. Jones?" contains the answer that the questioner seeks, that the light was red. Mr. Jones need answer only yes or no with no necessity to expound further on the answer.

More significantly, the question is also couched in terms of the plaintiff's theory of the lawsuit, that Mr. Jones was negligent in running a red light and in causing the accident and resulting injuries to the plaintiff.

Skillful phrasing of leading questions, carefully couched in terms of the plaintiff's theory of the case, is essential to several aspects of cross-examination: the witness is limited to yes or no answers, the testimony of the witness is controlled through avoidance of lengthy answers, the plaintiff's case is advanced through affirmative responses to leading questions, and tightly controlled leading questions are of extreme importance in maintaining control while discrediting or impeaching a witness.

4. Avoid Open-Ended Questions

The open-ended question is one that allows the witness to explain fully and often at length the answer to the examiner's question. The classic example of the catastrophically open-ended question is asking an expert, "How can you possibly have arrived at such an opinion?" In answering this question, the expert may testify at length as to every factor that played a part in forming the opinion. Such a recitation can only be disastrous to the cross-examiner's case. While there are no universal rules of witness examination, inquiries such as "why," "how," or "please explain" are almost invariably to be avoided.

5. Allow Re-Narration or Repetition Rarely

You may permit the witness to re-narrate or repeat an answer given on direct when you are trying to demonstrate that the witness has memorized the story and will tell the same story two, three, or more times in precisely the same words. Normally, a witness will not repeat a story verbatim unless it is memorized. However, few counsel will leave their witnesses open to this type of cross-examination. Another situation in which a witness may be encouraged on cross-examination to re-narrate is when the witness has told a story on direct that is so vulnerable that it can be totally destroyed. It must be emphasized, however, that such an approach is rarely indicated or justified.

6. Limit the Talkative or Evasive Witness

The cross-examiner frequently encounters witnesses who will not respond yes or no to leading questions but either insist on explaining every answer or evade answering the questions. Dealing with such witnesses creates problems, and there are two basic approaches to handling them. First, the cross-examiner can seek to enlist the aid of the judge in limiting the talkativeness or evasiveness of the witness. Faced with an unresponsive answer, the cross-examiner may move to strike the answer and request the court to admonish the witness to respond directly to the question.

When examining a witness who seeks to explain every answer, you may request the court to instruct the witness to limit answers during cross-examination to responses to the questions posed by the examiner and to further instruct that defense counsel, during redirect examination, will have a chance to bring out explanations.

The second approach is to allow the witness to duck, dodge, and explain, within certain limits. If the witness gives an unresponsive answer, ask the question again; if the answer is again unresponsive, ask the same question a third time. Then ask the "explainer" to limit answers to yes or no; explain that the witness will have a chance during redirect examination to explain the answers. Those examiners who do not seek to enlist the aid of the court in dealing with the problem witness and allow the witness to be unresponsive or evasive believe that the jurors will be able to detect the witness's lack of cooperation and candor and will draw their own adverse conclusions about the witness.

The choice between the two methods--invoking the power of the court or allowing the witness to appear evasive to the jury--should be decided based on your perception of the witness's relationship with the jury and the court and the significance of the subject matter of the testimony.

E. STYLE OF EXAMINATION

1. "Watch" the Case

One major premise on which master cross-examiners, past and present, agree is the importance of "watching" the case, particularly the witness. Counsel, with her face buried in a legal pad taking notes during direct examination of the opponent's witness, is missing many important elements of the case, including the witness's demeanor, opposing counsel's histrionics, the judge's body language, and the jury's reactions to the entire scenario. Never underestimate the importance of the trial judge, who is being closely observed by the jury and whose facial expression and body language can send vital and powerful messages to both the jury and counsel.

During cross-examination, it is crucial to watch the witness closely to determine the line of questioning that causes nervous responses, avoidance of eye contact, and changes in demeanor indicating a lack of confidence in the answers. It is often as essential for the cross-examiner to decipher the witness's body language as to hear the verbal answers. For example, if an expert witness is testifying confidently and with strong body language indicating a self-assured or arrogant attitude, you may decide that this is the proper point at which to impeach the witness--to increase the length of the witness's fall from the heights of arrogance to the pits of impeachment.

2. Listen to the Answers

It seems axiomatic to state that the cross-examiner should listen carefully to the answers from the witness. However, jurists and other observers of courtroom behavior advise that one of the most frequent mistakes of the cross-examiner is asking a well-planned question and immediately moving on to the next question while ignoring the witness's answer. Being so wrapped up in the questioning as to miss the effect, nuances, innuendos, and manner of delivery of the answer is a self-imposed trap for the nonobservant cross-examiner. The ability to assimilate the questioning to the answers is one of the hallmarks of a master cross-examiner.

3. Control Your Anger

One clear axiom for the cross-examiner is to hold your own temper while you lead the witness to lose his. Our precursors in ancient Greece were taught: "He who the Gods will destroy, first make angry." The concept that the cross-examiner must maintain control has broad applications, for example, control of the witness, the testimony, the atmosphere of the case, the theme development, and your own temper and demeanor.

4. Avoid Animosity

Fictional characterizations of cross-examination portray the lawyer as a relentless prober who storms about the courtroom pointing a finger at the terrified witness. In actual practice, the most effective cross-examination is usually conducted in a courteous and conciliatory manner. The witness is more likely to admit error to the courteous examiner with a friendly approach than to the hard-driving examiner who firms up the witness's opposition. Further, as the jurors look on cross-examination as an unequal contest--with the advantage on the side of the lawyer--the aggressive cross-examiner risks having the jurors disregard an admission because they feel that the examiner violated the rules of fair play in securing it. This is not to say that you should overlook or excuse conflicts; to the contrary, you must be tenacious in the pursuit of inaccuracies. You should merely seek to do your job without creating animosity between yourself and the witness. If the witness is caught in a lie, there is no need to emphasize that point to the jury during cross-examination by calling the witness a liar.

Never underestimate the collective wisdom of the jury to fully comprehend the impeachment; the jurors will

give more weight and cling tenaciously to discoveries they make on their own. Unless the impeachment is unequivocal and directly on a point that is highly relevant, the jury may sympathize with the witness whom they regard as being unduly berated on cross-examination by an overbearing attorney.

Cross-examination is most likely to be effective when it is conducted in a calm, rational, and unemotional manner, although righteous indignation, even controlled rage, may be indicated--and effective--in certain circumstances. While many hard-driving, savage cross-examiners have been successful, those who attempt to mimic this technique must exercise caution, for the technique can carry penalties. The quiet, calm, soft-spoken, yet confident and forceful examiner has an equal if not greater chance of being successful and does not risk alienating the jury.

5. Give Deference to the Court

You must treat the court with due deference at all times. If you convey animosity toward the court, the jury will be aware that you and the judge are in disagreement. The jurors will almost invariably assume that the judge is correct and that you are wrong, and your position will thereby be weakened in their all-important eyes. Additionally, the mandates of professionalism, which dictate the demeanor of the bench and bar, require you to pay due respect to the bench and those who occupy it.

However, deference to the court should not result in your failure to vigorously prosecute your client's claim to the fullest extent of the law. An advocate who allows the court to abuse its power to the detriment of her client's rights is flagrantly violating the duty to fully represent the client. It is essential to know the rules of court and fully exercise all your rights under those rules. In the event you disagree with the court, handle the conflict in a dignified and professional manner, such as "I appreciate that your Honor is performing your role as you perceive it, and I trust that the court will afford me the same courtesy as I proceed to represent my client's interests fully, within the parameters of the rules." Never be in the position of the counsel of whom the court inquired "Are you trying to show your contempt for this court?" and who replied "No, your Honor, I am doing my very best to conceal it."

6. Give Deference to the Witness

There is a vital distinction between discrediting the testimony and discrediting the witness. Unless the witness is a perjurer who can be clearly demonstrated to the jury as such, wise counsel will begin cross-examination by treating the witness deferentially. Only after careful probing demonstrates bias, lack of qualification, or other aspects that diminish the testimony of the witness are you free to directly attack the witness. At the outset of examination, the sympathies of the jury are invariably on the side of the witness, and jurors are quick to resent any unfounded discourtesy.

Jurors love the confrontation of advocate and witness when truth is tested in the crucible of cross-examination. Jurors are never more attentive than during a well-planned and executed cross-examination that draws from the witness a story or theory different from that which was given on direct examination. However, counsel takes no greater loss in the eyes of the jury than when, having viciously attacked a witness, the attack fails or when, having failed to successfully elicit favorable testimony, counsel places a false construction on the words of the witness to claim the victory that eluded him.

7. Country Bumpkin Versus Lawyer Expert

It is a matter of style for each individual lawyer to determine the appropriate persona to adopt in cross-examining each witness. The persona may vary from witness to witness or within the examination of the same witness. In a cross-examination of an annuity expert on deposition, you may appear to be totally ignorant of the subject matter and thereby lead the witness into overstating her position on direct examination at trial. Then, when you are suddenly sophisticated during cross-examination at trial, the witness is surprised and subject to dismantling because of her overstatements on direct examination.

If the witness did not overstate her position on direct, you may proceed with the poor-old-country-bumpkin routine during early cross-examination and lead the witness into overstating her position. You then shift into the lawyer-expert persona with full knowledge and fluid use of the technical terms of art for the purpose of discrediting or impeaching the witness. This technique is particularly useful with medical witnesses who virtually never perceive that the cross-examiner may be even more knowledgeable in certain areas of medicine than the medical witness.

Your adoption of a persona depends to a large extent on the makeup of the jury, the venue, the witness being

cross-examined, and the personality and style with which you are most comfortable.

8. Respect the Jury

A fascination with law pervades our society, and jurors enter the courtroom with preconceived notions of a trial derived from television, film, and theater dramas based on trials. In these versions of trial, the high point of confrontation and drama almost always occurs during cross-examination, and jurors watch cross-examination with an anticipation of high drama, or at least a few sparks. If you disappoint jurors with boring, repetitious, and meaningless cross-examination, you will find that the jury will respond in kind with a disappointing result for you and your client.

Jurors--who are captives in the jury box, unable to speak or express themselves--have nothing to do with their time but observe the most minute aspects of the protagonists in the drama that is unfolding before them and of which they are an integral part. Long before the advent of television, Francis Wellman, in his excellent and still timely treatise, The Art of Cross-Examination,[3] described the role of counsel and the relationship to the jury in a manner that remains viable today.

> It is the love of combat which every man possesses that fastens the attention of the jury upon the progress of the trial. The counsel who has a pleasant personality; who speaks with apparent frankness; who appears to be an earnest searcher after truth; who is courteous to those who testify against him; who avoids delaying constantly the progress of the trial by innumerable objections and exceptions to perhaps incompetent but harmless evidence; who seems to know what he is about and sits down when he has accomplished it, exhibiting a spirit of fair play on all occasions--he it is who creates an atmosphere in favor of the side which he represents, a powerful though unconscious influence with the jury in arriving at their verdict. Even if, owing to the weight of testimony, the verdict is against him, yet the amount will be far less than the client had schooled himself to expect.
>
> On the other hand, the lawyer who wearies the court and the jury with endless and pointless cross-examination; who is constantly losing his temper and showing his teeth to the witnesses; who wears a sour, anxious expression; who possesses a monotonous, rasping, penetrating voice; who presents a slovenly, unkempt personal appearance; who is prone to take unfair advantage of witness or counsel, and seems determined to win at all hazards--soon prejudices a jury against himself and the client he represents, entirely irrespective of the sworn testimony in the case.[4]

F. HANDLING OBJECTIONS

If during the course of cross-examination the court sustains opposing counsel's objection to some aspect of your cross-examination, you must proceed confidently and undeterred, without demonstrating the slightest sign of distress or anger. It is particularly crucial that you not demonstrate any hostility to the court, since the jury will almost invariably side with the court in matters involving disputes between the judge and counsel. You may effectively exercise damage control after having an objection sustained to a question on cross-examination by replying, "Thank you, your Honor, I'll rephrase the question." This conveys to the jury the understanding that the problem was the manner in which the question was phrased rather than the substantive content you are attempting to elicit.

G. CROSS TO COMPETENCE OF WITNESS

An essential skill for the cross-examiner is the ability to question the witness's legal competence either to testify as a lay witness or to render opinions as an expert.

1. Voir Dire Examination

The procedural mechanism for testing the competence of the witness to testify is to conduct a voir dire examination of the witness in the absence of the jury before the rendering of adverse testimony by the witness. While it is possible to get the judge to advise the jury to disregard testimony that the witness has just given, the practical effect of this is only to highlight such testimony. Therefore, you must examine each witness first in terms of whether the witness meets the legal requirements to qualify as a witness.

2. Legal Competence--Layperson

a. Age

There is no specified age at which an individual becomes competent to testify as a witness in a lawsuit. This is a matter purely within the discretion of the trial court, to be decided on a witness-by-witness basis. The underlying test generally applied is whether the court is satisfied that the witness is old enough to understand the oath and the significance of sworn testimony.

b. Non Compos Mentis

In certain types of cases, particularly closed-head injury traumas, there may be a question as to whether the plaintiff is too disabled to testify. This disability is based on the mental incapacity of the witness to understand the oath or to factually and accurately relate information to the jury. Or it may be due to a memory deficit that renders the plaintiff's testimony unreliable.

c. Qualifications--Expert

The competence and qualification of a witness to render an opinion in a case is predicated on the seminal finding by the court that the witness has expertise greater than that of the jury on a given subject and will aid the jury in rendering its decision in the case. Determining whether an individual is an expert is a matter within the discretion of the trial court. The threshold of expertise is generally very low and the court will generally rule that attacks on the competence to render an opinion go to the weight to be given the testimony rather than to its admissibility.

3. Direct Attack

a. Fallacies of Testimony

Effective cross-examination begins with the understanding that not every witness testifying for the opposition is automatically committing perjury. There are many witnesses who believe their testimony to be the truth and who testify with an honesty and sincerity which is impressive and persuasive to the jury. This can be very frustrating to counsel, armed with vast knowledge of the case, who believes that the witness is not testifying truthfully. However, it is essential in preparing to cross-examine such a witness to understand why the witness is testifying in this manner and to seek out the fallacies in the testimony.

The witness is testifying from personal knowledge of the facts. However, knowledge is the impression in the witness's mind and not the fact itself. You must understand that the witness is testifying from data acquired from two distinct sources: (1) the witness's sensory perceptions of sight, sound, touch, smell, and taste, and (2) the witness's conscious impressions based on personal experiences, bias, financial considerations, pride, motivation, loyalty, and personal character. It is for these reasons that two persons can witness the same event, experience the same sensory perceptions, testify completely differently regarding the events, and both feel that they are telling the truth.

Assume for example that the beating of a black teenager by a white police officer is witnessed by the mother of the teenager and the partner of the police officer. Each witness will experience the same unconscious sense perceptions, that is, the same sounds, sights, and smells. But when called on to describe the scene and events, the mother and the police officer would give considerably different accounts of the events, despite the fact that both would be testifying to what they perceive to be the truth.

The sensations they experienced would be the same. However, superimposed over these sensations would be their own personal biases, motives, experiences, and self-interests that, when applied to interpreting the sensations each witnessed, create the perceptions in each individual mind that form the basis of the testimony. Therefore, in cross-examining either of these witnesses, you must first understand and then probe deeply into each conscious motivation or bias that the witness applied to the unconscious sensory perceptions to arrive at the perceptions that form the basis of the testimony.

In addition to the conscious interpretation of the perceived sensations, you should inquire into the state of the attention level with which the witness focused on the facts. Undoubtedly, the attention level of the mother would be complete and undivided because of her personal interests in the matter she was witnessing. However, a passerby in a vehicle who also had to attend to driving would not be nearly as perceptive a witness because of a far lesser degree of interest in the events and a preoccupation with driving.

Desire is another fallacy of testimony that requires your examination. Witnesses who have a personal interest in the matters about which they are testifying are extremely prone to see what they wish to see. Additionally, the more they are called upon to repeat the story, the more likely they are to believe that they did, in fact, witness the events they have recalled.

Demonstrating extraordinary perception, Francis Wellman discerned that perhaps the most subtle and prolific of all of the fallacies of testimony arises out of unconscious partisanship. The witness will frequently feel complimented by the confidence of the party calling her as a witness and mold her testimony unconsciously so as to prove worthy of the confidence. Some witnesses derive a tremendous sense of power from being the center of attention in the witness chair with the ability to sway the verdict of a jury in one direction or the other. You should never overlook the desire to win that can color the testimony of a witness to the point that the witness leans in the direction of the one who called her as a crucial part of the case.

Therefore, when you are confronted with a witness who is unshakable in his apparent veracity, it is essential that you examine closely the witness's biases that are shading the testimony.

b. Probabilities

In evaluating the testimony of a witness, you should analyze whether the testimony comports with probabilities based on human knowledge and experience. Aristotle stated that "probability is never detected during false testimony." Therefore, one area of analysis and examination when preparing the cross-examination is to determine whether the evidence proffered by the witness comports more with probability or improbability.

c. Cross to Common Sense

While evaluating the testimony offered by the opposing witness in terms of probabilities, you should also examine the testimony in light of common sense. One of the great strengths of our jury system is that the collective common sense of the jury is a highly effective testing ground for evidence. This is more true now than ever before, since so much of current litigation is predicated on the testimony of dueling experts: experts hired by each side offer highly sophisticated and technical testimony on which the theory of the case or defense is predicated. Frequently, an appeal to the collective common sense of the jury during cross-examination of such an expert will serve as an extremely valuable tool in disarming the hired gun, since a common sense argument is much easier for a jury to accept than highly technical theories.

d. Collateral Attack

It is very difficult to attack expert witnesses directly within their area of expertise. For example, attempting to cross-examine Dr. Michael DeBakey on the techniques of heart surgery will lead to catastrophic results except at the hands of the most experienced and highly skilled master cross-examiners.

However, in this age of narrow specialties, the cross-examiner, by moving slightly out of the expert's area of expertise, can often conduct devastating cross-examination of an expert witness through collateral attack. For example, an orthopedic surgeon who testifies as a defense witness in a case in which a tomographic examination of the plaintiff is very important may be cross-examined successfully by the plaintiff's attorney. Tomography is a topic with which the orthopedic surgeon has only surface knowledge, and the cross-examiner, thoroughly self-educated about tomography before cross-examination, can often effectively decimate the credibility of the opposing expert by moving slightly out of the expert's area of expertise.

Another way to collaterally attack involves avoiding direct confrontation with the expert on his opinions within his narrow area of expertise while collaterally attacking the underlying assumptions on which the opinions are based.

For example, when electromyography was a new diagnostic tool about which few doctors and no lawyers had any knowledge, a certain polished doctor was considered to be a highly dangerous witness for the plaintiff. In numerous cases, the jury had accepted this doctor's testimony at face value and returned verdicts accordingly.

Finally, in a confrontation with a master cross-examiner, the doctor gave his usual unimpeachable testimony regarding electromyography and his interpretation of the results of his electromyographic test on the plaintiff. On cross-examination, counsel inquired first about the extreme importance of an accurate medical history. The doctor

agreed that the medical history was important; that the medical history plays an important role as a tool of differential diagnosis; that if the patient had experienced a previous back injury that the doctor was not told about during the medical history, this could be fatal to the diagnosis; and that without knowledge of the complete medical history, a doctor's diagnosis could be wrong, even when using the new magical electromyograph.

The doctor agreed with each of these propositions rather hastily as he anticipated moving on to his favorite discussion of the wonders of electromyography. However, counsel then surprised the doctor with "No further questions of this witness, your Honor." After the doctor was excused, counsel subsequently proved that the plaintiff had a prior back injury that she had not related to the doctor during the medical history. During summation, counsel was able to advise the jury that the doctor, in his own words, had stated that if the medical history was incomplete in such an important matter as omitting the prior back injury, the diagnosis would be totally inaccurate. The jury returned a verdict in direct contravention of the doctor's medical testimony on direct examination. This is a classic example of a successful use of the collateral attack technique.

H. LEARNED TREATISES AS CROSS-EXAMINATION TOOLS

In virtually every jurisdiction, where an expert witness has specifically relied on a treatise or text as supporting her opinion given in direct examination, she may be cross-examined from other portions of that treatise to show that the treatise does not in fact support her position. If the witness is to be cross-examined from the contents of some other treatise, some states require either independent authentication (e.g., from the plaintiff's own expert) or an admission by the witness that the text is regarded as authoritative. Some jurisdictions permit learned treatises or technical works to be used in the cross-examination of an expert witness--to test the witness's competence or qualifications--without imposing any specific requirement that the witness has relied on or recognized the authoritative status of the work.

> The Federal Rules of Evidence have adopted the following exception to the hearsay rule:
> Learned Treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

In using this technique of cross-examination, you must establish--by an independent expert witness, admission by the expert being cross-examined, judicial notice by the trial court, or request for admissions--that the authorities you intend to use are indeed authoritative in the field.

No examiner should ever attempt this technique without engaging in exhaustive preparation, as you will often find yourself playing on the expert's home field, where the expert is quite familiar and comfortable. Do not attempt to use isolated spot references from the treatise that may be completely repudiated or explained away elsewhere in the text.

I. CROSS-EXAMINING THE DEFENDANT'S MEDICAL EXPERT

During the trial, you as counsel for the plaintiff frequently will be faced with the problem of cross-examining a medical doctor who has testified for the defendant and cast serious doubts on the plaintiff's case. It will be your job to do what you can to mitigate the detrimental effect of the testimony and, if possible, to bolster your own case.

Again, you should not cross-examine at all unless your client's case has been hurt by the defense doctor's testimony, and you believe you can mitigate the damage by cross-examination or can bolster the plaintiff's case.

However, if the defense calls a medical expert, the expert's direct testimony is probably going to be damaging. There are many areas in which a judicious cross-examination of a medical expert can prove beneficial to the plaintiff. Attorneys must realize that medicine is far from an exact science. Doctors are human beings; each doctor has biases, prejudices, preconceptions, and predilections. There are many medical questions about which equally competent and honest physicians hold diametrically opposed views. Recognizing this, it becomes clear that cross-examination of even the most prestigious physician can be of value.

1. Qualifications

Almost invariably, the defense doctor will be a highly qualified physician. Therefore, an attack on qualifications should rarely be employed; however, situations can occur where such an attack may be indicated. Where you have determined that the expert is not board-certified in a specialty, this point may be brought out during cross-examination. Organized medicine created specialty boards during the 1930s to elevate the standards of practice in the various specialties; a doctor may be certified by a board only after pursuing a prescribed course of study and passing prescribed examinations, demonstrating competency in a particular specialty. Thus, board certification indicates special achievement.

Further, when a qualified specialist is called to testify in an area outside of his specialty, this should be brought to the attention of the jury during cross-examination; that is, the witness may be a qualified expert in his own field, but not specifically qualified to render an accurate medical opinion concerning the medical issue in the case. For example, if the defense doctor, an orthopedic surgeon, renders an opinion concerning the relationship of a coronary occlusion to trauma, you should attempt to point out by cross-examination that the particular problem is highly complex and falls outside the specialty of orthopedics.

You should only attack the basic qualifications of the defense expert or the expert's qualifications to testify concerning the particular medical problem in the case when you are certain that such an attack is well founded. Further, when such cross-examination is indicated, it should be employed gently. You should make it clear that you are not seeking to embarrass the doctor but rather to make the record clear concerning the extent of the doctor's qualifications to testify in a particular case. You can obtain information about the defense doctor's qualifications through several sources: interrogatories, depositions, and prior trial transcripts. You should also become conversant with the reference work Directory of Medical Specialists because it lists all the board-certified physicians in the country, as well as their areas of certification.

When preparing to cross-examine an important medical witness, obtain the curriculum vitae of the witness as far in advance of trial as possible. Peruse the curriculum vitae and investigate the accomplishments claimed therein. Most doctors regard the curriculum vitae as an important reflection of their professional status, and many will exaggerate their claims of accomplishments such as education, internships and residencies, certifications, and even licensure to practice. Also, in pretrial, ask a non-board-certified doctor whether he has ever taken the boards and failed them. Ask a board-certified specialist if she failed the boards before finally passing them. Jurors can readily decide that medical witnesses who have been exposed as exaggerating their qualifications and accomplishments are also exaggerating their testimony.

2. Opinions

Frequently, you can attack neither the basic qualifications of the defense expert nor the expert's qualifications to testify in a particular case; nevertheless, you may be able to attack the expert's medical opinions. The more you know in advance of the trial what the defense doctor's testimony is likely to be, the better prepared you will be to employ this technique. Where court rules permit, you should obtain the expert's reports. Where there is no such rule, make every attempt to persuade defense counsel to turn over copies of the reports; you could suggest that all reports of experts be exchanged. Where discovery procedures permit you to make direct inquiries of the defense expert, either by interrogatory or deposition, use such procedures fully.

Once you have informed yourself as fully as possible before the trial about the defense doctor's opinions, weigh and evaluate the doctor's position. A conference with the plaintiff's physician can be extremely valuable. Go over the defense doctor's reports with the plaintiff's doctor to determine in what respect the defense doctor's opinions are vulnerable. Read the defense doctor's report as much for what is not in it as for what is in it. Even if you are unable, because of local discovery rules, to obtain the doctor's report or depose the doctor, a conference with the plaintiff's doctor may still be valuable. The plaintiff's doctor may know the physician testifying for the defense and may be able to predict the general position the defense doctor will take and the concessions he will make during cross-examination.

In preparation for the trial, gather and read all books, articles, and speeches authored by the defense doctor. The text Index Medicus contains an index of medical publications by subject and author and is a valuable source for much of this information. Further, since many defense experts testify frequently, you should try to gather transcripts of prior testimony. Cross-examination of a defense expert by means of her own published or spoken words is a

devastating tool of advocacy.

3. Notes and Reports

Doctors frequently testify from their notes and reports, so it is important for you to obtain all reports and records used by the doctor to refresh his recollection for his direct testimony. During cross-examination, have the doctor admit that he has virtually no independent recollection of this examination because he sees many patients over the course of a year.

Once it has been established that the doctor has no independent recollection of this particular examination and is testifying on the basis of his notes, the doctor is thereafter tied to his notes and report. If the notes fail to mention any of the classic medical tests indicated by the plaintiff's complaints, this fact should be brought out on cross-examination. If there is no indication in the notes and records that the doctor gave a particular test, he may have trouble convincing the jury that he distinctly remembers giving that test.

4. Financial Bias

A frequent and often effective line of inquiry relates to the financial bias of the defense doctor. Every metropolitan community has a group of doctors whose services are frequently used by the insurance industry and the defense bar. Examinations of claimants can be a lucrative aspect of a medical practice. For a typical case, a defense physician conducts an examination, prepares a report, confers with defense counsel if trial appears imminent, and testifies in court if the case is not settled. Some doctors conduct one or more of these examinations each day and derive a substantial portion of their income from them. The jury may be interested in the financial stake the defense doctor has in performing defense examinations. Cross-examination that brings out the fact that the doctor conducts these examinations often or that the doctor frequently and typically testifies for the defense may greatly impair the witness's credibility.

But before you attempt to establish such a picture through cross-examination, make certain that such an attack is indicated. Make every attempt before trial to determine how frequently the doctor testifies, how frequently the doctor examines, and how frequently the doctor is retained by the defense firm involved in the case. It is a mistake to assume that simply because the doctor was called by the defendant, this line of attack will be worth following. Never go on a fishing expedition during the trial and never use this line of attack unless your success is assured by pretrial preparation and discovery.

Information concerning the financial stake of the defense doctor in medical-legal practice can be derived from several sources; for example, the transcript of the defense doctor's testimony in prior cases may be valuable, as may be your arranging a conference with experienced lawyers in the community.

Where pretrial deposition of the defense doctor is available, this line of inquiry should be pursued fully. Ask the doctor on deposition the number of times per week she is called by defense law firms, insurance companies, or adjusting agencies to conduct examinations of claimants. Also ask the charge for each examination, the charge for each report, the charge for pretrial conferences with defense counsel, the charge for deposition testimony, and the charge for courtroom testimony. During deposition you also should determine the number of times in the preceding year the doctor was requested to make examinations of a claimant, testify on behalf of a defendant, and testify on behalf of a plaintiff.

5. Medical Books

Frequently, you will seek to challenge the validity of the defense expert's medical opinion. Before undertaking such a confrontation, attempt to know more than the doctor knows about the medical questions involved. Again, a conference with the plaintiff's doctor will be invaluable in educating you as to the inaccuracies, if any, of the defense physician's position and about the authoritative sources that can be used to point out these inaccuracies.

The use of medical books as a means of cross-examining the defense doctor may be effective, particularly with a doctor who does not have experience in giving expert testimony. Generally, before you may use such a book or article to attack the opinion of the defense doctor, the doctor must first admit that the particular work is authoritative and that he recognizes it as such.

Where deposition of the defense doctor is available, try to determine what books the doctor considers

authoritative, the names of the teachers under whom the doctor studied, the leaders in the doctor's field, the basic medical texts on the question involved, and the names of any publications that the doctor may have authored in this area. Some jurisdictions have taken the position that if the plaintiff's doctor states that the medical text in question is generally considered authoritative, the plaintiff's lawyer may use the text to cross-examine even though the defense doctor will not admit to personally considering it as such.

6. Frequency and Length of Medical Exam

The defense doctor is not a treating physician, and she has normally seen the plaintiff only once. Apprise the jury of this fact at the beginning of cross-examination. During cross-examination, you may also wish to point out that the single examination conducted by the defense doctor was a brief one. Find out precisely how much time the doctor spent in the hands-on examination of the plaintiff. Frequently the patient will have been in the doctor's office for more than an hour but actually in the presence of the doctor for less than five minutes with only two or three minutes devoted to the examination. Often, the medical history is filled out by the patient and completed by a nurse.

Finally, ask the doctor to whom she reported her findings after completing the examination of the plaintiff. Did she treat the plaintiff as a patient and give him medical advice, prescribe medication, refer him to another specialist, or schedule a return visit? Did the doctor discuss her findings, diagnosis, and prognosis with the plaintiff as she normally would with her own patients? When the doctor reported back to the defense lawyer that hired her, did she send a copy of her medical report to the patient? When you carry this line of questioning out to its logical conclusion, it becomes obvious to the jury that the doctor is the defense lawyer's hired gun, not a treating physician of the plaintiff, and should be rejected by the jury as a credible medical witness in the case.

7. Collateral Legal Attack

Defense medical doctors are accustomed to the type of cross-examination discussed herein and will frequently be hired because of their ability to withstand cross-examination. However, one effective means of cross-examination for which the defense medical doctor is seldom properly prepared is the collateral attack based on the legal predicates controlling the plaintiff's damages. For example, instead of cross-examining the doctor on the medical aspects of the case, cross-examine as to the physical effects that the plaintiff will suffer from his injury. Doctors are generally not aware that the disability of the plaintiff is determined by his inability to perform usual tasks. Therefore, if you can secure admissions from the doctor that the plaintiff is unable to perform certain physical functions, this can later be translated to the jury as damages to wage-earning capacity.

For another example, in a case involving a rotator-cuff injury to a private pilot, the examining doctor for the defense determined that the plaintiff had only 5 percent general disability to the body as a whole. However, when questioned about the ability of the pilot to reach directly overhead and backwards with the injured arm and, more importantly, about the plaintiff's ability to lift with the arm extended backwards at a 45-degree angle, the doctor verified that the plaintiff would be totally unable to perform these functions, that this physical restriction was permanent, and that the condition would worsen as the plaintiff aged. Through other witnesses, including the plaintiff, it was established that these are precisely the functions a pilot would have to perform with the injured shoulder to manually lower the emergency landing gear on the plane. The doctor, who had admitted these disabilities of the plaintiff on deposition, testified on cross-examination at trial that under no circumstances would he ride as a passenger with a pilot who had no strength to operate overhead controls or lower the emergency landing gear. Thus, the 5 percent medical disability to the body as a whole was effectively translated into a permanent inability of the pilot to perform his usual work, thereby greatly damaging his wage-earning capacity. Through this collateral attack, the defendant's medical examiner became the most valuable witness in the case for the plaintiff on the issue of permanent damage to wage-earning capacity.

8. Concessions

You can frequently secure sufficient concessions from the defense doctor to cast doubt on the witness's testimony. These concessions can be used in argument to the benefit of the plaintiff. Examples of these concessions follow:

- The defendant's physician will frequently admit that she has not treated the plaintiff and that she examined him only for the purposes of rendering an opinion to the defendant's lawyer and testifying in court. She will generally concede that she does not know the plaintiff as well as the plaintiff's physician does and that the plaintiff's doctor is in a better position to give a complete picture of the extent and nature of the injury because of familiarity and the continuing nature of the treatment.

- The doctor will frequently concede that he cannot say that the plaintiff does not feel pain. He should admit, also, that a physician cannot see pain and that he has no medical basis to reject the validity of the plaintiff's description of his own personal experience, even though the doctor cannot demonstrate correlative objective symptoms.
- The doctor will generally concede that she treats many of her own patients on their subjective reports of pain--even when no objective signs of injury are present--and that certain injuries are likely to produce pain without producing objective symptomatology.
- The doctor will frequently concede that he does not regard the claimant as a malingerer or that he has no basis to support the charge that the plaintiff is malingering.
- You can often secure a concession that much of the practice of medicine involves a difference of opinion among physicians and that the conflict between herself and the plaintiff's doctor is not unusual. The defense doctor will generally concede that she cannot say with certainty that the plaintiff's doctor is wrong.
- The doctor will generally concede that the course of recovery for most injuries is marked by periods of remission and exacerbation and that he has no way of knowing whether, during his one particular examination, the plaintiff was in a period of remission.
- Frequently, the doctor will admit that she did not determine whether the plaintiff had taken pain relief drugs or muscle relaxants before the examination. Once this concession is gained, the doctor can be asked whether such medications could affect the validity of the examination by masking the symptoms of injury. Frequently, the doctor will concede such drugs could have masked symptoms of injury.
- The doctor will generally admit that in his own practice, after initial examination, he forms a tentative diagnosis, and that, sometimes, he subsequently decides that his tentative diagnosis was wrong. One examination is generally not as good as a complete series of examinations, and occasionally he must revise and change his opinions.
- The doctor may admit that she has no idea of the severity of the initial trauma that gave rise to the plaintiff's injuries.
- If the plaintiff's treating physicians are well-qualified doctors, the plaintiff's lawyers will generally have little trouble gaining a concession from the defense doctor that these doctors are skilled, well-trained physicians.
- Frequently, the defense doctor will concede having little knowledge of the plaintiff's work duties and leisure activities.
- In a trauma case where the defense is pre-existing arthritis of the spine, you should attempt to have the defense doctor concede that arthritis of the spine is present in many individuals over age 40 and that the condition frequently causes absolutely no pain or disability. The doctor may also concede that such a condition makes the affected person more prone to injury as the result of trauma and serves to delay the healing process.
- As discussed, the defense doctor may frequently concede that the plaintiff, despite a small percentage of medical disability to the body as a whole, has physical impairments that will render the plaintiff unable to perform the usual tasks of a worker, thereby reducing wage-earning capacity.

9. Re-emphasizing the Plaintiff's Case

Cross-examination of the defendant's doctor gives you an excellent opportunity to re-emphasize your own medical case. With leading questions, you can cover the basics of the plaintiff's injury so as to highlight the significance of the injury. If the plaintiff's doctor testified that there was a muscle spasm, you should ask the defense doctor if it is not true that muscle spasm is an involuntary reaction of the muscles, that this involuntary reaction is the body's means of splinting an injured area, that this is a defensive mechanism by which the body protects an injured area, and that a muscle spasm is an objective sign of injury.

Likewise, if the plaintiff's doctor has testified that the plaintiff's muscles or ligaments were torn, the defense doctor can be asked to affirm that torn muscles heal with scar tissue, that scar tissue is permanent, that scar tissue is less elastic than normal tissue, and that the plaintiff will be permanently scarred with the result of loss of motion in the area. Generally, if you stick to well-accepted medical propositions, you will be able to gain positive concessions when you cross-examine, and you will help make the plaintiff's injury and disability more vivid.

10. Style

During cross-examination of the defense doctor, you should be polite and courteous, yet firm; recognize that as a general rule the jury identifies with the witness more than with the lawyer. This problem may be compounded when the witness is a doctor, for most physicians are highly esteemed by the public, but this does not mean that you

should hesitate to cross-examine the defense doctor. It does indicate that you should be careful before undertaking a direct attack on the doctor.

11. Attacking Damaging Opinions

If the doctor renders damaging opinions, do not be reluctant to point out to the jury that the doctor's opinions are at odds with other recognized authorities in the field, that the doctor has made prior inconsistent statements, or that there were defects in the doctor's capacity to observe and gather information that reflect on the validity of her opinion.

J. CONCLUSION

The consummate cross-examiner's skill emerges from many individual traits that must be developed and honed before the cross-examiner masters the craft of testing witnesses' competence and veracity in the ultimate search for truth. The cross-examiner must be a logician in analyzing the body of facts, opinions, documentation, and law that constitute the case; a psychoanalyst in reading minds, observing body language, and intuitively discerning weaknesses; a master detective in sifting through the clues in the prosecution of the wrongdoer; and a skillful surgeon in probing the body of proffered evidence, swiftly excising cancerous perjury, and closing with only the truth intact.

Of all the skills required of the advocate, cross-examination is the most complex and the most crucial. Fortunately, the skills can be acquired through study, preparation, focus, and practice. Study the great cross-examinations of the past, read transcripts of current trials, and study the numerous treatises that analyze techniques; obtain assistance from others by attending a trial advocacy college, such as the programs presented by the National College of Advocacy. Prepare for cross-examination with extraordinary diligence and attention to detail. Focus on the specific goals you need to accomplish during cross-examination. Carefully analyze the character, motivations, bias, jury appeal, and areas of vulnerability of each witness that you will cross-examine. Know precisely what you wish to achieve, and when you achieve your goal--STOP.

Finally, practice the various techniques, particularly during deposition, until you have mastered several different approaches to cross-examination and have learned to adapt your style and techniques to the immediate situations that confront you.

One of the fascinating aspects of trial advocacy is that no one ever truly masters its skills because its challenges are always changing. The education of the master advocate is perpetual. There are no universal rules that apply to every cross-examination situation, but there are guidelines, as discussed in this chapter, that are time-tested and that you, as a skilled advocate, must possess.

The following guidelines for cross-examination, which were written 150 years ago by David Paul Jones, a British barrister, demonstrate the timeless nature of cross-examination skills. They serve those of us who labor in the vineyards of litigation today as well as they have served the barristers and attorneys who followed them in the past:

1. Except in indifferent matters, never take your eye from that of the witness; this is a channel of communication from mind to mind, the loss of which nothing can compensate.
   Truth, falsehood, hatred, anger, scorn, despair, and all the passions--all the soul--is there.

2. Be not regardless, either, of the voice of the witness; next to the eye this is perhaps the best interpreter of his mind. The mental reservation of the witness--is often manifested in the tone or accent or emphasis of the voice.

3. Be mild with the mild; shrewd with the crafty; confiding with the honest; merciful to the young, the frail, or the fearful; rough to the ruffian, and a thunderbolt to the liar. But in all this, never be unmindful of your own dignity. Bring to bear all the powers of your mind, not that you may shine, but that virtue may triumph, and your cause may prosper.

4. An equivocal question is almost as much to be avoided and condemned as an equivocal answer; and it always leads to, or excuses, an equivocal answer. Singleness of purpose, clearly expressed is the best trait in the examination of witnesses, whether they be honest or the reverse. Falsehood is not detected by cunning, but by

the light of truth.

5. But in any result, be careful that you do not lose your temper; anger is always either the precursor or evidence of assured defeat in every intellectual conflict.

6. Like a skillful chess-player, in every move, fix your mind upon the combinations and relations of the game--partial and temporary success may otherwise end in total and remediless defeat.

7. Never undervalue your adversary, but stand steadily upon your guard; a random blow may be just as fatal as though it were directed by the most consummate skill; the negligence of one often cures, and sometimes renders effective, the blunders of another.

8. Be respectful to the court and to the jury; kind to your colleague; civil to your antagonist; but never sacrifice the slightest principle of duty to an overweening deference toward either.[6]

Thus, as you rise to cross-examine a witness, you should be armed with the skill to adopt the style required for this particular witness and jury, the technique to search out the truth, the knowledge of guidelines that have developed over the centuries, and, most important, the wisdom to discern the proper combination of style and technique you need to serve well the consummate role of the cross-examiner--the truth giver.

ENDNOTES

1. Francis L. Wellman, The Art of Cross Examination, 1903.

2. Fed. R. Evid. 611(b).

3. Supra, Note 1.

4. Ibid at 30.

5. Fed. R. Evid. 803(18).

6. David Paul Jones, cited in The Art of Cross Examination, Supra Note 1, at 397.