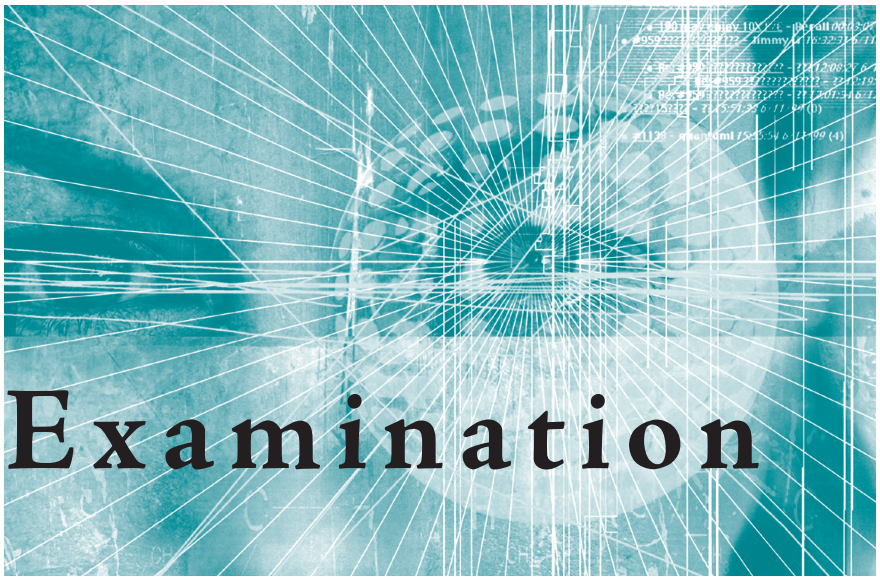
Revisiting the First Principles of Cross-Examination



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As many lawyers know, one of the most nerve-racking activities is to stand up in front of a group of colleagues or peers and speak on a subject as an "expert." Such demonstrations are often more intimidating than appearing before any judge or jury. For this reason, when I agreed to demonstrate a model Cross-Examination as part of this year's OSB Trial Advocacy College, I was dismayed to learn that not only would my techniques be held up as the "right way" to do things, I would be cross-examining the plaintiff in a type of case in which I had virtually no experience: a personal injury case arising out of a motor vehicle accident. My work preparing that demonstration cross, however, not only reminded me how much fun cross-examination can be, it also confirmed that the tried-and-true techniques for preparing and conducting a cross-examination of a hostile witness will work even with an unfamiliar subject matter. After over thirty years as a trial lawyer, I can almost recite in my sleep the basic concepts behind cross-examination, but this exercise underscored how far certain key concepts can take a lawyer who finds herself in a new or challenging situation.

Janet Lee Hoffman

"I'll tell you a story."
— F. Scott Fitzgerald

Dickens famously said, "Now, what I want is, Facts." The story the lawyer weaves from the facts ultimately carries the day. Trial practice has much in common with the theater and storytelling. An effective cross-examination will showcase your narrative more than any other part of the trial. With a critical witness such as the plaintiff in a personal injury case, the jury will expect something compelling, or at least somewhat interesting. Developing a captivating narrative requires putting yourself in the shoes of the juror and asking: What would a juror want to know about this case? What is my case theory and how can the witness contribute toward establishing my themes?

Although I knew little about the typical issues that arise in a car accident case, I knew that if I wanted to make an impression on the jury (or, in this case, interest and entertain my fellow lawyers), I had to do something more with my cross of the plaintiff than just elicit basic factual testimony that an accident reconstruction expert could later use to show inconsistencies between the plaintiff's story and the physical evidence.

In this case, the participants in the training program were given a set of prepared materials involving a motor vehicle accident that had taken place at an intersection in Southwest Portland. The written materials revealed some inconsistencies among the plaintiff's statements made to police, to doctors, and during depositions, but the statements mostly concerned matters collateral to the cause of the accident itself. The records, of course, provided evidence that the plaintiff had a motive to exaggerate—namely, a desire for a financial recovery—and had perhaps overstated the extent of his injuries. I needed to go beyond those issues

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if I wanted the jury to conclude that the plaintiff's statements that he was driving carefully and well within the speed limit when the collision occurred were not trustworthy.

It is common knowledge that people enjoy solving puzzles. Neuroscientists have found that not only does the brain enjoy puzzle-solving, once a person reaches a conclusion, it becomes a fixed belief. The ancient rhetorical device of creating a syllogism—where an audience is presented with two propositions from which it is meant to reach a desired conclusion—has long been used to sway public opinion. In the context of cross-examination, this means that jurors who are allowed to come to their own conclusions will believe the outcome is a matter of common sense and will not be easily swayed from their conclusion once it has been reached.

In this case the plaintiff testified he was driving the posted speed limit from the time he left work to the time of the accident. Because the defendant pulled out unexpectedly into the plaintiff's lane of traffic, the plaintiff was unable to slow down to avoid the collision. I knew I needed to set up the following syllogism: The plaintiff drove at a speed in excess of the posted speed limit after he left work. Therefore, the plaintiff's statement that he was driving the posted speed limit before the collision cannot be trusted. Once the inaccuracy was exposed the jury would have to conclude a person who lies about consistently driving the posted speed limit must be lying when he testified that he was driving carefully immediately before the accident. Therefore, the plaintiff's careless driving caused the accident.

If you hope to use a witness's own words to demonstrate his untrustworthiness or some other negative trait, it is imperative that you know as much as you possibly can about the subject matter at hand.

To determine whether your syllogism works, it is crucial to enlist trusted colleagues, if possible. Talk to those around you about your case theory; ask them if your talking points are persuasive; show them your exhibits to determine whether they make your point. If you can't accomplish these things in a succinct, appealing way ahead of time with an honest audience, it probably won't work with twelve strangers on a jury.

"Preparation is the be-all of good trial work." — Louis Nizer

We have all been told countless times about the importance of preparation in trial practice, and doubtless many of us have learned that lesson the hard way. But it bears repeating that thorough and exacting preparation is nowhere more important than in cross-examination. As stated above, a truly effective cross-examination results in the jurors drawing their own conclusion that the witness cannot be trusted. Your goal is to lead the jurors to conclude that the opponent's version of events is implausible and defies common sense.

If you hope to use a witness's own words to demonstrate his untrustworthiness or some other negative trait, it is imperative that you know as much as you possibly can about the subject matter at hand. For example, once I determined that the events at the scene of the accident would be the most compelling part of this cross-examination, reviewing and analyzing the written case file was merely the first step. The only way to explore fully the issue was to visit the scene and attempt to understand in a concrete way the context and identify any factors that might undercut the witness's statements. In any trial there is no substitute for getting out into the field.

In my case, I enlisted a few interested colleagues to travel to the scene with me to take photographs, to assess and document the features of roadway, and to explore what both the plaintiff and defendant would have seen before the accident occurred. We also mapped out and traveled the plaintiff's route on the day in question. We drove from his place of work to the scene of the accident. I was hoping

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that the time it took him to reach the point of the accident was shorter than the legal speed limit, proving he was speeding. Unfortunately, this theory did not pan out. Our investigation revealed that even in heavy traffic the plaintiff could have reached the location in the time he testified it took him while traveling well within the speed limit. From past experience I have learned not to waste time and squander credibility by cross-examining a witness on topics that don't further your goal of casting doubt on the opponent's case. No matter how good the questioning technique, if the facts don't support your point, the witness's answers will have the ring of truth.

What the investigation of the accident scene revealed, however, was that the posted speed limit for certain parts of the route was lower by half than what the plaintiff had testified to in his deposition since there were multiple warning and hazard signs, including school crossings and curves. When taken together, there was persuasive evidence to suggest that if the plaintiff had been driving at 40 mph as he had testified under oath in his deposition, he had been driving substantially faster than the posted speed limit. The jury could therefore conclude that he must have been speeding when he approached the relevant intersection. In other words, his testimony that he had been driving carefully and had slowed down just before the accident could not be trusted. The investigation revealed the key to the syllogism and showed me how I could lead the jurors to conclude that the plaintiff, not the defendant, caused the accident.

"Order is Heaven's first law."
— Alexander Pope

Once you determine the goals of your cross, formulate a step-by-step plan to achieve those goals. A well-organized cross-examination has several elements. The topics should flow logically; the organization should make sense to the listener and should be easy to follow. Oftentimes, the outcome of a case depends on which lawyer jurors trust more. Jurors are more likely to respect and trust lawyers who have a well-structured cross-examination and appear to know ahead of time what they are trying to accomplish. A well thought-out cross demonstrates to jurors that the lawyer knows her case and is confident in the positions she is taking.

While the Oregon Evidence Code grants the court the discretion to "exercise reasonable control over the mode and order of interrogating witnesses,"[1] the court generally will not interfere with the order of your questioning, if it makes logical sense and does not mislead the jury. Focus on one point at a time, and clue jurors in on the topic you are covering by using introductory statements, such as "Now I'd like to discuss the statements you made to the police officer at the scene."

It is also critical to consider the appropriate time to raise the different topics in your examination and depending on how those topics will impact the witness. Even hostile witnesses will frequently be able to provide testimony favorable to your case. In some instances, this function of cross-examination can be as important as damaging the credibility of the witness. If the witness can provide you with helpful affirmative testimony, elicit that testimony before you begin to impeach him or otherwise attempt to harm his credibility. There's truth to the old adage "don't insult the alligators until you have finished crossing the stream."

In all likelihood, opposing counsel will already have attempted to build up the witness's credibility during the direct examination and you can take advantage of her efforts by lending credibility to the testimony concerning your own case. When you want information from a hostile witness that will help your case, be nice to him, flatter him, build him up as an authority on the issue and make him feel smart. A witness who feels comfortable and competent will let down his guard and may want to appear to be an expert on the subject and to both continue to remain in your good graces and shine before the jury. He is more likely to answer your questions in a pleasant, affirmative way. Only after you have received the helpful testimony you want from the witness should you revert to "attack mode." In short, organize your cross examination to frontload the questions that will elicit information helpful to your case and backload the questions that will have the effect of impeaching or criticizing the witness.

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"No rule so good as rule of thumb, if it hit."
— Scottish Proverb

The classic rules of cross-examination work and bear repeating. Anything you read on cross-examination will tell you to use simple, leading questions to control the witness. As it is also commonly said, you should do the testifying, and the witness should simply be asked to agree with whatever you say. When you lead a witness by asking questions that themselves strongly imply the desired answer, you are in effect "priming a pump." Witnesses typically go into a cross-examination anxious and ready for battle, and if you can get the witness answering "yes" over and over, it will lull him into a rhythm. He is then less likely to reject the premise of your question, and more likely to provide the answer you seek.

Using simple questions is also critical because it requires the witness to do less thinking and supports the tendency to answer "yes" to every question you ask. Simple, short questions also hold the jury's attention and provide a coherent story free of confusion.

Some attorneys, like me, have the tendency to ask compound questions. These questions are not only subject to objection, they can be confusing to both the witness and the jury. If you ask a compound or poorly-worded question, don't be afraid to acknowledge it and to use humor when doing so. Levity and self-effacement can humanize you to the jury and build credibility. Lawyers who recognize their mistakes and appear personable are more likable and generally more trustworthy to the jurors than lawyers who convey a sense that they are always right.

One of the most oft-quoted rules for cross-examination is to only ask questions to which you know the answer. This remains a good rule of thumb, but like all rules of thumb, there are exceptions. There are some situations where any possible answer the witness gives will help you and no possible answer can hurt you. These are few and far between, but can be effective opportunities when recognized. Again, don't be afraid to use your trusted colleagues to help you determine whether a question you plan to ask can hurt you. If you can identify those questions, they can sometimes provide some of the most effective and compelling testimony in your case.

For example, in this case, the plaintiff had testified during his deposition that his car had "almost bottomed out" on a speed bump just before the accident occurred. The cross-examination question, "What did it feel like when your car almost bottomed out?" probably will not hurt you, even if you don't know what the witness will say in response. Everyone has had the experience of going over a speed bump a little too fast, so if the witness tries to minimize his earlier statement it will not undercut his prior statement. But, if the witness uses language that unintentionally conveys that he was going very fast over the speed bump, his own words can be used against him much more effectively than any characterization you could give. In my demonstration, the witness unexpectedly responded to that question by describing the feeling of traversing the speed bump as similar to being "on a roller-coaster"—very helpful testimony because using his own words, you could characterize his drive as his "roller-coaster ride."

"We are not won by arguments that we can analyze, but by tone and temper; by the manner, which is the man himself."
— Louis Brandeis

One of the most common ways that lawyers attempt to undercut an adverse witness's credibility is through impeachment, especially impeachment with prior inconsistent statements.[2] It is essential to make your impeachment count. All too often, however, the inconsistency appears much bigger and more significant in the mind of the lawyer than it appears to the jury. Jurors may empathize with the witness who is being put on the spot by a crafty lawyer, or they see the distinction the lawyer is making as trivial. Jurors may also fail to understand the meaning of the impeachment or fail to appreciate its importance, if they do not understand the issues. Because we all know our case much better than any juror could hope to, we should remember that during cross-examination the jurors must be led through the impeachment step-by-step. Through a methodical inquiry, they have an opportunity to appreciate fully its significance.

One common and effective way for jurors to appreciate the impact of your

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impeachment with a prior inconsistent statement is to highlight the original statement and build up the importance of the circumstances under which it was made. You should take the witness through the steps of his first statement: He should affirm how seriously he took that statement, and he should acknowledge that he understood the importance of being truthful. In doing so, you are demonstrating to the jury that the witness had every incentive to be accurate. The jury must come to believe as a matter of common sense and life experience that a witness is unlikely to make these inconsistent statements by accident. Rather, he must have been intentionally untruthful. If the first statement is highlighted sufficiently, the inconsistencies in the second statement will have much more impact. This can be done very easily with a series of short questions that build on each other.

If you are attempting to highlight the improbability of a witness's statement based on other evidence, you can lead the jurors to recognize the improbability by using small visual bites that paint a picture of the scene that is favorable to your case. Short, clear questions are always more effective in helping jurors recognize the inherent illogic of the witness's testimony.

"Patience and tenacity are worth more than twice their weight of cleverness."
— Thomas Huxley

A close corollary of this lesson is that it is essential to take your time with a witness when making an important point. While you don't want to bore the jurors or waste their time with irrelevant lines of questioning that are going nowhere, when you have something to show that will advance your case theory, you should not waste its potential impact by rushing through it. When you are cross-examining a witness, the courtroom belongs to you and no one should rush you or pressure you to finish your examination before you are ready.

Using short questions with small bites of information can have the effect of freeze-framing the action being described and will help the jurors focus on the details that you want to highlight.

Don't be afraid to draw out a particular subject if it is important to your case theory. This can be an effective means of building suspense and can help to grab the jurors' attention. Using short questions with small bites of information can have the effect of freeze-framing the action being described and will help the jurors focus on the details that you want to highlight. Think of it as peeling an onion one layer at a time. If you are describing an event, think about including questions that focus on the senses to paint a picture. Take your time and use baby steps. Lead the jurors to reach their own inevitable conclusions about your witness by leaving them with no other plausible choice.

For example, at the beginning of my career, I tried a kidnap-rape case and wanted to establish through cross-examination that the act was consensual. I wanted to prove that the complainant's statement that she did not call for help because no one was around to hear was improbable by establishing that when the alleged rape occurred, it was evening in downtown Portland, every restaurant and bar was open, and there were many people out and about. But instead of taking the witness through these details one by one, I simply asked, "There were lots of people around at the time, weren't there?" She replied, "Well, none that I could see." My argument was ineffective because owing to my inexperience, I had rushed through the issue and thereby lost a potentially fruitful line of impeachment. If I had instead used a series of concise questions to establish the scene, including the number of bars that were open, bus stops, street lights and movie theaters on her path, the jury may have concluded that her testimony that she did not call for help because no one was around was implausible. The jury might have then concluded that she had left with my client voluntarily.

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"It is the province of knowledge to speak, and it is the privilege of wisdom to listen."
— Oliver Wendell Holmes, Sr.

Another critical principle of cross-examination is the art of listening. Many times lawyers become so focused on their examination outline and the points they hope to make that they fail to hear and absorb important statements the witness made on direct or during the cross. Failure to listen accurately can also harm your credibility with the jurors because they may feel that you are taking advantage of the witness by twisting his words. The jurors might perceive you as manipulative and can have the added effect of creating sympathy for the witness. Poor listening might also cause you to miss an opportunity to remedy an unhelpful response, or you might miss a helpful answer that you could have used to your advantage during the examination.

During my cross of the plaintiff in this exercise, I asked the plaintiff to confirm (as stated in the police report) that the accident occurred at approximately 4:00 pm, with the goal of subsequently getting his agreement that the accident occurred while the 20-miles-per-hour school zone speed limit was in force. Perhaps sensing that the 4:00 pm time frame could hurt him, the witness was reluctant to agree and stated, "I'm a little shaky on the details." Had I been so focused on making my point about the 20-mile-per-hour speed limit, I might have missed that the witness had just admitted he was uncertain about his testimony regarding the fundamental details of the accident.

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One effective technique to show you are listening to the answers the witness is providing is to use the "mirroring" technique: Use the witness's own words when posing your questions. A similar technique is "looping," or integrating the witness's last answer into your next question. A witness will tend to agree with questions in which his own words are accurately restated.

If you are a careful listener, you will appear to be—and in fact will be—more engaged in the testimony that is being elicited. You will be a much more effective questioner than if you're simply following your outline. Failure to listen will likely result in missed opportunities.

"Tell me and I'll forget; show me and I may remember; involve me and I'll understand."
— Chinese Proverb

The logic of your position and your ability to establish your syllogism in the jurors' mind is greatly enhanced by the use of visual aids. Visual aids emphasize key areas of testimony and help them remember what they are hearing. Brain science has shown that people learn best and retain more new information when more of their senses are engaged. The brain is most active when it is stimulated in various ways. For example, a study by scientists at University of California at Santa Barbara examined some of the most brain-friendly instructional strategies to enhance learning and established that people learn best when presented with narration and are simultaneously exposed to a visual representation.[3]

In practical terms this means that to augment the impact of a point, the attorney should speak while showing some type of graphic, such as a photograph, demonstrative exhibit, or video clip. The brain is able to absorb both types of information by processing them through separate channels. It will process what it hears through its verbal channel and what it sees through its visual channel. The verbal information will enhance the visually-conveyed message and vice versa, causing more information to be retained.

Notably, contrary to popular wisdom, PowerPoint presentations are not effective visual aids. If the jurors are shown slides filled with words during an oral presentation, they are

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unable to absorb the written message and spoken information simultaneously because both modes of communication engage the same verbal channel part of the brain. The listener experiences an overload of verbal inputs and the brain is forced to ignore a certain portion of the information.

If, however, images are used as visual aids (e.g., videos, photographs or schematics), it can have the effect of demonstrating your point in a uniquely impactful way that cements the information in the jurors' brains. In this case, for example, an important part of the model cross-examination of the plaintiff included a series of photographs taken of the road along plaintiff's route in the mile or so before the intersection where the accident occurred. Luckily, this road had an unusual number of road signs, including several speed limit signs showing posted limits lower than the 40 miles per hour that plaintiff had claimed, as well as signs requiring a reduction in speed for a park, a school zone and a school crossing, as well as a speed bump warning. By using short questions to elicit small bits of information, while at the same time displaying the numerous road signs to the jury, it cemented the impression that this was a road that should have been traveled slowly and cautiously, and that plaintiff's admitted speed of 40 miles per hour was at times 20 mph over the posted speed and unreasonably fast.

In a real trial setting, of course, visual exhibits—photographs, films, videos, and the like—must be authenticated and shown to be admissible under the Oregon Evidence Code, particularly OEC 401 (relevance) and OEC 403 (balancing of probative value against risk of unfair prejudice), to be admitted into evidence. Any exhibit must be a "fair and accurate" representation of what existed at the time of the event or when it was prepared. While a visual need not be identical to the original, it must be similar in the aspects that are relevant to an issue in the case. The degree of variance may be taken into account in terms of what weight must be assigned to a piece of evidence rather than in terms of its admissibility.

In your next case, think carefully about the visual exhibits, graphics, and demonstratives that will most effectively get your point across to the jury. Prepare mock-up exhibits and show them to your colleagues to ensure you are choosing images with the greatest possible impact. With thoughtful preparation, the strategic use of visual aids will allow jurors to absorb more information and they may be more receptive to your message.

Any successful cross requires intense preparation. It requires that you identify the areas where your examination can lead the jury to conclude, as a matter of common sense, that your view of the case is the only logical one.

"Success is a science; if you have the conditions, you get the result."
— Oscar Wilde

Regardless of the subject matter or area of law, an effective cross-examination draws on the same tools and skills. Any successful cross requires intense preparation. It requires that you identify the areas where your examination can lead the jury to conclude, as a matter of common sense, that your view of the case is the only logical one. But once you identify those areas, don't squander your hard work. Get the most out of your cross by using some of these venerable tools to make the jury take notice and increase your chances of success.

End Notes:

[1] *See* OEC Rule 611.

[2] *See* Oregon Evidence Code Rules 607, 608, 609 and 609-1 for the key rules of evidence regarding the impeachment of witnesses.

[3] *See* Roxana Moreno & Richard E. Mayer, *Cognitive Principles of Multimedia Learning: The Role of Modality and Contiguity,* 91, No. 2, JOURNAL OF EDUCATIONAL PSYCHOLOGY 358 (1999). ❐