

The Journal of the Section of Litigation

American Bar Association

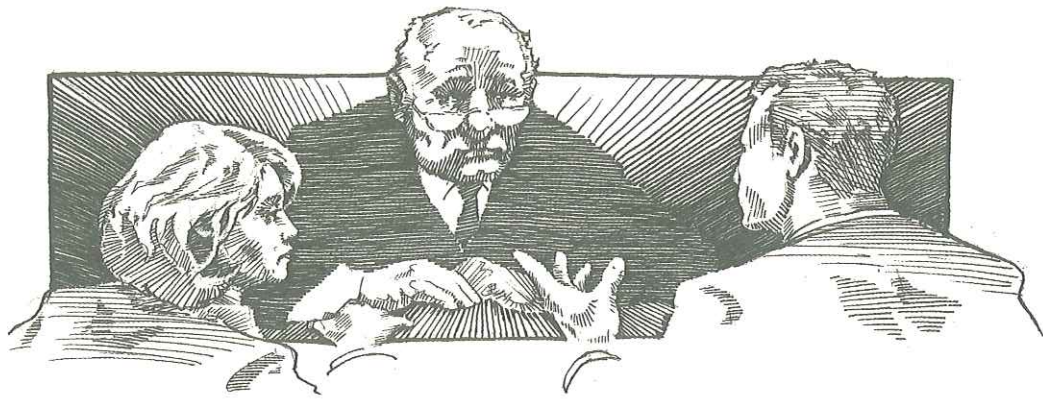
Litigation

ABA

Vol. 37 No. 2 Winter 2011



Rules to Live By



Sidebar

Cross-Examination

by **Kenneth P. Nolan**

Senior Editor

The idea is to destroy—credibility, confidence, demeanor. Rapid-fire, pointed questions to rattle. “Yes or no,” you order in a stern, loud bark. The witness squirms, hesitates, searches for escape. You pounce: “Yes or no, sir.” With a sigh, he responds meekly, his spirit broken, his will exhausted. You have him. You soften your tone, slow down a bit, but remain firmly sarcastic. The jury’s awake, heads nodding unconsciously. You pick up the pace. He doesn’t resist. He’s yours. You’ll dream about this moment for months, years, maybe always.

This is the payoff for all the tedious work, the years of exasperating depositions, the hours listening to the pompous instruct on proper techniques at CLEs, the miserable mandatory mediations, the anguish of so many last-second settlements. Finally, you’re a real lawyer. You’ve arrived.

After all, law should be fun. Well, at least a little. Satisfying at times, even enjoyable when a thank-you box of chocolates arrives. Exposing exaggerations, lies, forcing a witness to admit you’re right—a good, crisp, devastating cross is a hoot. Now you can join the old-timers in the courthouse halls pontificating about the time . . .

Of course, a knock-out cross is as rare as a kind word from one of your teenagers. At a recent bar event, a colleague mentioned that, back in the day, they’d always have at least six partners

on trial defending med mal cases. Now, maybe one or two. The text popping up on the iPhones of clients, judges, court administrators, insurers is universal—*trials are just too damn expensive.*

Fortunately, they’re not extinct. Trials occur, although not like when I first was admitted where, at calendar call, judges would immediately screech at the defense attorney, “You got money?” Any hesitation would result in a no-nonsense “Select.” Everyone picked a jury, including the timid law student who appeared in Bronx Supreme with an affidavit from the trial attorney attesting his engagement in another county. “What law school are you in?” the small, thin judge asked meekly. Listening, he wrote the following: I hereby give Brett Neubie of St. John’s Law School permission to select a jury. “OK, son, go pick,” he said without humor.

Today, you have to struggle through rounds of alternative dispute resolution before you ever contemplate a juror. The moment an answer is filed, I’m in some clueless mediator’s office, figuring a way to say no without screaming the usual string of curses I learned as a tot on

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Brooklyn streets. Whole industries have arisen with retired judges dispensing economic sense, patiently and successfully convincing both sides that resolution is best. “All’s well that ends,” is Judge Marsha Steinhardt’s logic, which, it appears, has been adopted nationwide.

Honestly, it’s not all bad. Efficient, cheaper, even fairer for cases to settle. I learned early that losing is no fun. If you lost at three-on-three in Holy Name schoolyard, you sat for 40 minutes or so until it was your turn again. Hearing the forewoman rule for your unctuous adversary is much worse—it costs money, injures pride, ruins reputation, causes night terrors. Sometimes the bad guy wins. Doesn’t instill confidence in our system when a dirt-bag criminal walks, when a two-bit phony case is successful.

But there will come a day—probably after you’ve announced, “Yeah, it’ll settle”—when you’re in a courtroom heavy with stale air. Adrenaline flowing, notes on podium, witness sworn—the judge will finally mutter: “You may proceed, counselor.”

Know everything. Whether crossing an obstetrician, economist, or engineer, master the subject. Don’t allow an expert to educate the jury, to make you look like a moron. If you haven’t learned the intricacies on how stock options are valued, you’re going to get hurt. An experienced expert will eat you alive: No, sir, that’s incorrect. Let me explain again

about how we designed and developed the electronic throttle control system on our Toyotas.

Facts are easier. Go to the scene (yourself), talk to witnesses (yourself), interview experts (yourself), read all documents (yourself). Don't rely on others. Studying photos, videos, summaries is fine, but hands-on is best. Look witnesses in the eye, visit the factory, evaluate whether this expert will connect in a Kentucky courtroom. No one has as much invested as you, the trial attorney. Don't be lazy and—I'm begging you—please don't believe you're too special to do the grunt work.

Memorize the facts, witnesses, even the law. Piece of cake for someone of your skill and intelligence. Learning how to fly a Bombardier Q400, to perform bypass surgery, or to program computer software is another story. We're dopey

each day. I would write the unfamiliar terms in a book, look up and study their definitions—something I didn't do for the SATs. Eventually, even a dolt like me became familiar with the lingo, the concepts. Today there's the net, and its instant wonder. Use it. Instead of stalking others on Facebook, study. Start when the case comes in; it's not college where you can cram the night before. Begin at day one so you'll be effective at depositions, more discerning when hiring experts, more knowledgeable in evaluating your case.

Prepare. Very few can cross effectively without extensive preparation. Write each question and potential answer. What if it's "Yes" instead of "No"? What the heck do I do if he agrees? Consider all possibilities. Some witnesses love to fight. Others, like an expert neurologist that I and many oth-

remained calm, never betraying discomfort, never arguing, always soft-spoken. Most jurors ignored the obvious implications and, instead, substituted admiration. Everyone used him and paid him a fortune, they reasoned, so he must be exceptional.

Write each question and answer, and then compose an outline of objectives. What do I want this witness to say? What direct testimony has hurt me, and how can I disprove that information? How will this witness's testimony fit my overall strategy, theme? Have a plan, a goal. Focus on a few critical points: perhaps qualifications—you've spent your career flying Boeing planes, not the Airbus A340 that was involved in this crash? Bias: You know Mr. Jones, true? You've gone to his house? Had dinner? Coffee? He's a friend, isn't he? Lack of actual knowledge: See *My Cousin Vinny*:



Gambini: Is it possible that the 2 defendants went into the Sac-O-Suds, picked 22 specific items off of the shelf, had the clerk take the money, make change, then leave? Then 2 different men drive up . . . in a similar looking car, go into the store, shoot the clerk, rob him, then leave?

Tipton: No, they didn't have enough time.

Gambini: Why not? How long was they in the store for?

Tipton: Five minutes.

Gambini: Five minutes? How do you know? Did you look at your watch?

Tipton: No.

Gambini: Oh, oh, oh, you testified earlier that you saw the boys go into the store, and you had just begun to cook your breakfast and you were just getting ready to eat when you heard the shot.

Tipton: That's right.

Gambini: So, obviously, it takes you five minutes to cook your breakfast.

Tipton: That's right.

Gambini: That's right, so you knew that. You remember what you had?

Tipton: Eggs and grits.

Gambini: Eggs and grits. I like grits, too. How do you cook your grits? Do you like

lawyers, studying hearsay exceptions, deciphering Rube Goldberg cases like *Palsgraf*. We don't make things, grow things. We think, speak, and write. Not terrible abilities, but we're not designing the iPad or explaining why Pluto's been booted from the list of planets.

Stand in the operating room while the surgeon performs his magic, sit in the simulator as the check airman tests a pilot, listen as one of these brilliant nerds explains how apps are created. Obviously, you can't do all in a \$50,000 case, but do as much as possible. When I started handling med mal cases, I read medical texts for an hour or two

ers used, always agreed. "Isn't it a fact that you've testified 80 times in the past year?" Turning to the jury, the doctor would shrug his shoulders and reply amicably, "Yes." And you testified for plaintiffs 99 percent of the time?" "Yes, I did," was the mild response. "And you charged \$350 an hour?" "Yes, that's what I charge for my time," again with a befuddled look. "That's \$342,000 for your testimony. That's a lot of money paid by people like Mr. Nolan," the lawyer spit, voice noisy, dramatic. "Yes, it is a lot of money," he agreed. This could go on for an hour or so, transcripts piled high on the table, all the while the doctor

them regular, creamy, or al dente?

Tipton: Just regular I guess.

Gambini: Regular. Instant grits?

Tipton: No self respectin' Southerner uses instant grits. I take pride in my grits.

Gambini: So, Mr. Tipton, how could it take you 5 minutes to cook your grits when it takes the entire grit-eating world 20 minutes?

Tipton: I don't know. I'm a fast cook I guess.

Gambini: I'm sorry. I was all the way over here. I couldn't hear you. Did you say you were a fast cook, that's it?

Tipton: Yeah.

Gambini: Are we to believe that boiling water soaks into a grit faster in your kitchen than anywhere else on the face of the earth?

Tipton: I don't know.

Gambini: Well, I guess the laws of physics cease to exist on top of your stove. Were these magic grits? Did you buy them from the same guy who sold Jack his beanstalk beans?

Always ask leading questions and insist on yes or no answers.

Q: You indicated to Mr. Nolan that, prior to this accident, you essentially had no medical problems; is that right?

A: Yes.

Q: You had arthroscopic surgery on your knee in 2008, 2009?

A: Yes.

Q: Your right knee?

A: Yes.

Q: And Dr. Lawrence—he's your orthodontist?

A: Yes.

Q: You had what is called TMJ prior to this accident?

A: Yes.

Q: Causing neck and back pains?

A: Yes.

Q: Dr. Thomas—he's your general practitioner?

A: Yes.

Q: You saw Dr. Thomas in 2004 complaining of pains in your back radiating around your chest?

A: I don't remember.

Q: And you saw him in 2006 complaining of the same kinds of pain?

A: I don't remember.

Q: Did you see him in 2009 complaining about the same kinds of pain?

A: Yes.

Don't let the witness squirm out of a "Yes/No/I can't answer yes or no" answer. Most judges will allow the interruption, "Just yes or no," when the witness starts to ramble. If the witness resists, stop and sweetly tell him, "I'm going to ask you questions that require a yes/no/I can't answer yes or no response. Is that fair?"

Q: You're saying that one of the problems with morphine is addiction; is that correct?

A: Yes. And the reason—I would like to finish my statement.

Q: You can do it on redirect, doctor.

A: I would like to answer you now. Is that OK?

Q: I would like you to answer my question.

The court: Doctor, try to answer the question and try not to volunteer.

Keep your questions short and ask one question at a time. Compound questions are confusing. Long, involved questions lose the jury.

Q: And with your husband and yourself together, did you get back on the elevator? Did you take an escalator or did you take stairs? Where did you go?

A: In a wheelchair into an ambulance.

Not only four questions, but the dope didn't know the answer. I just sat there and smiled.

Never ask an open-ended question. That's for direct: What then happened? Why is that your opinion, professor? If you ask "why" or "how" on cross, the witness will ramble for hours. And the judge will slap you: You asked, counselor. Now continue, doctor.

Never ask a question that you don't know the answer to. Of course, it'll happen. You're on a roll, the poor shlub

is agreeing with everything. And then you go for the kill.

Q: And from the time Mr. Ryan was taken in the ambulance to today, 2 years, 8 months, you never contacted him to see how he was doing, did you?

A: I tried. I was so upset that I called my brother who came and took me home. About an hour or so later, we went to Lutheran and tried to see Mr. Ryan. Nurse Eng said it wasn't a good time. I called the nurse's station every few days for an update, and I was so happy when they told me that Mr. Ryan was doing well and was going to go home. I didn't want to call the family since I received a letter from a lawyer; I think it was you, Mr. Nolan, a day or so after the accident.

Or:

Q: You were looking straight ahead?

A: Yes.

Q: And then you heard a bang?

A: Yes.

Q: It was after you heard the bang that you looked over to see the crash? (hoping you're right)

A: No, I was looking straight ahead, and then I saw this car try to beat the light and I thought: What an idiot. He's gonna kill someone.

If you haven't asked a question at a deposition, leave it alone.

Q: You were looking straight ahead?

A: Yes.

Q: And then you heard the bang?

A: Yes.

Q: And the bang was off to your side?

A: Yes.

Stop. Let the jury figure it out. In summation, you can posit: How could the witness actually see the impact if he was looking straight ahead and the noise was off to the side?

Uncover all facts at depositions. That's why you take them. If you don't know, don't ask. It's a gamble that you'll lose, just like Vegas.

Incorporate your cross into the trial strategy. Remember the O.J. Simpson

trial. F. Lee Bailey asked the detective a million times, did you ever use the *N* word? No. Anyone who said you did is a liar? Yes. No matter how many times and ways Bailey asked, the cop was adamant. A totally ineffective cross, I thought. This is the great F. Lee Bailey? He's terrible—long pauses, same question over and again. Looked lost. Later, the tapes revealed the cop used the *N* word as frequently as my daughter uses the *F* word. What appeared a totally ineffective cross was devastating. The detective lied and was caught. After the tape, no one believed a word; his credibility destroyed. The trial was lost.

Have a plan for each witness that coordinates with your theme. Looking lame is perfect if tied into larger strategy. That's why an outline is essential. What can you achieve? Expose weakness and hammer away. No one is gonna scream, "I give up. You're right—I'm a liar." Instead, raise a doubt or two; emphasize inconsistencies, lack of expertise, credibility. Small superficial cuts that accumulate slowly, but eventually prove fatal to your opponent. Accomplish your objectives and sit down. There's always summation.

Know your audience. Not only the judge and jury but witnesses, too. Some judges encourage a harsh cross; others abhor it. Shouting and running amok are effective but only if the judge allows and the jury enjoys it. An intimidating style may not work in the genteel South or with a thoughtful jury. In a malpractice case, the plaintiff's attorney was aggressive and insistent while the defendant was slow and soft-spoken. Before an educated Manhattan jury, theatrics don't trump logic. The defense used understated reason to quell the natural emotion of the death of a young woman. Reading glasses perched on nose, the defense attorney fumbled around and allowed each witness, even plaintiff's expert, to respond and explain. This put plaintiff in a quandary. If he machine-gunned short yes/no questions, the jury would wonder why he wouldn't allow defense witnesses the same freedom as the hospital's attorney. This calculated strategy removed much of the emotion, and the verdict was less than the offer.

I've tried cases against attorneys with significant physical disabilities, experts in wheelchairs, fact witnesses with severe speech impediments. Adapt. I've tried non-jury cases where the judge wanted a polite cross: "If a jury was

present, they wouldn't like your tone, Mr. Nolan." And another where the judge encouraged me: "Doctor, he didn't ask you that question. . . . Strike out the answer. Let's try to be responsive to the questions he asks, and don't give him a lot of information he didn't ask for."

Be yourself. These rules are generally true, but they may not be effective for your case, your witness. Do what's best for you, your case. Experience is invaluable. Learn by doing, by getting smacked around and then some more. Eventually, you achieve your goals and stumble back to your chair, battered but satisfied. In a courtroom, no one escapes without absorbing a right uppercut or two. Cross is a battle that you'll survive if you accomplish your objectives. Remember: It's just a part of a larger strategy. Great fun to destroy the witness, but more fun to win the case. ☐