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CROSS EXAMINATION: The Four “P”s and Five Basic “Rules” by Ric Gass

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INTRODUCTION

There is probably no part of the trial process more exhilarating or more frightening than cross examination. It is one of most interesting psychological interactions that two people can be involved in and is largely viewed by judge, jury and the participants as an event with a winner and a loser.

Masterful cross examination is a mystery to many and clearly more art than science. Sometimes it involves “white gloves” and other times virtually a sledge hammer. It seems to come to some so easily and instinctively. Most labor and angst over it. The effect and significance of many cross examinations seem to more readily fall onto the ends of the spectrum as either very helpful or unsuccessful, rather than to be distributed along a bell curve, and many times the true significance of cross examination are revealed only in the closing argument.

The topic of cross examination is obviously “book length” material, and probably more legal treatises have been written on it than any other part of the trial process. A column of this length can but scratch the surface. The goals of this column are to give the reader first a basic global view of cross examination, and then five easy “rules” to follow for successful cross examination.

THE FOUR “Ps” OF CROSS EXAMINATION

Cross involves, of course, at its core the substance of the witness’ information. Usually that substance more favors the opponent or else the witness wouldn’t have been called by opposing counsel. If there is no information the witness has to offer that is helpful to your side, then the pathway is clear; slash and burn, but in an artful fashion. If Christmas has come early and the witness has come across as unlikeable whether due to arrogance, deception or any of the seven deadly sins, then the pathway is even more clear; rape, pillage and burn in any fashion. Usually, however, the job is not so easy.

Not so easy because the witness may have some information helpful to your case. Now we must find the “sweet spot” of making the jury believe what the witness is helpful on, but disbelieve what he/she is not helpful on. That, is art.

That art involves not so much the substance of the testimony but rather the Four Ps of cross examination: Psychology, Presentation, Perception and Persona. Most attorneys view cross as going over the witness’ deposition and statements and scripting Qs and As and impeaching if the witness strays from the substantive points. The true art of cross examination involves playing at a different level, playing “above the rim” if you will. What you can do with a witness on cross depends greatly on your understanding of the psychology of the witness. Whether and how to use the carrot or the stick or a combination thereof. Each witness has a different psychological makeup and will react differently. That psychological analysis is the crucial first step in deciding how the cross will be built. Second, your presentation and the jury’s perception of you, the witness’ reaction and the witness is many times way more important than the actual words and substance of the witness’ answer. The witness may have said “no,” but the jurors perceived “it couldn’t have been anything else but yes.” And perhaps it isn’t a fourth P, but maybe just another way of saying Perception and Presentation, but your Persona and the Persona of the witness can “testify” as much or more so than substance. Were you the trusted guide or a bully on cross exam? Or as an opponent said to my partner in a recent three month trial when asking about me, “Will the pit bull be on or off leash today?” That leads me to the last point of this brief discussion of the foundation of cross; the ancillary effects of the Four Ps. When that opponent was preparing witnesses each night he had to think of what he was going to tell them to expect on cross: the leashed or unleashed pit bull. If he told them to be ready for the unleashed version and then they got Mr. Nice Guy they could have their pocket picked without even knowing it. But vice versa and they wouldn’t be ready for the battle. If he told them you don’t know which one is going to show up then they will be on edge. The point is that your style, persona and presentation have the ancillary effect of getting inside your opponent’s head and the head of the upcoming witnesses. It is part of the psychological battle, as well as the substantive battle.

THE FIVE BASIC RULES OF CROSS EXAMINATION.

There are many more rules and nuances and many more tactics and techniques that need to be studied, learned and practiced on this topic. However, the purpose of this column is to give you five simple rules to remember as a fall back structure when doing a cross.

Eye It Up. This is defining the goal of the cross examination. Are you going to use the witness or destroy the witness? Are you going to destroy the substance of the testimony or the credibility of the witness? Are you going to parse out the substance that is helpful and just try to neutralize or downplay the unhelpful substance? There is no “right” answer for every witness. But, there has to be a goal for the cross of every witness. The goal will help you decide on the right approach to that witness.

Set It Up. Freeze the witness. Get the witness committed to what he/she is saying in such a way that you then can destroy it. Get him/her to commit to your characterization of his/her substance. There must be no doubt as to what his/her position is.

Swat It Off. This is where you make your point. This is where you impeach. This is the fun part. This is what we live for. You know how to do this. You dream about it. As Nike says “Just do it”. But, the job isn’t done yet.

Hold It Up. Now you have to show the jury what you just did. Every single juror has to know what just happened. You can’t take the chance that they “got it,” and you can’t take the chance that they all got it. But, you’re not done yet.

Tie It Up. Make the point of how it *fits into the Big Picture*. Your goal is not just to win a round of cross examination. The goal is to win the whole contest, to secure a verdict in favor of your client. The jury needs to know how what you've just done on this cross examination of this witness fits into the big picture, the entire case, and what they will have to do in deliberations. Unless the judge has totally lost his/her mind and allows you to give a mini-closing argument at the end of your cross, this can be a bit difficult. Remember, this is art, not science, so while not always possible, look for a way to tie up what you just created with your overall storyline of the case and of the trial.

CONCLUSION

As intimidating as cross examination can be, keeping in mind the Four Ps and the Five basic rules of cross examination will get you through virtually any cross with a minimum of angst and a good measure of success.

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