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PHILOSOPHY OF CROSS-EXAMINATION

I. INTRODUCTION

Most lawyers and commentators agree on the generic purposes of cross. There is also a consensus on the approach. My presentation is an analysis and synthesis of the best thinking on the topic. Approach the topic of cross as a skilled craft. The more tools trial lawyers have in their tool chests, the more alternatives are available. At its core, cross is, and always has been, about the basics. When audiences listen to a particular lawyer on cross-exam, much of what they are impressed with is a function of the style with which the topic is presented, rather than anything particularly novel about the substance.

It is therefore important to separate content from delivery. The key to delivery is always the same: to act in a manner and with a range of expression that is natural for you. Prepare and practice. So what if you are not extroverted, there's a variety within your natural range that can be very effective. As in jury selection and closing, cross is one of those places in the trial where the lawyer's personality clearly intersects with content.

I first discuss going beyond Irving Younger's Ten Commandments, and offer my Chaos Model. Next I explore McElhaney's interesting view that the real purpose of cross is to establish that you, the trial lawyer, are actually the most credible "witness."

I close with Thomas Mauet's model which views cross as an analytical model organized by threshold decisions. Follow his decision-tree model and you will consistently make good choices. Mauet frames the topic in terms of realistically attainable goals rather than "rules."

II. GOING BEYOND THE TEN COMMANDMENTS

When Irving Younger first published his Ten Commandments in the late 1960s, he intended them as an anchor for beginners and guideline for journeyman. The Ten Commandments were the first systematic approach to cross-examination and remain the primer in this area of advocacy. Acquiring skills that transcend Younger's Commandments is crucial to the trial lawyer who desires to confront their fears and pursue excellence in the courtroom.

Younger's Ten Commandments are:

1. Be brief.
2. Ask short questions, use plain words.

3. Ask only leading questions.

4. Ask no question to which you don't know the answer.

5. Listen to the answers.

6. Don't quarrel with the witness.

7. Don't let the witness explain.

8. Don't go over direct examination.

9. Don't ask one question too many.

10. Save the explanation for final argument.

Let's survey some of the criticisms and comments the Commandments have generated.[1] Some have characterized the Commandments as a nice starting point, but only that. Others say breaking the rules is purely a "risk-reward" decision. Janis Joplin sang, "Freedom's just another word for nothing left to lose." If you are losing your case, and therefore have nothing to lose, consider ignoring the rules and going for broke. Thomas Mauet, author of *Trial Techniques*, 6th ed., frames cross-examination as "realistically attainable goals" rather than the application of rules. James Jeans, author of *Trial Advocacy*, states: "The Commandments are painting by the numbers. After that level, we need to do more than go outside a line now and then. We need to forget painting by the numbers and get more creative - to break out of stultifying rules. The whole thrust of the Commandments is 'Don't make an ass of yourself.' They are strictly defensive. And like the 'prevent' defense in football, they almost guarantee mediocrity."

III. FEAR IS OUR JUMP-OFF POINT FROM THE COMMANDMENTS

If the Commandments are the presumed upper level of competence for most lawyers, what does the next level of competence consist of, and how do we get there? I have selected the fear possessed by each lawyer as my instructional "jump-off" point from the Commandments. Why fear as a point of departure? Because it is common to all and so paralyzing. Only in cross-examination are so many inexperienced lawyers so worried about embarrassing themselves. There are good reasons for this. If things go poorly on direct, the witness looks bad. If things go badly on cross, it is you, the lawyer, who looks bad. This is because on direct the witness is testifying, while the lawyer slips into the background. In contrast, on cross, dynamically, it is the lawyer who is "testifying" through his or her declarative questions.

IV. THE COMMANDMENTS WON'T WORK IF THE JUDGE ALLOWS THE WITNESS TO EXPLAIN . . .

I submit there are clear reasons why Irving Younger's Ten Commandments are not as effective now as they were 30 years ago. The Commandments are all about the lawyer

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[1] McElhaney, James W., "Breaking the Rules of Cross: Fast Thinking Will Lift Inquiry Beyond Mediocrity." Litigation: The Journal of the ABA Litigation Section. April (1994): 96

controlling the witness, something today's judges are less likely to allow than in the past. What accounts for this difference? Many of today's judges are different critters. In the 1960s and 70s, becoming a judge was seen as a respected and honorable capstone to a long and successful career in the courtroom as a jury trial lawyer. This is not necessarily true today. Most lawyers ascend to the bench at a much younger age, with very few jury trials under their belts (at least as lead counsel). They may have enjoyed highly successful courtroom careers (in domestic relations, for example), but have little jury trial experience. The reduced number of civil jury trials results in a civil trial bench and bar with increasingly less civil experience. The less skill and experience your judge accumulated during his or her career as a civil jury trial lawyer, the less likely it is he or she will later, when serving as a judge, rein in non-responsive witnesses. It is my understanding that out of Oregon's 18 newest Circuit Court judges, only two had previously tried a civil jury trial as lead counsel before ascending to the bench.

So, back to the courtroom . . . You've carefully prepared all your cross-exam questions with the Commandments in mind, but, everything begins to fall apart when the witness refuses to answer your exact questions. It gets worse when the judge allows the witness to explain every answer. It wasn't supposed to be like this! You know the Commandments by heart. All that was supposed to be necessary was for you to confidently rise from your chair and object, request the judge strike the witness's answer as non-responsive, then caution the jurors to disregard the stricken answer. The judge would then turn and sternly instruct the witness to answer the question. That's what the Commandments say is supposed to happen.

Now what happens instead? Even if the judge instructs the witness to answer your question, which he or she will generally do, more often than not, many judges will then destroy your cross-examination by allowing the witness to thereafter generously explain his or her answers. This makes you, the cross-examiner, look aggressive, inconsiderate, incompetent, and disinterested in the truth. You are understandably reluctant to repeat this debacle, so your future cross withers, as your credibility and confidence plummet. This has happened to every trial lawyer, not just to you.

And so we come to the exact departure point I have selected from Younger's Commandments, the intersection of the questions: "How do I avoid this embarrassing situation?" and "What can I do when it happens?" Here's where my "Jury Empowerment" model might be helpful.

V. THE JURY EMPOWERMENT MODEL

When saddled with a judge who is reluctant to allow you to control a witness on cross-examination, the jury empowerment method is the alternative to retreating. My trial philosophy is always jury oriented. This approach asks "Is there a way to shift responsibility from the lawyer or judge to the jury?" In the area of cross-examination there are two applications of jury empowerment.

Don't vanquish a witness on cross - no matter how justified it may seem. When it feels like you should, and probably can, bury a witness, that is exactly when you should walk away. If the witness is a liar, and it is obvious, you don't need to say it. If it isn't obvious, then it is too risky. It's just that simple. During your closing, it is okay to discuss the reasonable inferences that can be drawn from the evidence concerning a witness's credibility. I didn't say argue the

evidence or inferences. I said discuss them. Avoid stating the ultimate conclusion that the witness has been lying. That determination belongs to the jury. Judging, after all, is their job, not yours. It's acceptable for you as a lawyer to judge acts, but leave judging people to the jury.

Gerry Spence says "Never vanquish a witness without the jury's permission." I agree so far as the statement goes; however, I see it a bit differently. When the jury wants you to punish the witness, and thereby gives you permission to do so, that is when you should walk away. Leave witness punishment to the jury. They will express their displeasure by the size of their verdict. When you tear up a witness, what is left for the jurors to do?

Even a cursory review of the Commandments shouts that the rules are a system of techniques for maintaining witness control. What is to be done if the judge won't allow you to acquire and maintain witness control, for whatever reason? I say embrace the chaos and use it to your advantage. View witness noncompliance as an opportunity, not a problem. A jury empowerment method is the only real alternative to retreat when the judge isn't helping.

On destructive cross, when witnesses decline to respond to your questions with the obvious "Yes" answer, they are revealing their partisanship, thus their bias, by their non-responsive narrations. Their conduct also flaunts the courtroom's "rules of the road." I submit that this is an opportunity . . . this is good!

Think of cross specifically, and the trial generally, like the martial art of jujitsu. Turn the opponent's aggression to your advantage. Rise above the witness's noncompliance by remaining conspicuously respectful and professional. If the judge won't control an obviously biased witness on destructive cross, then comport yourself in a manner that favorably contrasts your professionalism with the partisanship of the witness. This is an opportunity for you to enhance your own stature and for the jury to punish recalcitrant witnesses by discounting their testimony. None of this will occur without brief, clear questions or statements that command obvious "Yes" answers, combined with your behavior clearly contrasting with the witness's.

Yes, you can ask the judge to instruct a witness providing non-responsive answers to your questions; however, I submit there is a more effective way. Why not have the jury punish the noncomplying witness? Here is the general approach. When a witness provides non-responsive answers, ask the witness, "Did you understand my last question?" Because all of your questions on cross should be simple with the only answer being "Yes," the only response available to the witness is "Yes, I did understand your prior question." Now, instead of you repeating your last question, have the court reporter read it back to the witness! There is a real place for drama here. Face the jury when the court reporter is reading the question; now turn toward the witness, and with a bit of indignation, firmly request that the witness answer your question. If the witness continues to provide non-responsive answers, repeat this process two or three more times.

After the second non-responsive answer, you may choose to glance at the clock in the courtroom while explaining to the witness that a direct answer to your question is in everyone's interest, because (now looking toward the jury) we can all finish this trial sooner. Keep one eye on the jury. Their agitation will be increasing with each evasive answer. The jury will concurrently be watching the judge, who's increasing exasperation will also be obvious. Somewhere along the way, the judge will generally interrupt this cycle and order the witness to answer the question. By that point, it doesn't really matter what the witness will say, or has said. The witness's bias is obvious.

If you have a judge who allows you to control witnesses, then by all means do so. This also educates the jurors. When the judge admonishes a witness, it sets judicially approved expectations, which cues the jurors on how witnesses should conduct themselves when testifying. This is especially true the closer you are to the end of a long day. A nice variation is to alternate using the judge to control some witnesses, and the jury for others. Save the jury for the opponent's key witnesses. Let the judge set the cadence and spank the less important ones.

The use of jury empowerment techniques requires experience, judgment and some risk. These suggestions are somewhat counterintuitive, in that like some marshal arts, they offensively use the opponent's energy against them. They are not for everyone, and should be considered as no more than tools in the trial lawyer's arsenal of alternatives.

VI. McELHANEY'S THOUGHTS

My friend Jim McElhaney says ". . . the real purpose of cross-examination is to show the judge and jury that you are the better witness."[2] Jim emphasizes that the lawyer is the most important witness in the trial, and that while never under oath, you are functionally testifying during jury selection, opening, cross and closing. I agree with Jim's assessment.

> "Once you start looking at cross-examination as the time to show you are the better witness, you will see opportunities everywhere. Every group of questions is like a volley between you and the person you are cross-examining. How you handle yourself determines the score:
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> - When you try to make too much of a point, you lose that volley. The jury can't trust your view of the facts.
> - Quibbles are costly. The quibble is the lowest common denominator. It says this is the best you can do.
> - If the jury sees you check a fact when you ask a question, you win at least part of that volley. It sends the message that you are careful.
> - If the witness forgets something and you remind him, you win that volley.
> - If the witness can't find something in a document and you show her where it is, you win that volley.
> - Don't take it personally if the witness evades your questions. Rejoice. It means she doesn't want to answer your question, and it gives you a chance to show that to the jury. 'Dr. Maxwell, is there some reason why you don't want to tell us whether you did that test?'

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[2] McElhaney, James W. (2006). *McElhaney's Trial Notebook, Fourth Edition.* Chicago, IL: ABA Publishing. Chapter 51, page 445.

- If the witness says, 'If you say so,' you win that volley. Like the dog that rolls over on its back in doggy surrender, the witness is saying 'I give up.'

You can still show the jury you are right. So you say 'Not if I say so, Mr. Sisson, that's what it says in your letter. True?'

By the time you've finished cross-examination, you want the jury to think that you are:

Careful.

Fair.

Honest.

And you know the facts better than the real witness does. It makes you the guide worth following."[3]

VII. SUMMARY OF CHAPTER VII, CROSS-EXAMINATION

Trial Techniques, 6th Edition
Thomas Mauet

Mauet states that "20-25 jury trials are usually necessary to acquire the experience essential for a moderate degree of polish in cross (as well as other aspects of trials) . . ." In an age of alternative dispute resolution, this is small solace for the aspiring trial lawyer.

Prior to the start of trial, acquire a sense of the judge's temperament and discretionary inclinations. You should also know how the judge is likely rule in the following situations:

- Will the judge allow witnesses to explain their answers on cross, and if so, with how much latitude?
- When calling a witness, how much hostility will the judge require before ruling that the witness is adverse, thereafter allowing you to use leading questions?
- As a general matter of evidence, is the judge inclusive or exclusive, i.e., on discretionary calls, does the judge tend to let evidence in or exclude it? If inclusive, assume that most everything will come in leaving the jury to sort it out. If the judge is exclusionary, then an aggressive pretrial motion in limine can be a useful tool to help clean up the evidentiary terrain, thereby allowing you more certainty in planning your opening and trial themes. This discretionary pendulum is often found when rulings are made under FRE 403.

Before conducting any cross, ask yourself the following questions, which are organized in the order they should be presented:

1. Must I cross this witness?

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[3] McElhaney, James W. (2006). *McElhaney's Trial Notebook, Fourth Edition.* Chicago, IL: ABA Publishing. Chapter 51, page 447.

You should determine in advance what you can realistically expect to accomplish. This requires thought and preparation. Keep in mind that some jurors have preconceived notions about trials which include the notion that every witness can and will be crossed. Any decision must be made with this expectation and accommodation considered.

a. Has the witness really hurt my case?

b. Is the witness important?

In the case of a dangerous witness "leaving well enough alone" may be best, or at the most, conducting a cursory cross on peripheral matters only. In the case of a soft witness, there is an outside possibility they may have "sandbagged" you by saving something for cross in hopes you will take the bait and pursue the topic.

c. What are my reasonable expectations?

d. What risks do I need to take?

Real trials involve calculated risks. The extent of the risk you are willing to take depends on the relative strength of your case and your skill. If your case is solid, and you can reasonably expect to win, keep your risk to a minimum. Discretion is the better part of valor. If you are riding a loser, then consider casting caution to the wind and conduct a risky cross that searches for breaks in hopes of turning the case around. Where your facts are bad, and barring luck, you can confidently expect to lose, conducting a "risky" cross is a legitimate strategy.

2. Purpose and order of cross. There are two basic purposes of cross:

a. Eliciting favorable testimony, or constructive cross.

b. Conducting a destructive cross.

Understanding these two broad purposes, and their order of use, is essential to conducting an effective cross. When you conduct your cross, elicit the favorable or constructive before you move to the destructive. The reason is at the end of direct most witnesses have testified in a plausible manner and their credibility is at its highest. This is the time to extract favorable concessions, since the witness's credibility will enhance the impact of the concessions. Such admissions both are less likely to occur, and will have less impact, once you have attacked the witness. It is difficult to combine the credible concessions of admissions with a destructive cross. A destructive cross seeks to discredit a witness thereby inviting the jury to minimize what the witness has said. If you have been successful in obtaining significant admissions, you may choose to omit any later discrediting cross. Jurors might be skeptical if you argue that only a witness's testimony favorable to your side should be believed, while that part of the testimony you have attacked should be disbelieved. It is difficult to "have your cake and eat it too." In other words, a destructive cross may undermine the prior concessions.

3. Structure of cross.

a. Limit your cross to a few points.

Develop no more than three or four points. Why? Because any more will dilute the impact of your strongest points, and the weakest ones will probably be forgotten anyway. A good test is to ask yourself "Is this point one I will likely discuss during my closing?" The outer content of the closing is a good definition of the outer limits of cross.

b. Make your strongest points at the beginning and end of your cross.

All cross should be conducted crisply. If you chose to begin with constructive cross, then immediate hostility is incongruent; if however you go straight to destructive cross, then skip the small talk, a.k.a. introductory remarks.

c. Cross doesn't have to follow the order of the direct exam.

Consider "indirection," the ability to establish points without the witness perceiving your purpose or becoming aware of the point until it has been established.

d. Don't repeat the direct!

The rare exception is where a response is obviously memorized. Providing the witness the opportunity to repeat the same answer, over and over, exactly the same, announces a coached and rehearsed response.

4. Rules of cross.

a. Don't fish. This isn't discovery.

The primary purpose of cross is to elicit favorable facts or minimize the impact of the direct. This is Irving Younger's "Don't ask a question you don't know the answer to."

b. Carefully listen to the answers.

c. Don't argue with the witness.

When you argue with any witness, you not only lose control for the moment, you lose the high ground of the courtroom's psychological terrain. Be careful to contrast the witness arguing with you, rather than you arguing with the witness! When you argue with the witness, point to the opponent. Wait for the witness to argue with you. This is the opportunity you have been waiting for. When cleanly executed, the jury will punish the evasive or argumentative witness by devaluing their testimony.

d. Don't ask the witness to explain.

The exception is when it is obvious constructive cross and the answers are going to be favorable.

e. Don't ask that one question too many.

Stop! It is so difficult because a favorable response invites a reach for more. The older thinking on cross involved asking the final question. The modern approach uniformly saves the final point for closing, and then offers it as almost a rhetorical question by asking "Why would any unbiased witness have trouble answering such a simple question, a question to which the answer is self-evident?"

5. Questioning style.

Effective direct requires you to use open-ended questions that allow the witness to be at the center, with the lawyer secondary. <u>It is the opposite in cross</u>. The questions are all leading and you are the center. In effect, <u>it is you who are testifying</u>. The witness simply ratifies your question/statements with "yes" answers.

a. Project a confident, take-charge attitude.

You are now the center of attention. On direct, how a witness answers is as important as the answer itself. In a similar vein, on cross, how you ask the question is as important as the question itself. Projecting humor and incredulity are legitimate parts of cross. Here the personality of the lawyer shines through. What is the right style of cross? If authenticity is the key to acquiring and maintaining credibility, then it must be the style that is most natural and comfortable for you. Used appropriately, the witness and jury will sense both the attitude and expectation in your questions. Projecting your attitude often has more to do with obtaining the answers you want than the actual questions the witness answers. In keeping with the best laid plans of mice and men, a good poker face is essential when you order lemonade and get a lemon in the face.

b. Most young lawyers lead too much on direct and not enough on cross.

This quickly becomes a habit. The antidote is self-awareness, preparation and practice.

c. Be keenly aware of spacing, or your location in the courtroom.

Psychologists call this "proxemics." You should be a dominant physical presence since you want to capture and maintain the jury's attention. Keep eye contact with the jury. This imparts the strong impression of control. Consider questioning the witness from the blackboard, and maintaining eye contact with the jury during both your questioning, and the witness answering.

d. Use short, clear questions.

The common sense answer, obvious to every juror, to every question, should be a resounding "yes." Then if the witness gives any other answer, the jury will deal with the witness appropriately.

e. Keep control over the witness.

Witness control is necessary, not only to prevent the witness from hurting you, but also to provide the backdrop that permits and encourages the jury to discount the testimony of argumentative and noncomplying witnesses.

6. What favorable testimony can I elicit? This is constructive cross.

a. What parts of the direct helped me?

b. What parts of my case can he corroborate?

c. What must the witness admit?

d. What should the witness admit?

7. What discrediting cross can I conduct?

Discrediting cross always has one fundamental purpose: to suggest that either the witness or their testimony is less credible than it appeared at the end of the direct. It is called "increasing the improbabilities**."** Whether the approach is to extract unlikely explanations, retraction, contradictions, inconsistencies, or implausibilities, the goal is always the same. When selectively used it can be devastating.

Beginning lawyers sometimes mistakenly attempt the same thing through the refreshing recollection technique. Refreshing recollection is a technique of direct exam that steers a

favorable, but forgetful, witness back on track. It is therefore an accrediting technique. Regardless of the particular area, the approach is the same. Your cross must, bit by bit, carefully suggest the impeaching facts, and then stop just short of the conclusion.

An overly zealous cross runs the danger of offending the jury. Be firm, but never rude or hostile. Accordingly, subtlety is essential. The jury will respect your professionalism and reach the proper conclusion on its own.

8. When impeaching with a prior inconsistent statement, the rule is COMMIT, CREDIT AND CONFRONT.

First, commit the witness to the fact he asserted during direct on which you plan to impeach. Next, credit or build up the importance of the impeaching statement. Finally, confront the witness with the prior inconsistent statement by either reading it yourself, or preferably by making the witness read it back to the jury. Make him choke on his own words, words from his own mouth! Remember the fine line between being firm, yet always professional, versus being hostile and rude. Leave it to the jury. They will know what to do. Trust them.

It is difficult to impeach with long or wordy statements. Reduce the material to one critical fact or a few essential words. The buildup is critical.

A witness's truthfulness must be attacked before it can be supported. In other words, it must be discredited before it can be accredited.

There are seven basic impeachment techniques:

a. bias, interest, and motive

b. prior convictions

c. prior bad acts

d. prior inconsistent statements

e. contradictory facts

f. bad character for truthfulness

g. treatises - Oregon does not allow impeachment with treatises unless the witness acknowledges that the work is authoritative. In Washington, the treatise is admissible as substantive evidence, without this concession by the witness.

Any party can impeach any witness. When done on direct it is called "drawing the sting."

a. Can I discredit the testimony? (perception, memory, communication)

b. Can I discredit the witness's conduct?