Vincent Bogliosi once noted: “A jury remembers the tune and not the words.” Juries constantly evaluate witnesses to determine what the truth is. They make tentative decisions about who is winning and who is losing and who is good and who is bad.  

A jury often makes up its mind early in a trial long before a defendant puts on a witness. A jury frequently identifies with an individual plaintiff instead of a large corporate defendant. It sees itself as being able to level the playing field. During voir dire and opening statement, the defense attorney outlines his client’s story and sets the themes of the case. He then fills in the details of the defendant’s story through his cross examination of the plaintiff’s own witnesses through well-prepared and effective questioning. By the time he calls his own witnesses, he has probably already won or lost the case. The better the cross examination of the plaintiff’s witnesses, the fewer witnesses the defense will need to call in its own case, thus depriving a good plaintiff’s attorney of the opportunity to cross examine the defense witnesses in front of the jury.

This paper presents a composite of cross examination techniques that may be useful in effectively conveying a corporate defendant’s story. The paper also addresses the uses of technology and psychology to improve upon traditional cross examination methods and to assist you in finding the art in the process.

I. STRATEGIC CROSS EXAMINATION

“Cross examination is the ‘great engine’ for getting at the truth.”

A. PRIMARY PURPOSES OF CROSS

Cross examination generally serves two primary purposes:

Destructive Cross: The goal of destructive cross is to discredit the testifying witness or another witness. This type of cross is designed to reduce the credibility of the witness or persuasive value of the opposition’s evidence. The use of impeachment material is a key to destructive cross, as it is the ability to attack and discredit the bases for the witnesses’ statements or opinions. The questioner’s goal is to establish control of the

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1 The author acknowledges the able assistance of David Red of MehaffyWeber, Beaumont, Texas.
4 Fred T. Friedman, “Cross Examination Skills.”
witness both in his mind and in the mind of the jury. The jury expects that and as the trial proceeds, if the attorney excels in cross, the jury will look forward to what will happen next.  

**Supportive Cross:** This type of cross examination can be used to bolster the questioner’s own theory of the case and tell the defense story. It should develop favorable aspects of the case not developed on direct examination or expand on these aspects. This testimony may support your witnesses or help to impeach other witnesses.

In many jurisdictions, especially in state courts, cross examination is not limited in scope to the areas covered on direct. In those jurisdictions, cross can often yield helpful testimony given by experts in other cases or from other sources. Once a witness is on the stand he is fair game. Cross may also bring out helpful testimony from fact witnesses avoided in their direct testimony. Cross examination is the defense lawyer’s opportunity to tell his story and to make significant points with the jury. Jury research shows that the jury determines who should win a case early in a trial. Defense attorneys should rarely hold back developing their case until their case in chief because, by then, it may be too late. Jury research also shows that jurors pay closer attention to cross than any other part of a case. Effective cross should result in a defendant calling fewer witnesses. Strategically, the defense attorney may call fewer witnesses for several reasons:

- To avoid repetition of facts or details clearly brought out in the case already;
- To move the case along toward close without appearing to delay;
- To put on only key witnesses who will stand up well on cross themselves;
- To prevent giving a skilled attorney on the other side a chance to score major points himself and end on a high note during the defense case.

Before conducting cross examination, the attorney must think strategically. Is cross examination necessary for each witness? The answer is no. Of course, it is difficult to say “no questions,” and most attorneys take the bait. The attorney should ask himself:

Did that witness’ testimony hurt my case? If so, would asking questions improve or reinforce the situation?

Usually testimony of family members in a death or serious injury case hurts the defendant’s case; however, a jury expects these witnesses to be emotional and sympathetic witnesses. Jurors will have compassion for them and probably identify with them. Unless there is critical evidence you cannot get into the case any other way, consider asking no questions of family members. The jury knows that the family probably exaggerated its story, and a defense attorney does not need to point out the obvious. In a very high profile pharmaceutical case tried recently (after the case had been resolved) the judge stated privately that the defense’s decision to cross examine the widow extensively about her relationship with her husband and her husband’s other health issues was a disaster. Most of that evidence was already in the record through medical

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6 Id.
records and other witnesses. The jury thought the company was heavy-handed and inconsiderate, and the jury got mad at the company. And the old adage is if a party (or attorney) makes the jury mad, they lose the case. The defense decided strategically to have a female attorney ask the questions of the widow. That was her only assignment in front of the jury. It was an obvious ploy and the jury did not like it.

Other considerations in the decision of whether to cross a witness and how extensive the cross should be are the following:

- How important is the witness to your case or the plaintiff’s case?
- Does the jury expect cross?
- Will the jury think you are conceding everything the witness said if you do not cross?
- Did plaintiff leave out an area you consider important on direct that may be a trap if you ask about it? Obviously, if you have deposed the witness, this trap should not be a real potential.
- Can the witness be controlled?
- Do you want to give the witness a chance to repeat his testimony?
- Can the witness be impeached?\(^7\)

Typically, the jury will have an initially favorable view of non-party fact witnesses. So, at the close of direct, the jury most likely will feel familiar and friendly toward the fact witness.\(^8\) For this reason, the tone of the cross examination of fact witnesses must be carefully controlled. A harsh cross exam of such a fact witness, even if he or she is hostile toward the defense, is generally not well received by the jury.\(^9\)

**B. DEVELOP A PLAN**

All cross examinations must be carefully planned. Each witness must be evaluated separately. Establish a goal for each witness. Determine the type of witness, i.e. hostile, helpful, or neutral. Decide the facts you must prove with each. If you can further your story through plaintiff’s fact or experts, could that reduce the number of witnesses you need to call? Each part of a trial should be interrelated and should reinforce other parts. Cross examination is an integral part that should help the jury understand your client’s

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\(^7\) Id.
\(^8\) Id., p. 44
\(^9\) Id.
story. Each cross should have a purpose and the purpose, is to advance the case objectives and goals.  

Asking leading questions followed by yes or no answers enable the cross examiner to “testify” and is the general rule to follow in cross. Each question should be intended to advance the goals defense counsel has already established for this particular witness. Each question should fit within the planned scope of the examination. In most cases, juries will reject the testimony of an evasive witness who cannot or will not answer simple questions with simple answers. Cross examinations are successful equally for what is not asked as for what is asked. Unless the question fits within the plan, and the question furthers the goals, and the answer is known or does not matter, do not ask the question.

When developing the plan for each witness including fact witnesses, the attorney should outline the points to be made with that witness. How can the cross of this witness contribute to the defense story and themes? If the witness will not concede anything helpful, show the witness to be biased and undermine the credibility of the plaintiff’s story. If his bias is really obvious, you may be able to expand his negative testimony to show that his testimony is contrary to the experience of the jury and not to be believed.

C. EFFECTIVE RULES OF ENGAGEMENT

Judge Ralph Fine admonishes attorneys by stating the following rules:

“Do not ask a question on cross examination unless it satisfies one of the following rules:

1. The jury already knows the answer before the witness responds, or
2. The answer cannot hurt you, or
3. You have immediate impeaching material”

In his article, Fine provides an example of cross examination and gives a critique. Some of his points are worth careful consideration. In his opinion, a lawyer should rarely object in front of the jury to the admission of evidence. In most trials today, evidence is pre-admitted and objections have been previously made, but there are occasions for objections during witness testimony. Unless the objection is necessary to preserve the record for appeal, it usually should not be made. An objection only reinforces the testimony or document and he believes that “winning lawyers are truth givers in their trials.” He believes that objecting in front of a jury makes the jury think the attorney has something to hide. Obviously, the attorney may need to object to protect the witness, to make a point with the jury or to stop egregious behavior. In Fine’s example, however, the

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11 Friedman, supra, p. 44.
12 Id.
13 Id.
15 Id., p. 29
witness is answering questions very well, yet plaintiff’s counsel objects to a question for no purpose. The attorney may be technically correct, but the objection does not advance his case, and Fine believes that the testimony was actually helping the objecting attorney so what was the point?  In cross, make sure that opposing counsel has been given all documents in advance so that he does not slow your cross by asking to review long exhibits. This rule of course does not apply to a document that the attorney has held in reserve for effect. Fine points out that trying to have the court limit a witness’ answers to “yes” or “no” on cross is a futile and damaging effort. He observes that asking the court to admonish the witness appears to be whining and an admission that the questioner does not control the witness. He further points out that arguing with a witness is like beating a dead horse resulting in calamity. He reiterates that an attorney should start his cross on a strong point. He cautions against using “okay”, “I see”, “alright” after an answer because that merely emphasizes the negative.

1. The Commandments - Revisited

Cross examination does have some other generally accepted rules. The Ten Commandments discussed by Irving Younger years ago have been modified and updated by esteemed attorneys such as Tim Pratt. Pratt underscores the theme that cross examination is an art, and that three factors combine to create this “artistic” success – personality, presence and persuasion. His article is full of insight and examples and should be read in its entirety. Some points, however, deserve special emphasis. To be an effective cross examiner, the attorney must PREPARE. Throughout this paper the concept of preparation is emphasized more than once. It is a huge mistake to think that you can do an effective job of cross by winging it.

Some important tips on developing the art (and practicality) of cross examination:

- Establish goals for each cross.
- Outline the topics to cover.
- Allow the jury to see that the attorney knows and is committed to the case and that the opposing witness respects the attorney as an able adversary.
- Cross the witness on the essential controversy of the case.
- Master all prior depositions, articles, and other documents for each witness.
- Professional witnesses can usually be impeached by their prior testimony or statements in published articles because they often do not review them and may forget what they have said in the past.
- Investigate new and critical resources for an expert on the Internet including the witnesses’ own websites and the website of their employers and forms of social networking.

16 Id., p. 30
17 Id., p. 35
18 Timothy A. Pratt, The Ten Commandments of Cross Examination, FDCC Quarterly, Spring 2003
One particularly effective cross examination occurred in a Daubert hearing involving Tim Pratt and Gene Williams (both FDCC members) with Tim asking questions of a very qualified witness who was being challenged, and it illustrates the importance of finding out all you can about a witness – in this case a website.

Q: You are on staff at M. D. Anderson Hospital?
A: Yes.

Q: Isn’t it true that M. D. Anderson Cancer Hospital has a web page?
A: Yes.

Q: Have you ever had any articles published on the M. D. Anderson web page?
A: A few.

Q: Do you remember one of your articles that appeared on the web page just three months ago?
A: I think so.

Q: In that article, you talked about T-cell lymphoma, the very type of cancer involved in this case?
A: I believe so.

Q: And, therefore, you wanted to be as accurate as possible?
A: Of course.

Q: Turn to page four of the article.
A: Okay.

Q: In this article, which you published on the web page just three months ago, you talk about what is known regarding the cause of T-cell lymphoma, isn’t that right?
A: Yes.

Q: Isn’t it true that you said the following: “No one knows what causes T-cell lymphoma.” Is that what you wrote just three months ago?
A: That’s what it says.19

(The witness was excluded.)

- While it is generally a good rule to lead the witness, leading questions also can grow tiresome.
- Vary the routine of questions
- Often, it is best to have the answer come from the mouth of the witness.
- Know the difference between tough and mean, between confidence and arrogance, and between control and dominance.20
- One of the most difficult things for lawyers to do is quit. You need to continuously evaluate the cross. How is the jury responding? Is it too long?

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19 Id.
20 Id.
There are two times to quit: When the witness has been discredited and/or when the witness has made a monumental concession. How many attorneys regret asking that one extra question? Ask yourself, how much better can it get?

How many times have you asked those questions and the witness shoots a zinger of his own? \(^21\)

It is better to start and stop on a high note. A third time to quit: when the witness is winning and you digging a deeper hole. \(^22\)

Be organized, effective and quick to the point.

Know the impeachment materials and have them readily available. With newer technology, have the documents and impeachment material loaded in a trial presentation software to eliminate piles of documents, notebooks, depositions, etc.

Use impeachment sparingly. Do not impeach on minor points. The jury will not be impressed and may think you are harassing the witness.

If you are doing a high-tech presentation, **PRACTICE**. Do not fumble with the technology and always have a back up plan. \(^23\)

If the witness is strong and cagy and the questioner is masterful and a match for every detail, the jury may think the lawyer and witness are smart, but it may have no idea of what is going on.

Technical points generally bore the jury, and everyone else except maybe the witness.

It is the duty of the cross examiner to simplify the case so that the jury understands it.

**2. Don’t make the jury mad**

Do not demand a “yes” or “no” answer: Cutting off a witness who wants to explain an answer may offend a jury. After the witness gives an explanatory answer, the attorney might ask – “Is that a yes?” One way to get the “yes” or “no” is to ask shorter, more direct questions.

Do not quibble over minor details: The questioner loses credibility when he tries to impeach with minor points. Pick your battles.

Do not appear as a “cross” examiner. Every witness cannot be destroyed. The attorney should not be rude, or loud or emotional. The jury should have the emotional response, not the lawyer. \(^24\) In a recent trial, one particularly capable tall and very imposing plaintiff’s attorney with a loud voice and had one speed – aggressive. At first the jury liked him and watched him closely, but as time wore on, he became predictable and tiresome.

Do not treat every witness as a liar: Jurors do not believe every witness will lie under oath (especially those not being paid to testify). They may distrust a “hired” gun, but not every witness. Jurors react more favorably to the idea that a witness may be mistaken, misinformed, or potentially biased. Jurors may identify

\(^{21}\) Id.

\(^{22}\) Id.

\(^{23}\) Id.

\(^{24}\) Id.
with the witness. In a recent trial, the jury gave four adult children each a significant amount of money for the loss of their elderly father. One of the adult children lived several states away and rarely saw his parents. The jury foreman on post-trial interview said that he identified with that adult child because he could rarely visit his own parents, but he did not think that should diminish his loss if they died. The strategy to attempt to distinguish among the adult plaintiffs in cross examination backfired because of an unusual sensibility or perhaps even feeling of guilt of a key juror. That juror, by the way, sided with the defense on liability and argued strongly against punitive damages (which the jury declined to award), but he agreed that the award to the adult children should be the same.

- Do not argue with a witness. The jury may side with the witness, but at a minimum, jurors will not like it.
- Do not interrupt an evasive witness, but go back and repeat your question. Do not rephrase it. Repeat it verbatim. Eventually, the witness will look obstructionist or ridiculous to the jury.

3. **Be Flexible**

After the prior discussion of established cross examination techniques, the attorney should remember not to stay too tied to the traditional rules of cross examination. Allow yourself flexibility and make cross examination the art.

Outlines are necessary to a point: an outline keeps the questions organized, keeps impeachment materials at hand, makes sure the questions are in the right order and so on. The outline should be made, but not followed too rigidly. If you are glued to the outline, you may fail to:

- Keep eye contact with the witness to maintain control and observe his manner as he answers the questions.
- Recognize that the best question may arise from the answer, not on the outline. For example:

  Q: Are you a married man?
  A: No, my wife died.
  Q: That is too bad. What was her cause of death?
  A: She suffocated.
  Q: What is your current address? (From the outline.)

- Refrain from looking at the outline too often. It makes you seem dependent and insecure.
- Do not feel compelled to ask every thing in the outline

Non-leading questions have their place.

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25 “How to Cross-Examine Witnesses Without Alienating Your Jurors,” Trial Attorney Tips, TrialTheater.com
27 Id.
• When the witness is not comfortable with his testimony, it may be advantageous to ask him to phrase his answer in his own words. A leading question may let him off the hook.

Q: What were you doing as you approached the intersection?
A: I was driving. (she said haltingly because she was also talking to her child in the back seat, trying to read the GPS and texting her husband)
Q: So, you did not see the light change?
A: No.

• When the witness has been thoroughly discredited.
• When the witness is tied to a favorable fact. Have him state that fact.28

Even “Bad Answers” can work at times

• If the “bad answer” is contrary to the common experience of the jury. Let the witness walk off the cliff
• Or if the answer is demonstrably untrue, it will discredit the witness so let him say it.29

The “Art” of Cross is not just about what the witness says, but how he looks when he says it. It is how the questioner presents the question, how the witness refuses to give a straight answer or the questioner refuses to accept a reasonable answer. It is about answers contrary to the jury’s common sense or experience. It is about the open-ended question that reiterates a significant point to the jury to which the answer does not matter.30

II. CROSS EXAMINATION OF EXPERTS

Cross examination of expert witnesses can be the most crucial component of a trial. Whichever side does the most effective job of cross examination will probably win the case. Cross examination of technical experts may be daunting. Their testimony may be full of scientific and medical terminology, epidemiological information that is far beyond the understanding of the jury or the court.31

Lawyers rely heavily on expert testimony to provide powerful, convincing evidence.32 You are not the only one, however, who will be able to cross examine witnesses. The other side gets a shot as well. Preparation of your witnesses cannot be overemphasized. The witness preparation should occur well before trial. It is a common tactic for plaintiffs

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28 Id.
29 Id.
30 Id.
attorneys to subpoena opposition witnesses to call in their case in chief or to call your corporate trial representative to testify even if he does not know the facts of the case or to ask the court to compel the attendance of your corporate representatives or other corporate witnesses at trial during plaintiffs’ case. You should assume that this may happen and have those witnesses prepared for cross examination before the trial begins.

A. PREPARING YOUR OWN WITNESS

- Make your witness understand the elements you have to prove and how the witness’ testimony fits within that proof.
- Be sure the witness is familiar with his deposition testimony in this case and any prior deposition testimony so that he does not contradict himself opening the door to impeachment.\(^{33}\)
- Make sure your witness understands the standards of proof in the jurisdiction which may be “reasonable probability,” and that he does not waffle stating “anything is possible.”
- Do mock cross examinations for your inexperienced witnesses; make this as realistic a cross as possible.
- No matter how good the witness’ credentials are and no matter how well he tells the story on direct, if he is not prepared for cross examination, his testimony could be a complete failure and could damage your case.
- Consider videotaping your witness so that he picks up on distracting mannerisms, and he is familiar with the process.
- Be careful in witness preparation not to waive a privilege or let the witness stumble into testifying about all the things he did to get ready to testify. Skilled plaintiff’s counsel always ask witnesses about their preparation, and at best the witness usually appears uncomfortable answering the questions, and at worst provides a sound bite about how “the witness had to be coached to testify” and had “to rehearse telling the truth.”

B. ATTACKING CREDIBILITY OF OPPOSING WITNESSES

Recognizing that “professional witnesses are available to render an opinion on almost any theory, regardless of merit,” judges are directed to be “gatekeepers for all expert testimony.”\(^{34}\) To determine whether expert testimony is admissible:

1. the expert must be qualified; and
2. the testimony must be relevant and reliable.\(^{35}\) The courts applying *Daubert* have broad discretion to consider a variety of factors.

At the deposition phase of a case, the attorney may ask open-ended questions to obtain all an expert’s opinions. The deposition, however, should also include specific

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\(^{33}\) Id.

\(^{34}\) *Daubert v. Merrell Dow Pharms., Inc.* 509 US 579 (1993)

leading questions that assist in proving your case. Further, the deposition should include questions that may undermine the reliability of the expert’s opinions for use in a Daubert hearing if the expert is to be challenged. Cross examination is the time for the questioner to shine (but not necessarily present a show). The jury will be waiting to see what the questioner is going to do. Jurors will be paying attention. Jurors expect some fireworks especially regarding the major experts. The questioner should not be arrogant or rude although some simply cannot restrain themselves. The attorney should not try to play on the witnesses’ field because most witnesses know more about the science, medicine or technical fields than the attorneys, and most attorneys (not all) will lose that battle. The jury may be interested in the sparing between the expert and the attorney for a while, but will soon get bogged down in details if the topics are too complicated and may miss the points you are trying to make. We have all seen trials in which the attorney and witness have a great scientific debate enjoyed by no one more than themselves. A final note on this point, however, is that there are skilled attorneys who are so well prepared that they can beat an expert at his own game and that is a sight to behold even for an unsophisticated jury, and it almost always impresses the jury.

Generally, on cross, the attorney should keep questions short to obtain a short answer. Having long complicated questions, either on deposition or at trial, make clear impeachment very difficult. Move the examination along and do not skip around too much or appear unorganized. Everyone has had the unfortunate experience of attempting to impeach a witness with a question with two parts and an answer that was non-responsive and having the judge comment that the question was different and not impeachment.

If an expert has significant evidence of bias, on deposition it may be better to question the witness on bias after you obtain the concessions the witness is willing to give. Starting with bias puts the witness on the defensive, and he often is reluctant to concede helpful facts or opinions. At trial, that is a judgment call. If the witness has been willing to concede important facts or opinions, then the bias can be downplayed at the end; for example:

Q: Dr. ___, you, like all the other experts this case, charge for your litigation consulting?

Q: In fact, you charge $500 per hour for everything from reviewing records to spending the night in Beaumont, Texas?

Q: You have testified 40 times in cases similar to this one and 39 times at the request of plaintiffs’ lawyers?

Then on argument, you are able to say even “Dr. ___, plaintiffs hired expert, agreed that he had never made a diagnosis on the basis of this scant evidence before.”

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36 Id.
If the expert is unwilling to concede anything helpful, then bias is the place to start. A very effective cross examination can be to question the witness extensively about bias (especially a hired gun type expert) then follow with:

Q: Dr. __, you came here from a trial in Florida, tomorrow you go to California?

Q: In all these trials, in all these states, you use the same slides, the same facts, the same opinions?

Q. And you gave the same testimony today without reviewing a single document, deposition or shred of evidence about Mrs. Jones’ case that you will give tomorrow in another plaintiff’s case?

Q: Charging $500 per hour each and every time?

Then stop. If this is done effectively, the questioner has dismissed the expert as a hired gun whose opinions are not worth his time or the jury’s time to revisit.

The following deposition cross of a well qualified expert did a good job of undermining the reliability of the expert’s methodology:

Q: When you are listed as an expert, do you require that the firms you work with provide you with your expert designation so that you can approve it?
A: I would say that’s varied or been variable.

Q: You haven’t approved it for this case?
A: I have not, no.
Q: Have you provided two reports?
A: Yes.

Q: Do these two reports contain all the opinions that you intend to offer with respect to this case?
A: Yes.

Q: I think you mentioned earlier in your deposition, that mesothelioma can be difficult to diagnose?
A: Yes.
Q: You would also agree it’s a diagnostic dilemma to distinguish adenocarcinoma from epithelial mesothelioma?
A: I think that can be difficult, yes.
Q: In your opinion, what is the gold standard, if there is one, for distinguishing between the two? If you could have the best material available, what would it be?
A: Well, the best material would be probably an autopsy that occurred very shortly after the person died.
A: I think probably at this point in time the best specimen that we get is what is called a video-assisted thorascopic biopsy.

Q: Do you have any information with respect to the gross appearance of this particular tumor?
A: The only— not what somebody saw with their eyes, but I do have information about what Dr. _____ said about it and what I was told he said about it.

Q: Who told you what he said?
A: Plaintiff’s counsel.

Q: You understand that for years this tumor was diagnosed as an adenocarcinoma?
A: Yes.
Q: And that diagnosis had been made by several local physicians?
A: Well, as far as how many people made the diagnosis, I thought, you know, you basically look to the pathology report.

Q. The pathologist diagnosed adenocarcinoma initially?
A. Yes.

Q: And did you ever receive a copy of plaintiff’s death certificate?
A: I did not, no.
Q: You are not familiar with the fact that it stated that he was diagnosed with lung cancer?
A: That wouldn’t surprise me at all.
Q: Have you personally ever diagnosed an epithelial mesothelioma on the basis of a fine needle biopsy and the two stains done in this case?
A: Fine needle aspiration biopsy, yes. The two stains that were done in this case…no, I don’t think so.
Q: In a perfect world you would have wanted more material in order to do additional stains?
A: In a perfect world, yes.

Q: It is a potential risk when you are dealing with a destained slide that you might get a false positive or a false negative on the restained slide?
A: I guess that’s a possibility, yes.

Q: What stains would you have done in addition to the ones you did if you had more slides or tissue?
A: I would do a CK5/6 for a positive stain. …I would have done a test for a substance called desmin.

Q: Can you point me to any articles in the literature, medical literature, that would recommend diagnosing an epithelial mesothelioma based on a fine needle biopsy and the two stains that you did?
A: Not necessarily, no

Q: For you to have complete confidence in your diagnosis, you would have preferred to have had additional tissue to do additional staining; is that fair?
A: Yes.

Q: You don’t believe it’s an adenocarcinoma?
A: I don’t believe it’s an adenocarcinoma, but I would not be critical because I don’t know if I’ve said this to you already, I think – I can’t tell the difference and I almost have gotten to the point I don’t think cytologists can tell the difference between an adenocarcinoma and a mesothelioma.  

The case was tried and the same witness testified. The cross from the deposition was very helpful in setting up the last questions on cross:

Q: So the first three preferred and best ways to evaluate pathological material were not available to you?
A: That is correct.
Q: So the fourth best way, won’t you agree, is to evaluate tissue collected by fine-needle biopsy?
A: Yes.

Q: And again, you didn’t have the opportunity to do that?
A: That is correct.

Q: And as we said, we’re at the fourth level of what you would actually prefer in your criteria of diagnosing a disease?
A: Yes.

Q: So, essentially, as a last resort you have slides to look at, right?
A: Yes, uh-huh.
Q: And these were slides that were, what, ten years old when you saw them?
A: That is correct.

Q: Well, normally, more times that not, you don’t have to de-stain the slides, do you?
A: That is correct. No.

Q: And, as I think you said in your deposition, you have never before diagnosed a mesothelioma with a fine-needle biopsy and with only two stained slides?
A: That’s correct, I have not.

The expert had further admitted that he had reviewed thousands of cases before this one and had never made a diagnosis based on the analysis used in this case.

37 Cross done by Michele Smith, MehaffyWeber, Beaumont, Texas
38 Trial cross by M.C. Carrington, MehaffyWeber. (Result defense verdict.)
Simple admissions elicited from plaintiff’s experts may debunk his testimony. Debunking an expert’s opinion attempts to show the jury that the expert’s testimony is contrary to common sense. In the *Daubert* case, the court noted that the “adjective ‘scientific’ implies a grounding in the methods and procedure of science.” There is no room for speculation or conjecture in connection with expert testimony under the *Daubert* ruling. The “average juror” may not be able to fully appreciate subtle cross examination concerning complex scientific principles; he or she will, however, be able to recall a concession from an expert witness that his testimony is speculative or mere conjecture. It is crucial to elicit from the witness that at least some component of his testimony is speculative, conjectural, uncertain, or unreliable.

To secure admissions and factual testimony from the expert which tend to support either the defendant’s theory of defense, or defendant’s valuation of plaintiff’s damages, the questioner should attempt to impeach plaintiff’s experts. Impeachment can be accomplished by:

1. demonstrating bias, prejudice or clear partisanship;
2. pointing to prior inconsistent statements contained in reports, letters, prior deposition or trial testimony, articles, writings, etc;
3. demonstrating that the testimony of the expert is contrary to recognized authorities;
4. demonstrating that the testimony is unreasonable or improper; and/or
5. demonstrating that the credentials or qualifications of the expert do not entitle his opinions to consideration.

The defense counsel skillfully impeached plaintiff’s toxicologist in a series of trials involving dioxin exposures with his own words. The witness either was not familiar with his earlier testimony or was hoping no one would find it! In one trial, he testified on cross examination as follows:

Q: (Ms. Kuchler) Doctor, you told this jury that you’re board certified in toxicology. Are you board certified by the American Board of Forensic Toxicology?
A: No.
Q: What about the American Board of Toxicology? Are you certified by that organization?
A: No.
Q: Have you ever tried to get certified by the American Board of Toxicology?

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39 Weiner, supra.
42 Id
43 Cross by Deb Kuchler, Kuchler Polk Schell Weiner & Richeson, New Orleans, Louisiana
A: I think back when I got of school I took the first two parts of the examination. No, I think I took the whole examination and I failed the third session but never repeated it. It was early in – I’m involved in enough organizations, and the American Board of Toxicology is geared primarily toward research in animal study.

Q: You said you took the entire test once and passed sections one and two but not three; is that right?
A: Yes, that’s what I recall. It’s been a long time.

Q: You actually did take section three twice and you failed it twice, didn’t you?
A: I don’t think I took it again. I intended to.

Q: Do you remember testifying in a case called Lucy Marie Allen versus Azknobel Codings in October of 1997, sir?
A: Yes.

Q: On page three you were asked at line 17: You have taken section three twice; is that fair? Yes, I passed section one and but not three. Question: And you failed section three twice now; is that right? Your answer: Yes. I have devoted my studies to this case last fall, this case instead of my exam prep. Does that refresh your recollection?
A: It does. It does actually, and I appreciate that.

[website research pays off]

Q: If we could please, pull up the website from the organization that gives this test, and let's look at what's covered by section three, the section that you failed twice. Section three covers general principles and applied toxicology, doesn't it, sir?
A: That's what it states.

Q: It also covers -- let's see. Let's get to the parts that apply to this case. Environmental toxicology was part of the section that you failed twice. Section three covers general principles and applied toxicology, doesn't it, sir?
A: This is not the section that I had trouble with. I used the terms section one, two and three in that deposition. But I don't know that my use of those numbers corresponds with the -- I need to see the title of this again. Does it say section three?

Q: It sure does. You see the Roman numeral three right there?
A: Okay. Yeah. The section that I had trouble with was the animal studies section. One of the other two sections has to do very much with animal study models, and it was called methods of toxicology. And that's what I had trouble with, not that.

Q: So, you're telling the jury that when you testified under oath and said you failed section three, which covers forensic toxicology, and I think that's what you told the ladies and gentlemen of the jury that you do for a living. You're a forensic toxicologist, right?
A: That's right.
In the next of the series of dioxin trials, the following exchange occurred with the same witness:

Q: Okay. Now, Dr., you said that you were not certified by the American Board of Toxicology because you failed a portion of the test twice; once in 1995 and then again the same portion the next year in 1996. Is that what you told us?
A: I did, that's correct.
Q: What portion of the test did you not pass?
A: I believe it was a portion that had to do with reproduction carcinogenesis and a number of other -- of developmental toxicology and some other areas that were largely animal issues. The carcinogenesis and mutagenesis, developmental toxicology was all human, as opposed to forensic or public health aspects.
Q: I'd like to put up on the board, please, the American Board of Toxicology's classification of the three sections of the test. Of the sections that they list here, section one, section two, section three, which one of those sections did you fail?
A: I think it was two. The one I talked about, about the mutagenesis, carcinogenesis, developmental and reproductive. If you look under two, I believe that was the section.
Q: Okay. And under number two we see that that includes carcinogenesis, which you told us means causing cancer. That was part of the section that failed?
A: Yes. Although this particular test had nothing to do with human epidemiological studies or public health issues or causation, but rather the mechanisms involved in the animal models and performing the studies and that type of thing. It really wasn't as relevant as the forensic examinations that I took a year later and passed.
Q: But what caused Mr. Strong's cancer is what you're here to talk to this jury about and carcinogenicity was among the issues on the section you failed?
A: That's correct.
Q: Among the issues in the section you failed we also see hematopoietic toxicity; isn't that right?
A: Yes.
Q: Isn't multiple myeloma a hematopoietic cancer?
A: Yes, it is.
Q: And that's among the subjects in the section that you failed twice; is that right?
A: Correct.

Defense counsel should never lose sight of the significant benefits flowing from admissions by the expert during the course of cross examination. If such admissions can be secured, they may contradict testimony the expert has given on direct examination or contradict testimony of other experts called by the plaintiff.44

44 Id.
The goal of cross is to secure a statement from an expert which the average juror will easily understand, retain and which defense counsel can focus on during summation. A concession that even a component of the expert’s testimony is “speculative,” “unreliable,” or “conjectural” can be essential to undermine plaintiff’s expert opinion in the eyes of the jury,\(^\text{45}\) and may assist in either limiting or excluding an expert’s testimony altogether. An expert’s opinion will be viewed with skepticism if counsel is able to show that the assumptions and deductions the expert relies on are incorrect. The scope of defense counsel’s cross examination initiatives is limited only by his or her skill, aggressiveness, and imagination.

C. EFFECTIVE CROSS EXAMINATION OF FACT WITNESSES

The importance of the testimony of fact witnesses is often overlooked by trial counsel who may focus more on the testimony of experts. The jury, however, does not overlook fact witnesses. To jurors, the testimony of the fact witnesses may be a significant factor in the jury’s decision. The examination of every fact witness in any trial should receive extensive pre-trial preparation. Defense lawyers have the opportunity and the challenge of eliciting the desired testimony by way of cross examination of plaintiff’s fact witnesses.\(^\text{46}\) The better the cross examination of fact witnesses, the fewer fact witnesses you may need to call to support your case.

Fact witnesses may be hostile, neutral or friendly. Prior to conducting the cross examination of a fact witness, the questioner must determine whether the witness is hostile; if so, he must have in place a plan to deal with a hostile, negatively motivated witness. If the fact witness is neutral or friendly to the defense, then the attorney or his team should meet with the witness and discuss the scope of his testimony.\(^\text{47}\) Fact witnesses can be used to validate and provide the foundation for an expert’s exhibits and opinion as well as provide supportive testimony to tell the defense story.

A hostile fact witness must be controlled on cross examination. There may be questions that elicit bias on the part of the witness. The questioner must determine the goal or goals for that witness and give him little wiggle room. In the following example, the witness was hostile to the company’s position, but was also a co-worker who had first hand knowledge of the working conditions at the exposure site and had given some very negative testimony on direct. This witness needed to provide helpful testimony regarding workplace safety which was part of the trial story. The cross was done by Mike Foradas of Kirkland and Ellis who kept a very hostile witness under control.

Q: The buildings themselves, they were washed down at the end of each shift, were they not?

\(^{45}\) Id.
\(^{46}\) James, M. Campbell, “Cross Examination of Fact Witnesses,” For the Defense, March, 2000. p. 42
\(^{47}\) Id.
A: They was washed down all during the day, sir.
Q: So during the day, people would come in and wash them down and get the dust and debris out?
A: Yes.
Q: And that was important, not just because it was dusty, but you wouldn’t want to slip on something, it was just good housekeeping practice, right?
A: Yes, sir.
Q: And the lunchrooms, you mentioned, those are also cleaned frequently. You said many times during the day the lunchroom would be cleaned out, right?
A: Sometimes.
Q: If they got dirty?
A: Yes, sir.
Q: In fact, the other trades would get pretty upset at you if you were blowing dust (with an air hose) toward them, right?
A: Yeah.
Q: And that’s both common courtesy and it’s sort of safety, you don’t want to be blowing debris at people, right?
A: That’s right.
Q: Now, you talked a little bit about respirators on your direct examination. There were three kinds of respirators that were in use at one time or another
A: Yes, sir.
Q: And so you would use those to keep stuff out of your nose and your ears and your mouth?
A: Yeah.
Q: And they actually had nose clips, so you would put the mouth bit in your mouth, right?
A: Yes.
Q: And you’d put a nose clip on your nose?
A: Sometimes.
Q: But it was available to use it that way?
A: It was available, yes sir.
Q: You would use it to get out of the gases and the dust, right?
A: Yes sir, but mostly for gas.
Q: And the people who worked back in the gas house would use those two-cartridge respirators, right?
A: Sometimes.
Q: They were certainly available for them to use?
A: Yes.
Q: And there was also a full-face respirator, right?
A: Yes, sir.
Q: And that would cover your whole face?
A: Yes, sir.
Q: Section folks would come out and make sure the respirator fit okay in case you wanted to use it?
A: Right.
Q: And that wouldn’t be your recollection, I take it, that they didn’t use those two-cartridge or full-face respirators?
A: No, sir. They used just the mouth-bit respirator.
Q: So his recollection is obviously a little different than yours, if that’s what he said?
A: It’s a little different.
A: We’re two different individuals.
Q: That happens, people remember things differently?
A: Yeah, m-h’m.
Q: And you said he’d get as much overtime as he could get, and I take it everybody would like to try to do the job on overtime that they normally did, if possible, right, because you would be good at it, and it would be a little easier work?
A: No. It was for the benefit of the money is the only reason we done the overtime.
Q: No, I understand why you would want to do the overtime. I’m saying, if you’re doing the overtime, you try to do the job you normally do, if you can?
A: If you can, or unless there’s an easier job.
Q: …you could get into trouble for violating those safety rules, as I understand it?
A: Yes sir.
Q: I think one of the witnesses called it an unpaid vacation?
A: Yeah.
Q: And the Supervisors and your Union Stewards would both beat those safety rules into your heads?
A: Yes, sir.
Q: And one rule that you knew about was if you were working around heavy dust, if you thought it was heavy, you should use protection, right?
A: Yes, sir.
Q: And you would personally do that yourself?
A: Yes.
The deposition of every potential witness in a case should be taken in contemplation of the potential cross examination of that witness at trial. Clear answers to clear questions must be obtained. Then, during the deposition, the questioner must consider how the question and answer will appear in a typed transcript. If the question or answer is equivocal or imprecise, the effectiveness of the transcript to impeach or control the witness at trial will be reduced or eliminated. The depositions of fact witnesses in a case are crucial because that witness may not be called to trial to testify, and the only testimony the jury hears may be video clips from the depositions. The attorney attending the deposition should be prepared to do a trial cross of the witness. If the witness has anything helpful to say about the company, its rules, its core values, its safety record, its practices and procedures, its reputation, try to establish at least to some degree during the deposition. It is not ideal at trial to have to use a video clip of questions from plaintiff’s counsel to the witness to try to show the jury that the entire deposition was not bad for your client.

Unless the goals of the cross examination are clearly understood by counsel in advance, it cannot succeed and is doomed to be an unfocused exercise with no beginning or end. You may be able to obtain proof that an accident happened in a certain way; proof of certain foundational matters; proof that will discredit the plaintiff’s theory or his experts; or provide the basis for the admission of certain exhibits. If the fact witness is hostile or motivated to assist the plaintiff, a plan should be developed for staying away from problem points. If, however, these points have already been raised, develop a plan on how to address and deal with each problem and a plan to impeach the witness.

48 Id., p. 43
49 Id.
50 Id.
IV. USE OF TECHNOLOGY IN CROSS EXAMINATION

“Technology is great, and when it works…it spoils you. Now that I have it, I can’t imagine going back to the old way.”

Judge Edward C. Prado (W.D.Tx)\(^5\)

“The juries and lawyers love it. It is really worth doing…”

Judge Catherine D. Perry\(^5\)

While technology is the rage, not all Courts or attorneys are in the same technological place. There are still attorneys who do not have a lot of sophisticated trial technology available to them, and they may not use even the basics. This reality, however, is changing very quickly. More courts are embracing technology. They are turning to paperless files and electronic file and serve requirements forcing litigants toward technology. It is axiomatic that use of technology improves trial presentations and increases efficiency handling evidence and improves the effectiveness of cross examination.

A. NEW AGE OF COURTROOM TECHNOLOGY

Many federal courts have evidence presentation systems that enable judges or lawyers to show jurors (and each other) photographs, documents and other exhibits on a network of monitors. Some also allow or mandate video conferencing which permits witnesses to offer testimony during trial without actually being present in the courtroom.\(^5\) Video conferencing technology has not only been used to allow witnesses from remote locations to testify in a trial, but has also enabled some courts to conduct hearings with witnesses and counsel located in multiple locations.

While many, if not most, federal courtrooms are equipped with state of the art technology, state courts generally vary from very tech friendly to downright unfriendly, though technology is usually a priority in the construction of new court facilities. Harris County, Texas, for example, equipped all 39 courtrooms in its new civil courts building the latest evidence presentation systems. Each courtroom contains a video system which allows the presentation of all types of evidence from exhibits, PowerPoint presentation, video clips of depositions, to timelines, charts and animations among others. The system’s master controls, including an override, are at the bench and each jury box has eight 15” LCD flat screen monitors. Counsel tables have connections for laptops and touch panel monitors. Wireless Internet is also available to the courts and the attorneys throughout the facility.\(^5\)

\(^{5}\) Courtroom Technology Used Increasingly to Enhance Proceedings. The Third Branch.

\(^{5}\) Id.

\(^{5}\) Id.

\(^{5}\) Harris County District Courts, www.justex.net/civilcenter/civilcourttechnology
No matter how useful it is, technology is no substitute for preparation (that word again). In fact, using sophisticated high-tech presentations in trial takes even more preparation than the more traditional low-tech methods. The attorney cannot simply plug in the case and put it on auto-pilot; technology should enhance trial and not distract from it. The trial lawyer must continue to develop his case themes, present key documents and testimony, provide compelling jury presentations and effectively examine and cross examine witnesses. He must not stumble or fumble with technology; he must use it seamlessly in front of the judge and jury. If used improperly, technology can go a long way toward winning an argument or a case. If not, it can also be a significant factor in a loss. It takes time and patience to integrate evidence into a cross examination outline. The attorney or others assisting him must review each deposition clip and exhibit to make sure each is crucial to the examination and that each is carefully identified. The attorney or trial technician must be able to find the clip or exhibit immediately.

1. Improve Your Case

Studies have shown that jurors retain only 20% of information that is told to them, but retain a much higher percentage of information that is shown to them. Younger jurors probably expect visual presentations as they have never known life without them. This is true of judges as well as jurors from younger generations. Jurors do not like to be lectured to with long-winded opening statements or closing arguments. Some attorneys believe that they are so eloquent that they just need to talk to the jury. Wrong. Jurors lose interest and retain very little of what is said. They may only recall an impression of the speaker. After several hours of closing without technology, the jury ceases to hear words but only hears sounds like from the dog Snoopy. Studies also show that individuals form an impression, either good or bad, of an attorney within minutes of seeing and hearing him (or her). Juries often decide who should win based on the stories told during opening statements. Use of well prepared exhibits and other demonstratives from the beginning of trial are critical to success.

While some courtrooms are still not equipped with their own evidence presentation equipment, almost all courts will allow the attorneys to set up and use their own equipment. Setting up evidence presentation equipment in a small, round courtroom, for example, is a challenge and should be done in advance of trial. It will be worth the effort. In a small awkward space, it is better to avoid cluttering the area with too much equipment. Too much equipment is distracting and can cause delay and confusion. It is sometimes preferable for the parties to agree to use the same equipment set up, but that does not always happen. Prior to trial, the equipment must also be tested to make sure it works properly, and that the operator (whether the attorney or an assistant) knows how to operate each piece of equipment. In a recent trial, the plaintiff’s lawyer used his paralegal

56 Id.
57 Id.
58 Id.
to assist with videoclips and exhibits. She did not do it well. The defendant’s system worked very well, and it made a difference.

The attorney using the equipment must practice with it. He must choose the exhibits, video clips and other documents which he wishes to present to the jury carefully and know exactly where these items fit into the overall presentation of evidence in the direct and the cross examination of witnesses. Video clips must be viewed in advance and carefully edited for minimum playing time. The attorney should only use important sound bites and avoid their overuse. Using too many video clips simply dilutes their effectiveness and becomes tedious to watch. This point cannot be over emphasized. It is obvious that video has been overused when the jury groans audibly as the next video is introduced.

2. Back Up Plan

No matter how well prepared he is, the attorney should always have a back up plan if equipment fails for some reason. He should have multiple copies of any exhibits (to hand to the jury if allowed), should have hard copies of depositions marked to show to a witness for impeachment and should be ready to proceed with the examination of a witness without comment or delay in the event of technology malfunction. While useful, a high tech approach is not the only way to effectively cross examine a witness. During cross examination of a witness, the examiner could write important points made with that witness on a flip chart that stays in the courtroom. Deviating from the use of technology in this instance may show the jury that these points are truly important. Using a flip chart also indicates that the attorney has not prepackaged the entire case. The points being written from the flip chart made during witness examination can be put into a PowerPoint presentation and revisited during closing argument.

3. Technology Options

No matter what device or technology you decide to use, choose it carefully. A Visual Document Presenter (a/k/a an “Elmo”) may be considered old technology today, but can still be effectively used in cross examination because the attorney can hold up a transcript and then show pages from a prior deposition to both the witness and to the jury simply by placing it on the Elmo. This presentation system also has the benefit of not requiring a lot of advanced preparation and is good to have available for use with an exhibit, article or book that may be used on direct, and you want to show other pages or passages on cross. An Elmo may add to the clutter a small courtroom. Unfortunately, it must also be focused with each use and that may add to the amusement of the jury. An Elmo should be used sparingly to avoid becoming tedious. While an overhead projector may still be used in trial to show exhibits to witnesses and the jury, the use of transparencies is dated and may actually interfere with the jury’s understanding instead of aiding it.\textsuperscript{59} The transparencies are difficult to see and have no flexibility.

Multimedia systems consisting of fast, high-capacity computers that integrate presentation media and allow the manipulation of demonstrative evidence, including graphics, animation, video, documents and audio, are the current state of the art. Such a system provides a clear picture and provides the flexibility of using multiple types of media at the same time. Another advantage to this system is the capacity for information storage and retrieval. This system is superior for cross examination because it gives the attorney the ability to move quickly among a series of documents, exhibits and video clips. (While helpful, the use of such systems requires more planning and advanced preparation). The media system is only as effective as the attorney using it. He must be familiar with each document and deposition and must seamlessly integrate this evidence into his cross examination to avoid confusion. Jurors even in smaller, more rural venues still expect a professional presentation and no longer view technology as a big ticket item available only to the more wealthy and powerful parties. Today, everyone is familiar with video depositions. Prior to use in trial, however, there are questions that should be considered regarding the video depositions. The attorney should know the following:

- Has the video been digitized or converted (have VHS or DVDs been converted to an MPEG-1 format?);
- Has the transcript of the video deposition been secured in a 24-25 line transcript with page breaks?; and
- Have the CD/DVDs, MPEG-1 files and ASCII text files all been synchronized?

Only after these steps have been taken is the video deposition ready to be used during cross examination. Once the video deposition has been loaded into the presentation software, the attorney can create reviewable designations, counter designations, edit impeachment clips, and begin building folders or electronic binders for individual witnesses.

Once a distinct set of trial (or deposition) exhibits have been scanned and labeled, they too can be loaded into the trial presentation software for use alongside the video depositions and other graphics. The trial presentation software allows the attorney to move easily from one deposition clip to another; from exhibit to exhibit. It allows the exhibits to be highlighted in advance and important parts pulled out for easy reference to show a witness and the jury. Flip charts, photographs, White Boards, and magnetic boards still have their place in the courtroom. These “old technologies” can still be used to change the pace of cross and to add variety of media to keep the presentations or questions from getting monotonous.

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60 Id.
61 Id.
63 Id.
4. Use of Video Depositions

Video depositions may be used at trial for two purposes: testimony and impeachment. The creation and compilation, for either use, of video clips must occur prior to trial, but further editing during trial is essential especially regarding running time. The shorter the clip, the better and more effective it is. In addition playing the video itself (which should show the witness as well as a scrolling text of the testimony), most software platforms allow “linking” documents to certain portions of the video. These documents can be highlighted or important passages can be enlarged for emphasis and displayed along side of the image of the testifying witness.

Traditionally, attorneys have used written deposition transcripts on cross to show the jury a witness’ prior inconsistent statements. When faced with these inconsistencies, the witness is forced to explain why he or she made the earlier statements or the current inconsistent one. In these circumstances, the witness has options other than admitting that his/her present testimony is erroneous — usually starting that he was confused or misunderstood the question during the deposition. Sometimes a witness may respond by accusing the cross examiner of causing the problem. If a witness is well-prepared and familiar with prior testimony, even inconsistent statements, he will be ready with some plausible reason for the discrepancies. Jurors observing the witness see someone whose demeanor on the stand appears credible while the written transcript may seem vague, and the jury may not understand the setting of a deposition. Impeachment via video clips is generally effective since most jurors are impressed by seeing a witness impeached through a video of his own words. Succinct excerpts from the witnesses’ videotaped depositions can clarify what really happened on deposition and show that the witness was not confused (or harassed) when the statements were made. Today’s video technology allows the cross examiner to index and play selected portions of videotaped deposition with minimal interruption in the examination process if it is done right.

a. Impeach with video

Impeachment clips must be short, on point, accurate and worthwhile. Some judges will not allow the use of video clips for impeachment, and if allowed, will intervene if the video impeachment appears to slow down the testimony. If they do not really impeach, such clips will fall flat. The attorney must have a properly marked hard copy of the prior transcripts to provide the witness during the cross examination to avoid the appearance of unfairness. Video clips are subject to objection on at least the basis of completeness. Thus, if the clips are clumsily edited or worse, do not really impeach the witness, they damage the credibility of the proffering attorney not that of the witness and will probably be shut down by the court. Displaying the impeachment testimony in line/page presentation on a screen for the jury to see is an alternative to the use of video clips and may work well to provide a change of pace.

65 Id.
Practice with equipment and video clips to make sure they are precise and call up the exact points you want to make. How many times have you seen an attorney show a video clip of the wrong testimony, one that is too long or inaudible, or one that did not remove excluded testimony? How many times has a jury watched the attorney or his assistant have to find the right document, start the testimony again and so on? If this is a consistent problem in a trial, the jury is left with questions about the competence of the attorney, his team and its commitment to the case.

b. Undermine Basis of Opinions

Video clips may be used to attack the basis of an expert’s opinion, not just to impeach the expert with his prior statements. For example, in a recent trial, the plaintiff’s attorney used video clips from five co-workers to contradict the testimony of an expert. (This tactic was used over objections by defense counsel. The court concluded that these videos were already in evidence, and, therefore, could be used for this purpose.) This technique was very effective because it allowed the actual testimony that contradicted the facts used by an expert in formulating his opinion to be shown to the witness and the jury (again). Plaintiffs’ counsel did not have to use hypotheticals with the witness. The attorney then asked obvious questions of the expert and proved the following:

- That the expert had no personal knowledge of the working conditions;
- That he had never been to the building that he had described;
- That he disagreed with five eye witnesses

Some courts would not allow the use of video clips of other witnesses to cross the expert. It is not impeachment through a witness’ own prior statements. The defense objected that it was cumulative and repetitious and not proper impeachment and that the clips were incomplete and gave short sound bites of testimony but not the entire testimony. Once the court allowed their use for this purpose, however, the tactic was very effective. The cross frustrated the witness because there was little he could say except that he disagreed with some of the witness observations. The tactic was creative, but the proffering attorney took too long with this approach, and it lost some of its effectiveness. Too much of a good thing.

5. Tips for Evidence Presentation

- Do not overuse video clips in cross examination
- Do not crowd PowerPoint slides
- Focus on the impact
- Use technology to make your strongest points
- Practice, Practice, Practice
- Do not stumble
- Do not hesitate or waste time
- If something goes wrong, move on quickly
- Find your own style
- Prepare your own outline and questions
• Be comfortable with the pace of the questions and material
• Be prepared for an equipment malfunction
• Have alternate means to continue
• Do not let the malfunction interrupt the flow
• Be able to move to alternate plan
• Start and end strong
• Do not be afraid to shorten the cross examination

B. LIVE WEBSTREAMING

In certain circumstances, courts have found live video streaming to be worthwhile, and it is a technology on the rise. For instance, in *In Re: Disney Shareholders*, the court implemented live webstreaming from the courtroom during trial proceedings. The Disney trial was one of the first to be made available to the public via the Internet using webstreaming technology. The audio and video feeds also featured scrolling text transcript and images of the exhibits as they were shown to witnesses. Both live feed and on demand file versions of the transcripts were available. The trial teams using the live feed were pleased with results. Members of the teams not present in the courtroom were able to access the proceedings from their hotel rooms and offices using their laptops. Support team members were able to send comments and questions to the trial team in the courtroom based on the live feed. Expert witnesses were able to view testimony live without having to actually be present in the courtroom.

Of course, whenever technology is used so broadly, it is imperative that those relying upon it have a back-up plan. Anything can go wrong and interrupt the process including the audio, video, transcript, network, email, Internet connection malfunction for some period of time. Most of the participants interviewed after the Disney trial thought that webstreaming technology was effective for a large trial and that it reduced costs by allowing lawyers and witnesses to avoid travel and to save time.

Recently, in the Texas Asbestos MDL, certain designated parties have begun beta testing the use of live Internet based audio and video streaming for depositions, especially for those occurring out of state. Obviously, the ability to set up video conference depositions has been available for years, but there have always been difficulties with this technology. Everyone recalls distorted pictures, distorted sound, static on phone lines, lack of synchronization of video and audio rendering the Q and A tedious at best. The video use of documents was clumsy as well. To avoid some of these issues in the protocol being tested, the court reporting firm provides the required equipment to the participants. Prior to the deposition start time, the participants call in using a provided number just like

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66 Kim Moninghoff, “Courtroom Connects Webstreaming of Court Procedures in *In Re: Disney Shareholders*” Courtroom 21 Affiliates White Paper, p. 1
67 Id.
68 Id., p. 4
69 Id.
70 Id., p. 5
a conference call. The audio feed can be transmitted through the Internet, but so far the quality is better with a polycom speaker phone which is provided at the deposition location. Using this system, the deponent will be able to see the questioner and vice versa. Documents can be shared with the witness, with all parties also being able to view the documents at the same time. The court reporter marks documents electronically and uploads real time transcripts. Drawbacks identified so far with this technology include the extensive amount of bandwidth necessary for participants to accommodate the streaming video and the lack of capacity to accommodate large multi-party depositions.

A number of manufacturers, including West LiveNote Stream™, currently offer the capability of live audio and video from depositions, arbitrations and trials. Participants only require a broadband Internet connection and the latest Microsoft Internet Explorer browser. The advantages of this technology includes cost savings for time and travel to depositions or to other appearances in out of the way places. The parties are able to take live testimony in trial, hearings or depositions and show this testimony to judges, juries, and other members of their trial teams with limited cost. Most companies offer technology which provides a live picture, a scrolling real-time transcript, and an audio feed for the testimony. Depending on the technology, the questioner can show exhibits to those observing the testimony at the same time he shows the document to the witness. The questioner can receive comments and suggestions from others on his team who are observing the testimony off site. The livestream technology will be improved upon and will be used more frequently in the future. Courts have promulgated guidelines for such use and litigants can expect more in the future.
SAMPLE GUIDELINES
GUIDELINES FOR
LIVE VIDEO FEED TESTIMONY
TO
HEARING ROOMS OR COURTROOMS

1. Must have either a written stipulation from all opposing counsel to proceed with video feed testimony or an Order from the Court, after hearing, authorizing this type of testimony.

2. Must have a notary public at site with witness to identify witness and possibly administer the oath to the witness.

3. Should have an attorney present with witness or other person in case problems arise.

4. Must have a technician available to operate the equipment at the remote site to make camera and/or audio adjustments as needed.

5. Have hard copies of any exhibits or demonstrative aides at the remote site if the items are to be referred to by the witness. If records are multiple pages, they should be “Bate” stamped to match the exhibits that are in evidence, or being offered into evidence, in the courtroom.

6. The video should be tested by the professionals no later than the last business day before the video feed to make sure the video can be connected and shown.

7. Notice, well in advance of trial, must be provided to the Court and all opposing counsel that the video testimony will be utilized. If all counsel are not stipulating to the use of live video feed testimony, a hearing must be held and an order obtained from the court. If counsel are in agreement a written stipulation should be filed with the Court no later than the start of the trial.

8. It is strongly recommended that a back up video or written depositional testimony be obtained to be used should the video link not be operable for some reason.

9. Any questions, or to arrange for live remote video feed testimony, please contact J.R. Denman, Manager of Systems & Technology, at (407-742-2488) or help_osceola@ocnjcc.org.

10. Osceola only supports video over IP and must originate the connection.

11. Other questions should be directed to the judge’s judicial assistant.

71 Guidelines form provided by The Honorable John Marshall Kest, Circuit Judge, Ninth Judicial Court of Florida.
C. SOCIAL NETWORKING

No discussion of the uses of technology in the courtroom would be complete without a discussion of social networking sites. No matter what their original intent, social networking sites such as Facebook and MySpace have become treasure troves of information, some of it perfect for use in cross examination. Users of these sites post comments, photos and videos, build on-line networks and in general share information with friends and complete strangers. As most people are rather casual in what they post on these sites, the savvy lawyer can find lots of useful, if not shocking, information, photographs and even videos regarding his own client, the opposing party, opposing counsel, expert and fact witness and prospective jurors. These sites may contain relevant information that could be used for impeachment cross examination.

While they are the largest and best-known sites, Facebook and MySpace are just the tip of the social networking iceberg. Sites exist for just about any interest that one can have, including LawLink, “the first and largest world-wide social network exclusively for attorneys, expert witnesses, law students and other law professionals.” Other sites such as Flickr and YouTube allow their users to post and share photographs and videos. Blogs are very easy to set up these days and permit individuals to post their personal journals on the Internet and/or to create newsletters and opinion forums. Twitter and Pownce are microblogs which typically limit individual posts to around 140 characters or less, but which have tens of millions of users. As stated earlier in the paper, individuals, experts, and employers have websites. It is imperative to search each one prior to deposition or trial. There are recently posted articles, collections of documents, opinions (at times rather radical), financial information, locations, businesses, among many other types of information. These postings may be more current than published literature. This information is a tremendous source of cross examination material.

V. THE PSYCHOLOGY OF CROSS EXAMINATION

“There is no other instrument so well adapted to discovery of the truth as cross examination, and as long as it tends to disclose the truth it should never be curtailed or limited.” As stated earlier in this paper, cross examination is one of the primary methods our legal system employs to safeguard accuracy and truthfulness. Despite its importance, cross examination remains one of the most difficult skills to utilize effectively.

In recent years, experienced trial attorneys have utilized quantifiable aspects of human behavior and psychology to improve cross examination techniques. A shrewd examiner can implement even the most basic knowledge of human psychology to achieve effective results in the courtroom. Social psychology teaches that most people will respond in

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72 www.lawlink.com
73 The author acknowledges the fine work of Lee Ziffer of Kuchler Polk Schell Weiner & Richeson, LLC in New Orleans, Louisiana, in the preparation of these materials on the use of psychology in cross examination.
predicable and quantifiable ways when faced with certain stimuli. Social psychology principles, when grafted onto traditional courtroom techniques, produce new insights into old methods and help today’s litigators use modern understanding of human behavior and cognitive bias to their advantage.

The purpose of this section of the paper is to extract information from social science studies for use in effective cross examination. This section is divided into two sub-parts, the psychology of the witness and the psychology of the jury. These two topics overlap, but are distinct and worth discussing separately. Understanding witness psychology helps the examiner elicit favorable testimony, and understanding jury psychology allows the examiner to draw information from the witness to maximum effect.

A. COURTROOM PSYCHOLOGY GENERALLY

The psychology of the cross examined witness focuses on interpersonal interaction whereas jury psychology focuses on theories and research pertaining to persuasion. Using psychological tools to elicit favorable testimony from witnesses can be extraordinarily effective. Understanding how people react to method and content of questioning, body language, posture, and vocal intonation are invaluable tools when attempting to elicit positive testimony from an uncooperative witness. However, research into jury psychology has unveiled what should come as no surprise: using intimidation and control techniques against witnesses must be tempered by the realization that no one likes a bully.

To put psychological understanding to good use, an examining attorney must achieve the desired result from the witness AND elicit the desired response from the jury. Juries respond negatively to an attorney’s over use of intimidation and control. Therefore, an attorney should employ these techniques keeping in mind that manipulating a witness is not a goal in and of itself. Rather, the purpose of controlling a witness is to make a favorable impression on the jury. Intimidating a witness into submission won’t score the examiner any points. After all, a cross examination will go better if the witness and jury respect you. You don’t want the witness and jury to hate you.

B. THE PSYCHOLOGY OF THE WITNESS

One of the fundamental “rules” of cross examination is that the examining attorney should be in control. Unlike direct examination, where the jury’s focus should be placed on the witness, an attorney conducting cross examination should focus the jury’s attention on himself. Cross examination should not only be used to discredit the witness or witness assertions, but also to elicit testimony favorable to the attorney’s case. Keeping

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75 Voss, Jansen; The Science of Persuasion: An Exploration of Advocacy and the Science Behind the Art of Persuasion in the Courtroom, 29 Law & Psychology Review 301 (Spring, 2005).
76 Gibbs, Margaret; The Effect of Cross Examination Tactics on Simulated Jury Impressions; Paper presented at the Annual Meeting of the Eastern Psychological Association (Arlington, VA, April 9-12, 1987).
77 Id.
that in mind, adverse witnesses are unlikely to willingly help an adverse attorney’s cause or contradict themselves, especially if it hurts their case. As a result, a cross examining attorney should control the conversation, attempting to highlight harmful facts and use psychological techniques to elicit favorable witness responses.  

1. **Manipulation of Personal Space and Body Language**

A trial attorney can increase the anxiety level of an adverse witness if the attorney enters the witness's personal space. When an attorney invades a witness's personal space, “the witness often becomes anxious and testimony may appear more hesitant and uncertain.” It is also thought that responding to questions when the examiner is within one’s personal space makes confident answers difficult. Research shows that when an attorney invades a witness’s personal space, it suggests dominance and increases nervousness and anxiety. In turn, nervousness and anxiety make the witness more submissive to the attorney’s questioning.

Similarly, something as innocuous as courtroom positioning conveys powerful messages to a witness. Commentators suggest that during cross examination, attorneys refrain from using podiums, notes, legal pads, or other aids. These items are psychological “barriers” between the attorney and witness, and serve to decrease witness anxiety. The podium, for example, is thought to be a symbolic barrier between the attorney and witness. Without the podium, the witness is less protected and more exposed. Psychologically, this creates higher levels of anxiety in the witness, and leads to the appearance of unconfident answers. Moreover, a witness is more inclined to agree with the attorney’s leading questions when feeling less secure.

2. **Playing into Vanity**

Just like most people, witnesses want to make themselves look knowledgeable, important, and intelligent. This is particularly true for expert witnesses, who are paid for the express purpose of appearing knowledgeable, important, and intelligent. Given the format of a cross examination, it is relatively easy to allow witnesses to ‘paint themselves into a corner.’ In the end, some witnesses would rather avoid losing face in a courtroom than preserve their own case. It is important to develop a cross examination so that the witness faces the dilemma of making a damaging admission, no matter which way the question is answered. If the answer is “yes”, he will admit the substantive aspects of the

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80 Id.
82 Id at 59.
83 Id. at 52.
85 Id. at 52.
86 Id.
88 Id.
cross examination. If he answers “no,” he will acknowledge his lack of knowledge of the facts or experience in similar matters.\textsuperscript{89}

Let us consider a case that illustrates the point. In a personal injury action involving a motorcycle accident, the defense called an industry expert to opine about the necessity of various safety mechanisms available on motorcycles. One such safety mechanism was a “kill switch,” that operated to immediately cut all power to the engine should the driver encounter a stuck throttle. The expert’s basic opinion was that people do not need kill switches because there are far better ways to kill the engine, for example, by hitting the brakes. Consider the cross examining attorney’s recount of his encounter with the expert witness:

Q: “Are you familiar with the Motorcycle Safety Foundation?”
A: He rambled on for three minutes telling the jury about what a wonderful organization this was.
Q. “Do they put out any publications?”
A. Once again, his answer went on for another three minutes. He applauded the Motorcycle Safety Foundation for the publications they put out to promote safety in the operation of motorcycles.
Q. “Are their publications any good?”
A. He once again spent several minutes applauding their efforts.
Q. “Do you consider those publications authoritative?”
A. He agreed that they were indeed authoritative.
Q. “Have you ever seen their publication on safe motorcycle operations?”
A. He rambled on about all the publications that he had read and about how important they were to him and how important they were to the safety of the public. The questioning attorney offered as an exhibit one of the publications from the Motorcycle Safety Foundation after he agreed that that publication was authoritative.
Q. The witness was asked to turn to page 147 and read it aloud. It read as follows: ‘Sometimes when you operate a motorcycle you will encounter a stuck throttle. It is inevitable. You must be prepared to properly deal with this emergency. Rule #1 – Don’t hit the brakes. Hitting the brakes will take the motorcycle out of control and create the danger of a fall. Rule #2 – Hit the kill switch. Rule #3 – Put in the clutch and bring the motorcycle to a controlled stop.’”\textsuperscript{90}

Despite having no knowledge of the publication’s content, the witness agreed that it was authoritative and agreed to the applicability of a text that contradicted his own expert opinion. Although this is an anecdotal example, it illustrates the lengths to which witnesses will go to appear credible in the eyes of the jury, even at the risk of painting oneself into a corner. An expert in the field of motorcycle safety could scarcely deny knowledge of an organization such as the Motorcycle Safety Foundation, nor could he deny the merits of such an organization. To do so would make him appear

\textsuperscript{89} Id.
unknowledgeable or false in the jury’s eyes, leaving the witness in an impossible situation.

3. The Loaded Question

One study has shown that perceptions of a witness’s credibility can be influenced by presumptions inserted into cross examination questions. The insertion of an implication into a cross examination question that implies something negative about the witness’s reputation was shown to impact the jury’s perception of that witness. Whether the presumptuous question resulted in an outright denial, an admission, or an objection from the witness's attorney – even when that objection was sustained – jurors indicated that the question itself damaged the witness’s credibility.

Interestingly, the study found that when the negatively charged question was met with a denial or objection, jurors indicated that they understood the unsupported presumption was false. However, jurors still reported overall lower credibility ratings for the witness than did a control group, who was not presented with the negatively charged question. The study’s authors believed that consciously, jurors rejected the negative implication when the opposing attorney objected or the witness denied its truth. Subconsciously, however, jurors were affected by the negative question, and found the witness to be less credible as a result. The inescapable conclusion was that implications built into cross examination questions have a subconscious effect on juror’s perceptions of a witness’s credibility. As the study’s authors put it, “even when the [witness] denied the charge, even when his attorney objected to the question, and even though many subjects … did not accept the cross examiner’s presumption, the witness became ‘damaged goods’ as soon as the reputation question was raised.”

The study’s findings comport with general understandings of how people process information. First, research in communication suggests that when people hear a speaker offer a premise in conversation, they assume that the speaker has an evidentiary basis for that premise. Second, research in persuasion techniques has revealed that people often remember the contents of a message, but forget the source. From a practical standpoint, these findings suggest that juror perceptions of a witness or the facts can be influenced by loaded questions. The study indicated that even when these questions are met with denial or objection, the ‘bell has been rung.’

92 Id.
93 Id.
94 Id.
95 Id. at 380.
96 Id. at 380-81.
4. Is This Ethical?

The forgoing study, revealing that merely asking a loaded question can influence juror perceptions, introduces a potentially sticky ethical situation. The rules of evidence and trial procedure that guide the questioning of witnesses are intended to facilitate the jury's quest for the truth. In theory, direct and cross examination should thus enhance the credibility of witnesses who are accurate and honest, while diminishing the credibility of those who are inaccurate or dishonest. In other words, it should heighten the jury's fact-finding competence. However, if an attorney can influence a jury’s perception of credibility by merely interposing a baseless accusation, these fundamental precepts are undermined. With powerful tools come responsibility, and experts have raised viable concerns about unethical uses of scientific methods of courtroom persuasion. Such ethical questions raised by the use of psychological techniques in cross examination are beyond the scope of this paper.

C. THE PSYCHOLOGY OF THE JURY

The jury is the most important player in the courtroom cast. Many attorneys make the mistake of placing too much emphasis on influencing a witness’s answers through psychological techniques while ignoring how the jury might perceive this manipulation. Although helpful, many techniques often ignore the fact that using psychology to control a witness is not an end unto itself. Rather, the purpose of controlling a witness is to make a favorable impression on the jury and improve the chances of winning the case. After all, making a cross examined witness look bad or untrustworthy is pointless unless the jury is persuaded by your efforts. An attorney may succeed in berating a witness until he contradicts himself or breaks down. However, intimidating a witness into submission won’t score the examiner any points with the jury. For a technique to be effective, it must achieve the desired result from the witness AND elicit the desired response from the jury. Therefore, an understanding of juror perceptions is vital to understanding the psychology of cross examination.

1. The Importance of Cross Examination to the Jury

From a juror’s perspective, cross examination is one of the more interesting aspects of the courtroom drama. Television shows glorify the cross examination as the crux of a case. Although dramatized aspects of a court case are fictional, jurors tend to view cross examination as one of the most important tests of the lawyer’s case. A fact finder expects that a witness on direct examination will support the side responsible for calling the witness. This juror cognitive bias does not hold true on cross examination, where a witness is expected to fight the examiner tooth and nail before admitting to a harmful or
damaging fact. Therefore, fundamental facts of a case, if elicited through a hostile witness, may be given more weight by the jury. Moreover, studies have shown that jurors are more attentive during cross examination than during other parts of the trial.\footnote{102} Jurors also expect a cross examiner to be aggressive and hostile, and the witness to be stalwart. When the witness concedes a key point, jurors perceive the examiner to have won a victory.\footnote{103}

Conversely, juries tend to sympathize with lay witnesses, and may hold an inherent distrust of attorneys.\footnote{104} They see the witness as one of their own, and the attorney as an attacker, attempting to make the witness look inferior. In this vein, it has been said that jurors are subconsciously rooting for the witness to “win” the battle.\footnote{105} Even on hurtful points, the attorney should never outwardly convey that a witness has done damage to the case, especially during cross examination. Jurors respond to visual cues, and it is important to always appear confident, in control, and like you expected every word that has come out of the witness’s mouth.\footnote{106}

2. Powerful and Powerless Speech

Jurors are extremely sensitive to word choice, speech patterns, and overall style of speech. These can have a profound effect on a jury’s perception of credibility and are powerful tools to use during cross examination.\footnote{107} Sociologists have found that attorneys can influence juror’s perceptions by manipulating the “powerfulness” of speech and style.\footnote{108} Researchers have found that speakers convey powerlessness when they use hedge words, like “sort of” or “kind of;” intensifiers, like “very” or “definitely;” and filler words, like “um” or “you know.”\footnote{109} Avoiding these phrases increases the “powerfulness” of the speaker’s message. In another study, a speaker’s use of seemingly innocuous phrases like “to be honest with you” or “to tell the truth” was perceived as a marker of untruthfulness.\footnote{110}

Similarly, using an inquisitive intonation at the end of a sentence suggests that the speaker seeks the listener's approval and conveys a lack of confidence.\footnote{111} Consider the difference between the following:

Q: So you pushed him down the stairs?
versus:
Q: So you pushed him down the stairs.

\footnotesize{\begin{tabular}{l}
\footnote{102} Bray, R. M., & Kerr, N. L. \textit{Methodological considerations in the study of the psychology of the courtroom}. In N. Kerr and R. Bray (Eds.), \textit{The psychology of the courtroom} (pp. 287-323). New York: Academic Press (1982).
\footnote{103} \textit{id}.
\footnote{104} Wellman, F. L. \textit{The Art of Cross Examination} (2nd ed.). New York: Coller (1936).
\footnote{108} \textit{id}.
\footnote{109} \textit{id}.
\footnote{110} \textit{id}.
\footnote{111} \textit{id}. at 1380.}
One is a question, and the other is a statement. In the first example, the witness is presented with the option of answering the question of whether or not he pushed someone down the stairs. The implication is that the witness is free to admit or deny the question without explanation. In the second example, the attorney is telling the witness that he pushed someone down the stairs. Here, the undertone is accusatory, and the witness is on the defensive. Research in communication suggests that when people hear a speaker offer a premise in conversation, they assume that the speaker has an evidentiary basis for that premise. The difference, therefore, between asking the witness and telling the witness is key. In one, the emphasis on the witness’s response and in the other, the emphasis is on the attorney’s assertion.

3. **No One Likes a Bully**

Although commanding the courtroom is important during cross examination, many studies have shown that juries tolerate aggressive behavior only to a point. Juries will often disregard the message if they don’t like the messenger.

One 1987 study showed a strong correlation between an attorney’s perceived aggressiveness and a jury’s negative impression of that attorney’s effectiveness. The study was conducted to examine the effects of a lawyer's hostile versus non-hostile behavior toward a witness, and a lawyer's use of leading versus non-leading questions. The study involved a scripted negligence case, where attorneys utilized each of four conditions, which varied by lawyer hostility and use of leading questions. One lawyer used a hostile style and only leading questions, one lawyer did neither, and the other two lawyers employed only a hostile style or only leading questions. The test subjects acted as jurors in the trial. The “jurors” rated impressions of the lawyer, indicated a verdict, and gave a decision about the size of the award.

The study found that the lawyers with the highest effectiveness rating employed either a hostile style OR leading questions, but not both. The lawyer who employed neither a hostile style nor leading questions was perceived as weak and ineffectual, and the lawyer who employed both was perceived as a bully. The study’s authors believed that their findings supported the view that although a powerful style produces a more effective attorney than does a less powerful style, there is a limit to a jury’s indulgence of an attorney’s aggressiveness.

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113 Gibbs, Margaret; *The Effect of Cross Examination Tactics on Simulated Jury Impressions*; Paper presented at the Annual Meeting of the Eastern Psychological Association (Arlington, VA, April 9-12, 1987).
114 *Id.* at 3.
115 *Id.* at 3-4.
116 *Id.* at 5.
117 *Id.*
In the same vein, other researchers have found that attorneys who engage in verbal clashes with witnesses are perceived as less effective.\textsuperscript{118} One study showed that even when the attorney dominated a cross examination, the attorney was perceived as having lost control of the witness.\textsuperscript{119} Therefore, verbal clashes should be avoided to prevent a negative impact on the attorney’s image. Moreover, an attorney should not interrupt witnesses because the jury perceives it as unfair and combative.\textsuperscript{120} Juries respond to an attorney who commands the courtroom, but juries will not tolerate a bully.

**IV. CONCLUSION**

One trial handbook teaches that trial advocacy “requires the lawyer to engage in a practical application of psychological knowledge, and it is the obligation of every lawyer to succeed in doing so.”\textsuperscript{121} Even a basic understanding of the psychological underpinnings of cross examination tactics can help every attorney achieve a more successful examination of a hostile witness. Effective cross examination requires a balance between witness control and jury appeasement. Accomplishing dual goals is easy to espouse and difficult to implement, but understanding “why” people do what they do can help the experienced attorney walk this tightrope.

Cross examination is an art. If the attorney considers the points discussed in this paper, he will be able to present the most interesting and challenging parts of a trial more effectively and successfully.


\textsuperscript{119} Id.

\textsuperscript{120} Id.