Oregon State Bar

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In This Issue…

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2012 Owen M. Panner Professionalism Award

By Ronald K. Silver
Civil Chief for the
United States Attorney's Office

Judge Lynn Nakamoto was presented with the Owen M. Panner Professionalism Award at the Annual Banquet of the Litigation Institute and Retreat at the Skamania Lodge on March 2, 2012.

Until her appointment to the Oregon Court of Appeals in January 2011, Judge Nakamoto spent her legal career litigating on behalf of people needing a voice in our system. After moving to Oregon in 1987 from New York, she worked for the Marion-Polk County Legal Aid Society. Then in 1989 she began at Markowitz Herbold Glade and Mehlhaf PC, eventually becoming the Managing Partner before her appointment to the Bench.

Judge Nakamoto was praised by her former partner David Markowitz, as well as her former paralegal, and now practicing attorney, Leslie S. Johnson, for her commitment to her clients, social justice, and her colleagues. Judge Nakamoto also asked Ron Silver, Civil Chief for the United States Attorney's Office, to speak. Ron talked about Lynn from the vantage point of being her adversary in a hard fought case between a federal employee and her agency. Ron complimented Lynn on the passion and professionalism she brought to the litigation. He described her as a relentless and fair opponent, and staunch advocate for her client. He described a hard fought case where both attorneys always showed respect for their opponent and ultimately were able to reach a creative settlement that benefitted both sides in ways that could not have been achieved at trial. ❐

Senior U.S. District Court Judge Owen M. Panner and recipient Judge Lynn R. Nakamoto

From the Managing Editor

They Don't Think Like Lawyers

By
Dennis P. Rawlinson
Miller Nash LLP

During the course of a trial, a lawyer works hard to present evidence and jury instructions to ensure that the jury will view the case from the same perspective that the lawyer does. A lawyer knows that under the law, the decision of the jury must be based on the admissible evidence and guided by the jury instructions.

Jurors ignore this.

Dennis P. Rawlinson

A number of studies confirm that jurors decide cases on a number of factors, the least of which are jury instructions and admissible evidence. Jurors don't think like lawyers, and successful jury trial lawyers recognize this fact.

1 Inductive versus deductive reasoning.

Lawyers are trained in inductive reasoning. They use specific facts to prove a conclusion. Each element of the claim for relief they are trying to prove is substantiated by specific facts arising from testimony and documents.

Most of us, however, during our nonlawyer, everyday lives use deductive reasoning—we use general knowledge to make assumptions about a specific case. Most of us, based on our experience, develop general assumptions about the way the world works. Those assumptions include stereotypes, biases, and prejudices. When we are exposed to a new situation, we simply apply the assumptions developed from our general knowledge and experience to the situation at hand to arrive at a conclusion.

2 During deliberations, jurors discuss their own general experiences.

Studies disclose that during deliberations, jurors share with fellow jurors their own personal experiences, which they believe will be helpful in coming to the right conclusion in the case on which they must make a decision.

Recent studies disclose that jury deliberation time is devoted to a discussion of the following issues in the following percentages of total deliberation time:

a. 50 percent discussing general experiences;

b. 35 percent discussing procedural issues;

c. 8 percent discussing jury instructions; and

d. 7 percent discussing perceived admissible evidence.

These statistics are shocking, in that they disclose that jurors spend only about 15 percent of deliberation time discussing the two factors (jury instructions and admissible evidence) on which they are bound to make their decision.

3 What these statistics ought to tell us.

Because jurors are inclined to spend most of their time and energy sharing general experiences and ignoring jury instructions and admissible evidence, certain practices should be considered:

a. Remind the jurors of their obligations. We need to emphasize the importance of jury instructions and admissible evidence and drive home the jurors' responsibility to decide each case solely on these factors. Experienced practitioners often warn jurors against their natural inclination to allow their own general experiences, biases, prejudices, and presumptions relating to stereotypes to influence their decision. This warning not only encourages each juror to resist deductive reasoning but also encourages the group as a whole to be critical of any individual juror who argues on an inappropriate basis.

b. Recognize that you can't change the stripes on a tiger. Experience teaches most of us, however, that despite our encouragement, lecturing, and cajoling to the contrary, most jurors either openly and expressly or secretly and impliedly allow their general experience to influence their decision. Recognizing this phenomenon suggests certain techniques:

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From the Managing Editor: They Don't Think Like Lawyers

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(i) Eliminate jurors who are predisposed against our clients. If we recognize that jurors are naturally heavily influenced by their own general experiences, then during jury selection (voir dire) we try to eliminate jurors whose general experience and background will predispose them to look at our client or our version of the facts adversely. Appeals to duty, the requirements of the law, and civil responsibility are largely ineffective. Use your peremptory challenges to eliminate potentially troublesome jurors.

(ii) Appeal to the general experience of jurors. Recognizing how strongly and naturally the jurors will be inclined to judge your case on their own general experiences, develop themes and arguments that appeal to the jurors' general experiences so that supporting you and your client will be consistent with their natural deductive reasoning.

(iii) Expose yourself to the experiences of the masses. Each of us needs to work hard to ensure that if we wish to persuade jurors, we either share or understand the general experiences that they will carry to the courtroom. Some lawyers make it a habit of viewing the most popular movies and television programs and reading the most popular novels and magazines to enable them to think like a juror and recognize where common experience can be used in the art of persuasion. Other lawyers listen to talk shows to develop a sense of what people on the street are thinking and why. Other lawyers never miss an opportunity to engage in small talk with the kinds of folks who serve on juries (cab drivers, gas station attendants, and grocery clerks) to develop an awareness of how they think and how they are persuaded.

4 Conclusion. There are no easy answers here. But awareness is what is key. If we realize how jurors are inclined to deliberate and to make their decisions and use that information to our advantage, we can make our persuasion skills more effective. ❐

Oregon State Bar

Summer Calendar

CLE Seminars

Live Seminars

July 20

Handling Domestic Relations Cases

9 a.m.–4:30 p.m.
Oregon State Bar Center
16037 SW Upper Boones Ferry Road, Tigard, Oregon

4.25 General CLE or Practical Skills credits and
2 Ethics credits

August 10

Family Law Settlement Conference Workshop

8:30 a.m.–4:30 p.m.
Oregon State Bar Center
16037 SW Upper Boones Ferry Road, Tigard, Oregon

7.5 General CLE or Practical Skills credits

To register for or find out more information about these and other upcoming seminars offered by the Oregon State Bar, please visit the OSB's Web site at www.osbarcle.org, under Seminars, where you can view the online CLE seminars calendar, download a PDF of the current calendar, and register online for live seminars and video replays.

The F.R.C.P. 30(b)(6) Primer: Learn It. Know It. Live It.

By Francie Cushman
of Davis Wright Tremaine LLP

Francie Cushman

In the average civil litigation, depositions are generally simple in process and tolerable (boring?) in substance. The witness is identified, the lawyer preparing the witness reviews with her what she knows, maybe shows her some possible exhibits, and provides tips about how not to tell her life story when posed with a simple question such as "What is your date of birth?"

One might think a similar approach would be equally effective when your client is served with a "Notice or Subpoena Directed to an Organization" pursuant to F.R.C.P. 30(b)(6). Not so. The rule is tricky, the particulars not all that obvious. Lawyers must know the rule well so as to prevent its all-too-often abuse. What follows is a 30(b)(6) primer covering the five key areas likely to give rise to dispute in the context of a corporate deposition.

The Rule: In the notice or subpoena, a party may name as the deponent a corporation or other entity.

- The notice must describe with "reasonable particularity" the matters for examination.
- The corporation must designate "one or more" officers, directors, managing agents or other persons to testify on its behalf, and may set out the matters on which each person designated will testify.
- The designee must testify about information "known or reasonably available" to the organization.
- A corporate deposition pursuant to this rule "does not preclude a deposition by any other procedure" allowed under the federal rules.

Key Issue Number 1: Individual Deposition of the Corporate Designee

Often, the corporate designee has knowledge relevant to the case that is beyond the matters that have been stated in the notice. The question becomes whether and how the corporate witness can answer questions outside the scope of the notice in their individual capacity. The *minority rule* in federal courts is that the examining party "must confine the examination to the matters stated with 'reasonable particularity.'" *Paparelli v. Prudential Ins. Co. of America*, 108 F.R.D 727, 730 (D. Mass 1985). However, the majority rule is that "no special protection is conferred on a deponent by virtue of the fact that the deposition was noticed under 30(b)(6)." *Detoy v. City and County of San Francisco*, 196 F.R.D. 362, 366-367 (N.D. Cal. 2000); *King v. Pratty & Whitney*, 161 F.R.D. 475, 476 (S.D. Fla. 1995), *aff'd mem.*, 213 F.3d 645 (11th Cir. 2000). And, even the *Paparelli* court noted that it was improper to instruct the witness not to answer questions outside the scope of the identified topics. The consequence? Witnesses must be fully prepared for any question within the scope of discovery. The defending lawyer should be prepared to note on the record that the witness is testifying in an individual capacity rather than as a corporate representative.

Key Issue Number 2: Deposition Beyond the Scope of the Notice: One Dep? 7 Hours?

In seemingly simple fashion, F.R.C.P. 30(a)(2)(A) states that absent agreement of the parties or leave of the court, no more than 10 depositions per side are allowed in federal civil litigation. Further, no repeat depositions of the same witness are allowed. What happens, then, if timely and proper objections are made that the questions are beyond the scope of the topics for which the witness has been designated, but the examining lawyer persists? Can the examining lawyer take another deposition of the same witness in his or her individual capacity without leave of court? How much time can the individual deposition consume in light of the seven-hour limitation?

The *Detoy* case, cited above, held that if the deposition goes beyond the scope of the 30(b)(6) notice, it should not "count" as a second deposition against the limit on the number to be taken by each party. That court did not address how long the combined deposition could take. In *Blackman v. Board of County Comm'rs*, 2011 WL 663195 (D. Kan. Feb. 14, 2011), the

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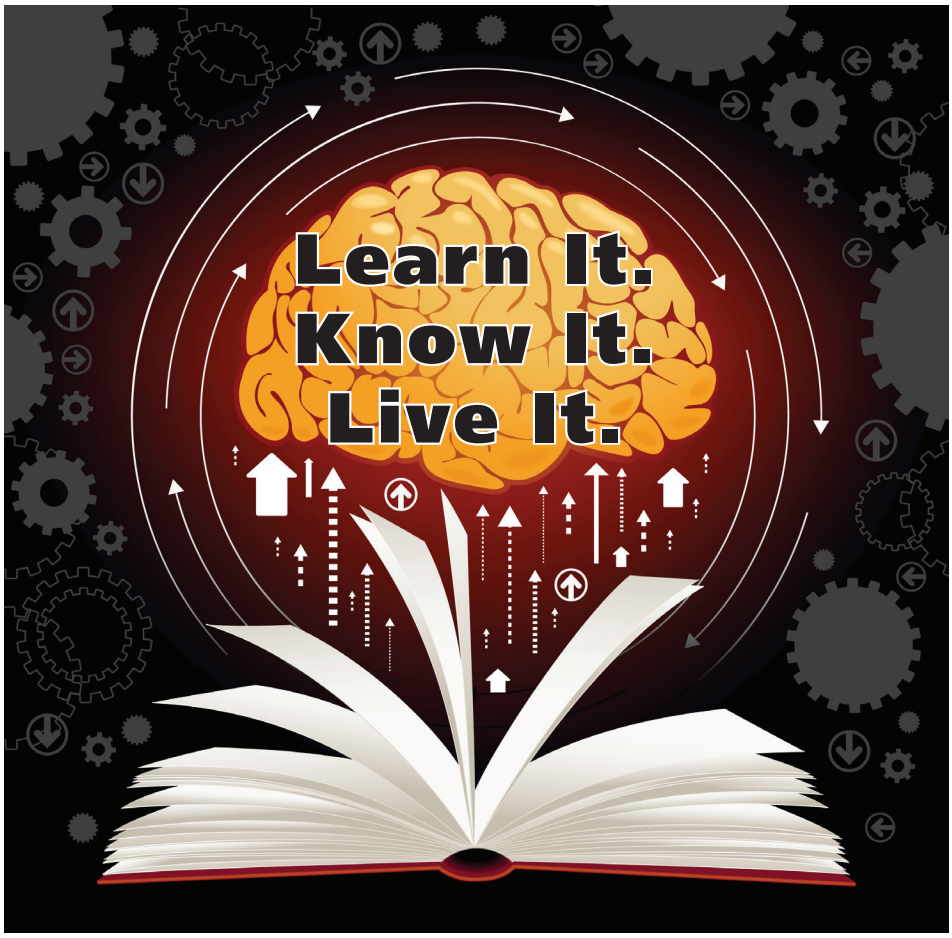
court held that the time spent with a representative witness is "completely separate" and did not count against the seven hours available for depositions in an individual capacity. *See also Salbre v. First Dominion Capital, LLC*, 2001 WL 1590544 (S.D.N.Y. Dec. 12, 2001) (holding that it would be "absurd" to conclude that time spent in deposition in one capacity should limit the time available for deposition in another capacity; such a rule would have "substantial potential for over-reaching").

Best practice? Require any individual deposition to follow immediately on the heels of a deposition in a representative capacity. This addresses the problem of giving the examining party two bites at the apple, through separate individual and representative depositions, perhaps far apart in time. It also avoids the need to prepare the witness twice. Be prepared to argue on the issue of time limitation.

Key Issue Number 3: Presenting Multiple Designees: One Dep? 7 Hours?

When a corporation presents multiple designees pursuant to a single 30(b)(6) notice, the question arises how to count the multiple designees against the 10 depositions per case limit. The 1993 Advisory Committee notes to the rule state that, relative to the presumptive limit of 10 depositions per case, "A deposition under Rule 30(b)(6) should . . . be treated as a single deposition even though more than one person may be designated to testify." *E.g., In re Rembrandt Tech., LP Patent Litigation*, 2009 WL 1258761 (D. Colo. May 4, 2009); *In re Sulfuric Acid Antitrust Litig.*, 2005 WL1994105 (N.D.



Ill. Aug. 19, 2005). *Accord, Loops LLC v. Phoenix Trading, Inc.*, 2010 WL 915785 (W.D. Wash. Mar. 4, 2010) (dictum).

In the "multiple designee" scenario, the question also arises how to manage the length of those depositions relative to the seven-hour limitation per deposition where, technically, the 30(b)(6) notice is really for a single deposition. The 2000 Advisory Committee notes state that, regarding the presumptive limit of seven hours per deposition, "the deposition of each person designated under Rule 30(b)(6) should be considered as a separate deposition." Note that this is *inconsistent* with the plain language in Rule 30(d)(1) which states that without contrary agreement or court order, "a deposition is limited to 1 day of 7 hours," and which treats a 30(b)(6) deposition as a single deposition, at which the organization is the deponent.

Despite this inconsistency, one will be hard pressed to find a case which has permitted multiple seven-hour depositions of separate representatives under a single 30(b)(6) notice. *In re Rembrandt Tech., LP Patent Litigation*, 2009 WL 1258761 (D. Colo. May 4, 2009), rejected the position that the deposing party was entitled to take seven hours per representative, on the ground that it rewarded overly broad deposition notices and was unfair and unduly burdensome to corporations that maintained information in

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"silos." In *United States ex rel. Baker v. Community Health Systems, Inc.* (D.N.M. May 6, 2011) (not reported in Westlaw), the Court held that depositions of 30(b)(6) witnesses would be charged against the maximum limit at the rate of one deposition for each eight hours of testimony.

Key Issue Number 4: Multiple 30(b)(6) Depositions

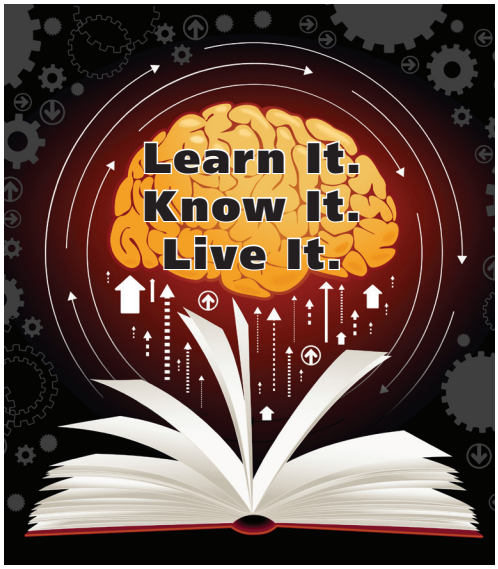
The majority rule is that leave of court must be obtained under F.R.C.P. 30(a)(2)(A)(ii) before a second 30(b)(6) deposition may be taken. *See Ameristar Jet Charter, Inc. v. Signal Composites, Inc.*, 244 F.3d 189, 192 (1st Cir. 2001) ("Because this second Rule 30(b)(6) subpoena was issued to GEAE without leave of court, it was invalid"); *Appleton Papers, Inc. v. George A. Whiting Paper Co.*, 2009 WL 2870622 (E.D. Wis. Sep. 2, 2009); *State Farm Mut. Auto Ins. Co. v. New Horizont, Inc.*, 254 F.R.D. 227, 234 (E.D. Pa. 2008); *In re Sulfuric Acid Antitrust Litig.*, 2005 WL 1994105 (N.D. Ill. Aug. 19, 2005); 7 *Moore's Federal Practice: Civil* § 30.05[1][c] (2008) ("The rule requiring leave of court to take a second deposition applies to an entity that is deposed pursuant to Rule 30(b)(6). . . . Even though a party may be deposing a different corporate representative, it is still seeking a 'second' deposition of the entity.").

Key Issue Number 5: Requests for "All Facts Supporting" A Claim, Defense or Contention

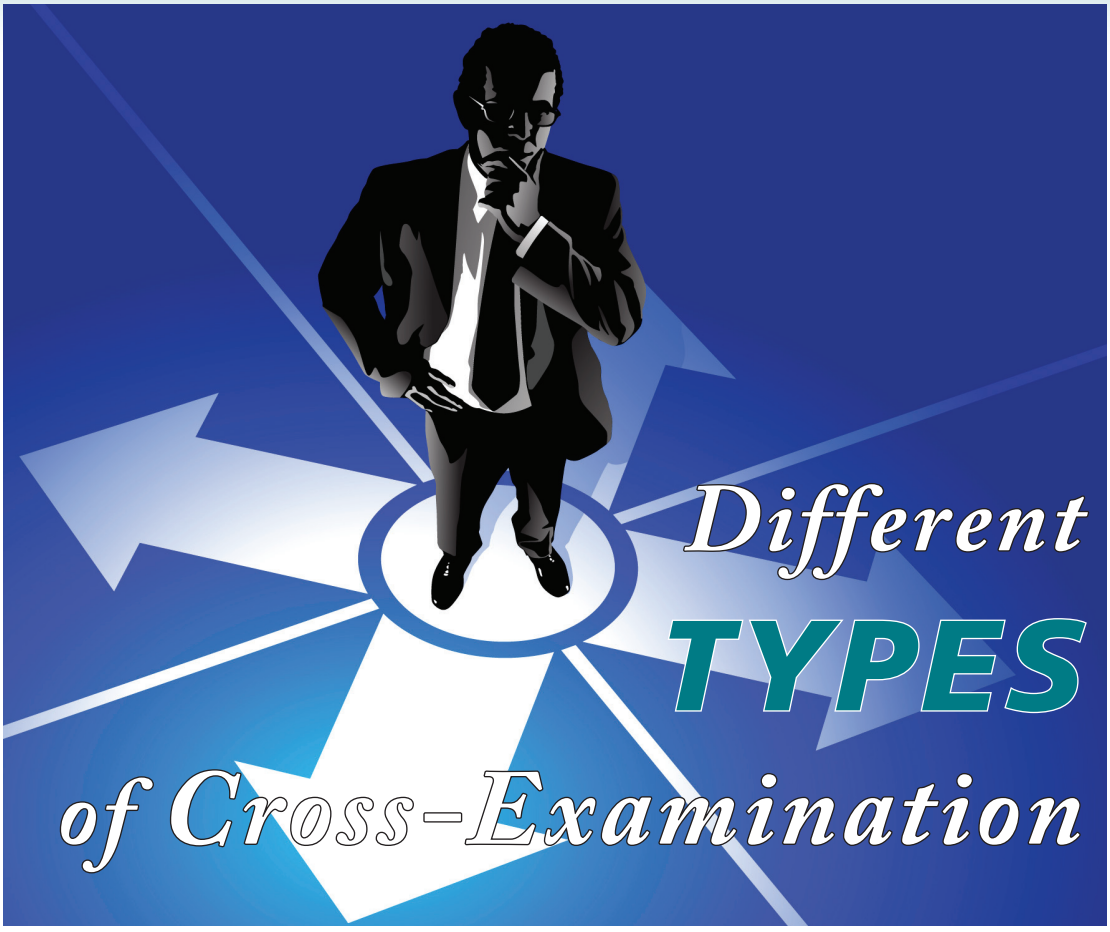
A 30(b)(6) notice asking a corporation to designate a witness to testify about "all facts supporting" a particular claim or defense poses at least two potential problems. First, are such "contentions" ever the proper subject of a 30(b)(6) deposition? Second, what if the relevant knowledge came to the corporate deponent by way of discussion with counsel?

Courts are split on the first question. *See In re Vitamins Antitrust Litig.*, 216 F.R.D. 168, 171-174 (D.D.C. 2003) (yes); *In re Indep. Serv. Orgs. Antitrust Litig.*, 168 F.R.D. 651 (D. Kan. 1996) (normally not); *United States v. Taylor*, 166 F.R.D. 356, 364, *aff'd*, 166 F.R.D. 367 (M.D.N.C. 1996) (case-by-case). *JP Morgan Chase Bank v. Liberty Mut. Ins. Co.*, 209 F.R.D. 361, 362 (S.D.N.Y.) is a useful case for those litigators inclined to the "no" position.

On the second question, courts generally take the position that just because a party learned facts from the lawyer, proper questioning of the corporate deponent is allowable. This is true even if those facts were uncovered by a lawyer and even if the lawyer is the only person affiliated with the organization who knows the facts. *E.g., Upjohn Co. v. United States*, 449 U.S. 383, 395-396 (1981); *Hickman v. Taylor*, 329 U.S. 495, 508 (1947). Accordingly, it has been held improper to instruct a 30(b)(6) witness not to answer questions about facts "known or reasonably available to" the organization, even when the witness learned those facts from trial counsel for the party. *E.g., EEOC v. Caesars Entertainment, supra*, 237 F.R.D. at 434; *In re Linerboard Antitrust Litig.*, 237 F.R.D. 373, 384 (E.D. Penn. 2006); *State Farm Mut. Auto. Ins. Co. v. New Horizont, Inc.*, 250 F.R.D. 203, 215 (E.D. Penn. 2008) (any other rule would mean that "every Rule 30(b)(6) deposition in which an attorney was involved in preparing the witness would be doomed from the start"); *Protective Nat'l Ins. Co. v. Commonwealth Ins. Co.*, 137 F.R.D. 267, 280 (D. Neb. 1989).



However, several cases involving enforcement agencies have held that particular 30(b)(6) depositions were in substance, if not in form, an effort to depose opposing counsel as to its legal strategies and theories, and were improper on that ground. *E.g., SEC v. Buntrock*, 217 F.R.D. 441 (N.D. Ill. 2003), *aff'd*, 2004 WL 1470278 (N.D. Ill 2004); *EEOC v. HBE Corp.*, 157 F.R.D. 465 (E.D. Mo. 1994); *SEC v. Morelli*, 143 F.R.D. 42 (S.D.N.Y. 1992); *SEC v. Rosenfeld*, 1997 WL 576021 (S.D.N.Y. Sep. 16, 1997); *United States v. District Council of New York City*, 1992 WL 208284 (S.D.N.Y. Aug. 18, 1992). *See also In re Linerboard Antitrust Litig.*, 237 F.R.D. 373 (E.D. Pa. 2006) (under all the circumstances, Rule 30(b)(6) could not be used to elicit the substance of in-house lawyer's recollection of witness interviews he had conducted in the course of an internal investigation). ❐



By William A. Barton
of The Barton Law Firm, P.C.

Lawyers have developed a number of approaches in pursuit of the "perfect" cross-examination. I count at least seven distinct types of cross, each with unique applications. Like different pitches in baseball, the combination of these techniques in the same trial proves more effective than the repetition of any single style of cross.


William A. Barton

THE DIFFERENT KINDS OF CROSS

1. "NO QUESTIONS YOUR HONOR . . ."

I start with the threshold question of whether you should even cross the witness and assign this number one because it's obviously the first question to be answered. Irving Younger maintains if the witness hasn't hurt you, simply waive cross with "the face of a Christian in a poker game holding four aces." Jeffrey Kestler explains why with an inventory of thoughts that apply to all cross-examination questions:

You do not have to cross-examine every witness, particularly if you are more likely to hurt your case than help it. In fact, that is the very criterion for decision on this issue: Do the potential benefits outweigh the risks of cross-examination? In order to determine an answer, ask yourself the following questions:

1. How badly has the witness damaged your case?
2. Will the jury perceive a failure to cross-examine as a concession or a sign of weakness?
3. Do you have enough material to conduct an effective apparent examination which does not actually meet the harmful testimony head-on?
4. Does the witness have favorable testimony to provide?
5. If so, is this witness the only source of this information?
6. Did the witness appear credible?
7. If so, what are your prospects of destroying that image?
8. What impeachment material do you have available to bring to bear against the witness?
9. Would it be more effective to

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Different Types of Cross-Examination

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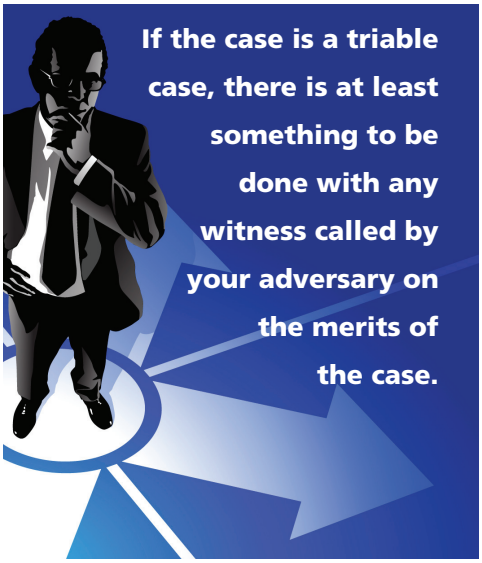
confront the witness with this material or to introduce it as part of your case?

10. Can you show that the witness has misstated or overlooked certain important facts or taken them out of context?
11. How will the witness react under the pressure of your questioning, and how will this affect the jury's assessment of the individual's credibility?
12. What are your chances of convincing the jury that the testimony is insignificant or cumulative if you waive cross-examination? Unfortunately, you must sometimes reach your decision whether to cross-examine in the time it takes you to rise from your chair after your opponent states, "No further questions."[1]

Judge Herbert Stern's volume on cross begins by saying, "More cross-examinations are suicidal than homicidal." He then advises you to never waive cross.[2] If the case is a triable case, there is at least something to be done with any witness called by your adversary on the merits of the case. Maybe you cannot attack him as a liar (impeach), but there may be some way to limit or to blunt his thrust; if not that, or in addition to that, he probably has at least something to help you, so you can hitchhike. If a witness called by your adversary offers nothing to you by way of any of these avenues, then I have to question the triability of your case. And then, putting aside the question of what you are doing trying such a case,[3] you simply have nothing to lose by cross-examining because you are going to lose anyway! More and more authors suggest at least some cross is expected.



2. CONSTRUCTIVE CROSS

The purpose of constructive cross is to extract favorable points from an opposing witness. This type of cross is consistently undervalued and overlooked. It's often referred to as "hitchhiking" and is an invaluable tool that should be used at the beginning of your cross. Do this before any destructive cross because once you're hostile to witnesses, they are less likely to concede points.

Start by asking what parts of your opponent's direct helped you. What parts of your case can this witness corroborate, what must this witness admit, and what should the witness concede under the rule of probabilities?

Mauet suggests that if you've been successful in obtaining significant admissions from a particular witness you may want to omit any later discrediting cross. He argues that jurors might be skeptical if you argue that only testimony favorable to your side should be believed, while the rest should be disbelieved. In other words, a destructive cross may undermine the prior concessions. I think it's just the opposite because any concession from an opponent is virtually impossible to question later.

3. YOUNGER'S YES/NO TEN COMMANDMENTS AND ITS PROGENY

In the late 1960s Irving Younger established the gold standard for destructive cross by positing thin sliced fact statements offered as declarative statements in the form of "questions." Never let the witness explain an answer and leave the final point for closing argument. This is often referred to as the "yes/no" approach and permits only four answers: "yes," "no," "I can't answer the question yes or no," or "I don't know." Law schools teach this method and it's the starting point for every beginning lawyer.

The yes/no questioning sequence runs as follows: If the witness answers your yes or no questions with a yes or no answer, then there's no problem. If, however, the witness insists on explaining every answer, then you have the following choices: If the judge allows the witness to explain every answer, then select the chaos model; however, if the judge will order the witness to answer your question yes or no, then you have the option of moving the court to strike their prior answer as non-responsive, and also instructing the witness to

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answer your yes or no question with a yes or no answer.

Younger's famous Ten Commandments are:

1. Be brief.
2. Ask short questions, use plain words.
3. Ask only leading questions.
4. Ask no question to which you don't know the answer.
5. Listen to the answers.
6. Don't quarrel with the witness.
7. Don't let the witness explain.
8. Don't rehash the direct examination.
9. Don't ask one question too many.
10. Save the explanation for final argument.

I find the yes/no method somewhat overrated. Skilled opposing lawyers predictably clean up any confusion spawned by your cross during their redirect; thereby anticipating and blunting the larger point you will develop during closing. It also makes you look overtly partisan, meaning you're not interested in the "whole truth," but only in your one-sided and thin-sliced version of "the truth."

Being an obvious advocate may at first seem to be exactly what our jobs are; however, under my philosophy, there are degrees of advocacy and when you're striving (as a lawyer) to be the most credible (unsworn) witness the jury hears, then yes, you can have too much of a good thing. I want the jury to see me as pursuing justice, not just winning. There are plenty of criticisms of Younger's Ten Commandments. For instance, "most of the false rules and laws of cross-examination bequeathed to us are bottomed on fear—fear of what witnesses may say, fear that we cannot deal with what they will say. The so-called 'rules' and 'commandments' of cross-examination are designed to protect advocates from witnesses. But these rules counsel folly. Every seasoned cross-examiner breaks and dishonors them regularly."[4] The most criticized "rules" are:[5]

- Ask only leading questions;
- Force all witnesses to only answer "yes" or "no";
- Ask no question to which you don't know the answer;
- Never ask "how" or "why" questions; and
- Don't let the witness explain.

Younger says that if you're well-prepared you should be able to give 80% of your closing before the trial ever starts and that the largest purpose of cross is to set up the arguments you wish to make during closing. He suggests you limit your cross to three points with each witness. He also believes it takes about 25 trials for a lawyer to become reasonably competent at cross. While most of us can become reasonably "competent" at cross, he adds that it takes real God-given talent to excel at cross, and that only seven or eight lawyers in the history of the English common law have been blessed with that gift.[6]

THE COMMANDMENTS' YES/NO PROGENY

Pozner and Dodd authored a fine contemporary update to Younger's "yes/no" approach in *Cross-Examination—Science and Techniques.* They hold there are only three "rules":

1. Use leading questions only;
2. Use one new fact per question; and
3. Break cross-examination into a series of logical progressions toward a specific goal.

Pozner and Dodd quickly acknowledge the limitations of any cross that saves the last point for closing. They advocate a chapter method of cross that is topically driven and discuss clinical techniques such as the advantages of "looping" and speaking in trilogies.

After Pozner and Dodd's work, *MacCarthy on Cross-Examination* is a fine yes/no work; it insightfully emphasizes the lawyer "looking good" and/or having the witness "look bad." He cautions that looking bad has a far greater impact than looking good. The bottom line is you don't gain if you look bad in making a witness look worse. Strive to look good because form and impressions are more important than substance, particularly the longer the trial lasts. By the time of closing no one remembers exactly who said what, but the jurors will retain their impressions of your cross, and thus you.

Obtaining helpful information, discrediting witnesses and their testimony, and bolstering the credibility of other witnesses may be worthwhile goals within any given cross; however, they aren't its primary goals. The underlying premise of MacCarthy is that to be successful in cross, you must strive to look good. Form is more important than substance.[7]

You may or may not elicit the information you want, but don't engage in meaningless pleasantries, "beg," or viciously attack witnesses. Begging and beating up on witnesses

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looks bad, even if you occasionally get something of value out of them. It's not worth making the witness look bad if the price is you look even worse. By focusing on looking good, we start to correct some of the bad habits traditional wisdom in cross has taught us. The system for successful cross is:

SHORT + STATEMENTS = CONTROL

This formula would appear to suggest that control of the witness is our primary objective, but that's not the case. Our primary objective is not control, because we appreciate that witnesses can, if they so desire, deny us control. What the formula is suggesting is that by properly using short statements, you will either get witness control or the witness who decides to deny you control must, out of necessity, "look bad." Either result is to be desired.[8] You will see this is the essence of the next "type" of cross I refer to as the chaos or jury empowerment model.

MacCarthy's report card is a simple one, not unlike the one you received in the first and second grades. You get stars, gold, silver or bronze, depending on the degree of your accomplishment. Every time the witness answers "yes," you get a gold star. Every time the witness answers "no," and "no" was the desired answer, you get a silver star. Every time the witness answers "I don't know" or "I don't remember," you get a bronze star. At the end, the best cross is the one with the most stars, preferably gold. If the result is anything but a star, you get either an "incomplete" or a negative mark.[9]

Per MacCarthy, cross resembles a child's teeter-totter with the lawyer beginning in the down position and the witness in the up position. The object is to reverse these positions by creating a positive impression.[10]

4. CHAOS OR JURY EMPOWERMENT CROSS

Use this application of the yes/no model when the judge lets witnesses explain their answers. A big problem with Younger's Ten Commandments is Rule No. 7: Don't let witnesses explain their answers. When Younger developed his Ten Commandments in the late sixties, judges didn't allow witnesses to explain answers. If the judge allows witnesses to explain their answers on cross then simply continue to repeat your tight, clear yes/no questions. However, if the judge is willing to allow you to control the witness, then, as I mentioned earlier, you have the option of asking the judge to instruct the witness to answer "yes or no" and move to strike their prior explanation as non-responsive.

I label this the chaos or jury empowerment model because it invites and empowers the jury to devalue the witness for overt partisanship in not answering your brief, simple question. Let the witness go (if the judge lets them explain, you can't stop them anyway), and politely but firmly keep repeating your short, tight and simple question. It should now be obvious why this type of cross is a sequential adjunct to the yes/no genre. Here's an example: "Isn't it true, doctor, that you examined my client one time, two years after the wreck?"

Every current teacher of cross supports this approach. Most writers, however, don't encourage asking the judge for help by instructing the witness to answer the question or strike the non-responsive answer, suggesting it makes you look weak.[11] You need to appear to be in control, particularly when the witness is not. I'm in a minority, and think jurors respect the judge as the boss, so you don't lose anything if you know the judge will rein the witness in. You should know the judge's inclinations and thus likely ruling, lest you look both weak and incompetent.

I also refer to this as a "chaos" model because, unless done well, everything soon goes to hell. The traditional response when the witness keeps running on and refuses to directly answer your short and simple question is to keep repeating the simple thin-sliced fact declarative statement question while impatiently looking at your watch. If you're lucky enough to still have a court reporter instead of electronic recording, around the third time the witness fails to answer the question, request the court reporter to read your question back to the witness. Again, this impeaches the witness, not for factual inaccuracy, but for bias, because the witness exposes their partisanship each time they refuse to answer your simple yes or no questions with a yes or no answer.

Impeachment for bias is underappreciated. Rarely do lawyers impeach a witness for serious factual inaccuracies, and even rarer for lies. The staples of most cross are: (1) impeachment of a witness's conclusion(s), particularly an expert's, for having ignored or not been aware of inconsistent underlying facts, and (2) impeachment for partisanship as shown by not answering your question, and of course, (3) impeachment with prior inconsistent statements. Many lawyers become frustrated when the

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witness won't answer their plain and simple questions. Quit complaining and instead view their non-cooperation as a gift. The real question is how to take strategic advantage of their non-compliance.

The use of jury empowerment techniques requires experience, judgment, and involves some risk. That's why you first have to know your judge in order to be able to correctly assess your options and risks. These suggestions are somewhat counter-intuitive in that, like some martial arts, they offensively use the opponents' aggression against them. The common engine for both Younger's Ten Commandment yes/no cross and the chaos model are the brevity and quality of the questions.

5. STORYTELLING CROSS

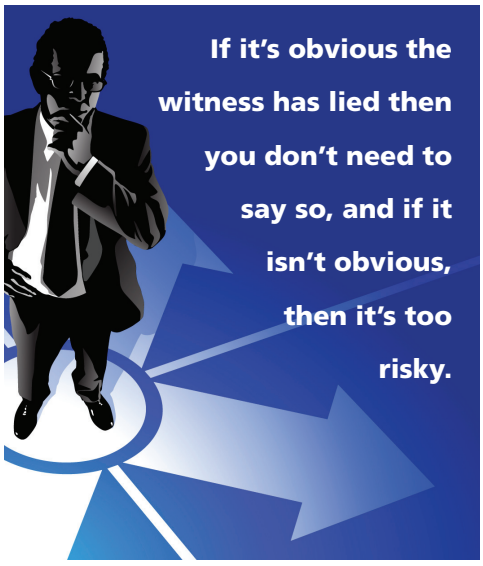
This approach views cross like every other part of the trial, it's simply another chance to tell your trial story, and that's why it doesn't matter what the witness says. Once again, you're "testifying." As mainstream as storytelling is, it didn't surface until about 25 years ago. Now, we take it for granted.[12]

Gerry Spence took storytelling cross to new heights when he combined psychodrama with storytelling.[13] Spence's use of psychodrama's structured development of the trial story and witness preparation drives his "compassionate" or soft cross. Many effective trial lawyers intuitively understand the psychological levers that motivate human behavior; however, great instincts aren't the same as psychodrama with its structured format.

Psychodrama is a forensic process consisting of a cluster of techniques that reveal the deepest aspects of human nature. Some of these include role reversal, doubling, scene setting and soliloquy. The lawyer asks questions to which the witness's answers really don't matter because every juror knows what (really) motivates the witness and, therefore, knows the true and unspoken answer. The questions have a sensitive feel that says to the witness (and jury) that "yes, you fudged, but we understand."

Psychodrama is action, not words, "don't tell me, show me . . ." Don't talk about an event; instead, recreate it to refresh the witness's memory of the original event and the full emotions experienced at the time. When you approach a set of facts this way, it accesses a powerful story from the witness's perspective.[14]

Nobody likes angry people. A big part of all of us longs for a higher emotional state than anger. Spence says most of our cross sounds like an argument. He's right. He also talks of the "magic mirror" saying, "When you point your finger at a witness, you're pointing three fingers back at yourself." You may win the battle but lose the war. With storytelling and constructive cross, you examine without sarcasm or aloofness.[15] In other words, your cross doesn't have to be cross.



I want to add here there's almost no time when you should call a witness a liar. If it's obvious the witness has lied then you don't need to say so, and if it isn't obvious, then it's too risky. Sure you can talk about bias, interest and motive, please do so; but once again, your job as a lawyer is only to judge acts. Judging people is the jury's job, and under the jury empowerment model it's one they are well equipped to do.

The April 1999 issue of *Trial* contains an informative overview of psychodrama and examples of its application:

> For example, in preparing to cross-examine a physician who does a large number of independent medical examinations (IMEs), the director asks the lawyer to take on the IME doctor's role. The lawyer may learn that a true story the doctor is not telling—and that the lawyer on cross can tell—goes something like this:
>
> "I became a doctor to relieve human suffering. I remember the first time I helped a sick person. It was the greatest feeling in the world. When I was approached to do a defense medical evaluation, the feeling was different. I was uncomfortable because I wasn't being asked to help the patient.
>
> "Gradually I got used to it. Now I have many financial obligations. I make a lot of money by doing these evaluations and by

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testifying for defendants. Practicing medicine is far more difficult now than it used to be because of all the restrictions managed care puts on me. Doing an IME and testifying is so much easier. I never have to worry about treating a person who doesn't get well. I realize that the defense attorney evaluates whether my testimony helps the defense and that there are other doctors waiting to take this work if the defense attorney doesn't choose me in the future."

Alternatively, in preparing to cross-examine a former confederate of a criminal defendant who testifies against him in exchange for a greatly reduced sentence, the lawyer is directed to take the role of the witness. The lawyer may learn that a true story the witness is not telling—which the lawyer on cross-examination can tell—is the following:

"I was facing long years in prison. I was afraid of being separated from my children and of them growing up without me. I am rarely allowed even to see them in jail, and when they come, it is indescribably painful to have them see me locked up.

"In prison, I would be hundreds of miles away from them, and I'd see them even less. Being in jail is being an animal in a cage. My cell is only 12 feet by 12 feet. I have no privacy, even for the most basic of human needs. I hate it."

The jurors can see the true motivation of the witness and understand that the witness is not objective or unbiased. The lawyer's humanity and credibility are strengthened in the eyes of the jurors, and the witness is discredited.

Spence did both civil and criminal trial work at an extremely high level and always used a story of betrayal. Graduates of his three-week Trial Lawyer College program soon view all trials as competing stories.[16]

6. McELHANEY'S LAWYER ACCREDITATION CROSS

Jim McElhaney in *Trial Notebook*, 4th ed. says: ". . . the real purpose of cross-examination is to show the judge and jury that you are the better witness."[17] This means the purpose of cross is to accredit you, not discredit the witness. Consistent with my trial philosophy, Jim emphasizes that, while never under oath, you functionally testify during jury selection, opening, cross and closing. This may appear only to be a shift in purpose because the actual questions can be done about any way you want, including yes/no or soft, but it feels less aggressive and confrontational because, like Spence's "compassionate" cross, it's not about discrediting the witness, you're just trying to be helpful! I do it respectfully and gently, and it feels right to me. I mention McElhaney's perspective because I've never heard another lawyer or speaker view cross in this creative manner. I quote extensively:

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

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

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

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

Careful.
Fair.
Honest.

"And you know the facts better than the real witness does. It makes you the guide worth following."[18]

Credibility is absolutely essential for plaintiffs' lawyers during closing when arguing for serious money damages, particularly "unseen" or non-economic damages.

7. HERBERT STERN'S CROSS

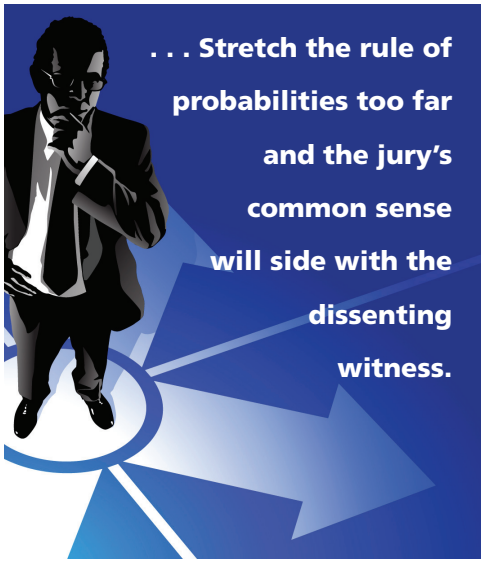
Judge Herbert Stern's five volume magnum opus, *Trying Cases to Win*, has an entire volume dedicated to cross examination.[19] Stern says a credibility attack is not the purpose of cross; instead, it's one of three cross-examination techniques. The purpose of cross-examination is the same as your opening argument and your direct examination: to argue your case to the jury. You argue through the witness, not with the witness. You make all statements through the witness to the jurors and thus communicate information directly to them.[20]

The three purposes and techniques of cross are:

1. To impeach;
2. To get help (hitchhiking); and
3. To demonstrate that the witness's testimony doesn't matter (in other words, the witness's testimony and cross-examiner's theme and theory of the case can live together in the same lawsuit).

Whenever we attack the credibility of a witness and fail, we impeach and impale our own personhood and ethos. We start a spreading peritonitis. When lawyers pick a credibility fight with a witness during cross they concurrently wager their own credibility. Whenever we make an assertion of truth in the form of a question which the jury rejects, we self-immolate.

Whenever a lawyer tries to force a witness to answer in just one word, he sends an unmistakable signal to the entire courtroom that he is afraid of the witness and what the witness has to say about the case. And that is no way to signal that the lawyer is a truth giver interested in justice rather than a game player only interested in winning.[21] This obviously, is a stark contrast to the yes/no approach.



When the cross-examiner's statement to the jury through the witness, and the witness's answer to the jury through the examiner do not agree, the tribunal votes on the question and answer immediately. The jury agrees either with the examiner's assertion or the witness's denial. No one waits to vote.[22]

The second great tool of cross is the rule and law of probability. Here "the attorney makes an assertion crafted to go as far as possible in his own favor, but not one whit farther, in which the witness must agree with, at the pain of being disbelieved . . . ." Stretch the rule of probabilities too far and the jury's common sense will side with the dissenting witness. There is a double hit in these situations; the selection of either the lawyer over the witness, or vice versa, necessarily implies a rejection of the other, and is a loss that's toxic to a lawyer's credibility.[23]

The great power of cross is the ability to pick the subject of confrontation with the witness. The selection should be determined by the cross-examiner's assessment of his ability to make his point, and to prevail in the confrontation he selects. And this, in turn, will be determined by the material the cross-examiner has at hand to cross with. These are the "tools" of cross-examination.[24]

Stern doesn't think cross should avoid the central issue of the case. He further disagrees with the yes/no teaching wherein you save the last point for closing and thus effectively try the case to win it in summation. McComas is obviously in the Stern camp.

"We have seen the advice to be fluid in opening and save the thrust

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for summation. We have seen the advice to avoid being too clear on direct, so that the jurors can come to their own conclusions, which will be more meaningful by dint of their own discoveries. And now, even on cross-examination, we are advised to withhold the punch, to save the point, to wait even now . . . for the summation.

"I believe the jurors have formed opinions early during opening. I believe that they are voting again on every question and answer during both direct and cross, and are trying their best to vote along the lines of their already-formed preferences and prejudices; and that by summation—in any trial of length—they are so fixed in their views that they are past any fair votes on the advocate's offering: the jurors will instead struggle to deny the recollections of the testimony presented by attorneys whose view of the case they do not share, or rationalize away that which they cannot deny."[25] "Summation, then, is not a time to move the jurors to your side. It is a time to show those jurors, who are your partisans, how to argue once they go in to do battle with those jurors who take a different view."[26]

James H. McComas in *Dynamic Cross-Examination* is a contemporary iteration of Judge Stern's approach. He starts with the premise that traditional yes/no type questioning can't and won't cut it; that something much more vigorous is required.

> "Instead of prohibiting the question why, Dynamic Cross-Examination answers all the important why questions in a way conducive to the acquittal of or recovery by, our clients. The answers to these whys make plausible the reality we want the jury to believe, and help lever the outcome in our favor. This dynamic method uses the witness's own statements, demeanor, and behavior in court to provide those answers.
>
> "To elicit helpful answers to key questions, Dynamic Cross-Examination employs a psychologically based strategy. By investigation, preparation, and careful observation at trial, the examiner determines who the witness wants to be for purposes of his court appearance. Then she designs her approach and her questions to the witness in order to take full advantage of the witness's predisposition, needs, and agenda."[27]

One of the biggest points in the book is "Remember: Identifying contradictions, inconsistencies, omissions, and 'mistakes' gets the $5 prize and virtually never determines outcomes. Figuring out WHY the witness made contradictions, inconsistencies, omissions, and 'mistakes,' in a way that supports our plausible reality of innocence, wins the $500,000 prize—and it often determines outcomes."[28]

The author uses the term "levers" to denote anything persuasive that can be used to impeach a witness. This may be a prior inconsistent statement, a fact or a plausible argument that's inconsistent with what the witness is contending.

No shyness here, McComas refers to the witness as the lawyer's "dance partner or boxing opponent" and cross-examination is a "fight or dance." It's a dialogue that goes far beyond yes/no questions. The lawyer uses open-ended questions to coax answers from witnesses that expose who the witnesses really are and what truly motivates their testimony. Gone is the safety net that comes from never asking a question you don't know the answer to. McComas suggests the risks are greatly overstated and the ultimate weapon is the lawyer's case theory.

This approach can be unsettling at first because it suggests the lawyer isn't in complete control, but the attorney actually remains in control by the choice of topics and ability to use the answers to advance the case theory.[29] The heart of *Dynamic Cross* is developing proof and arguments to your client's maximum advantage that answer the "why" questions to each side's outcome-determinative points.

You prepare a list of psychological motivations (the witnesses' agendas), distinct topics to cross on, and the precise factual leverage points you can quickly refer to in controlling the cross. You also shift your level of intensity by topic.

McComas doesn't plow new ground. Stern suggests the same techniques and rationales while exposing witness motivation in a manner similar to how Spence does it in his constructive cross. Because there aren't depositions in criminal cases, McComas relies on native talent, i.e., intuition and instinct, rather than the techniques of Spence's psychodrama to generate his material for an effective cross.

Some of my favorite material from McComas is found in Chapter 19, entitled "Maxims for Attorneys for the Underdog":

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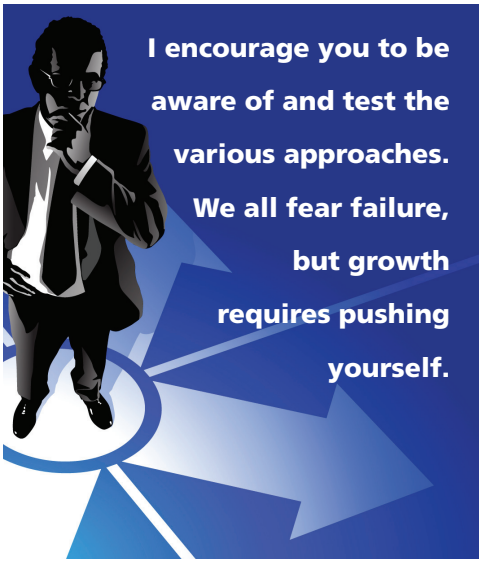
- To a large extent, we make our own room in the courtroom.
- The mental demand is to develop a functional understanding of how facts, human behavior, courtroom dynamics, and the legal system fit together. Organization is the most neglected form of advocacy.
- The bad part of a case won't go away just because we ignore it. The worse a fact, legal issue, or outcome lever is, the sooner we need to understand it, and the sooner we need to figure out how to deal with it.
- Experience is way, way overrated. Hard work and preparation are way, way underrated.
- Persuasion still comprises logos, pathos, and ethos. Today, however, ethos not only includes the advocate's personal credibility, but, more important, appeals to the cultural premises of fairness, duty, and equality.
- We trial lawyers must be fluent in three languages simultaneously:
  * The language of fact = controlled by the rules of evidence.
  * The language of persuasion = advocacy.
  * The language of the rules of decision = jury instructions.
- Attack or disrespect a witness only after he deserves it or asks for it, by the witness's own behavior in front of the jury or when the witness must be disbelieved.
  * Even then, be firm and relentless, not out of control.
  * Always consider whether staying above the witness's level may hurt his credibility even more than duking it out.
  * Show no joy in destroying a witness in front of the jury. It's like snake-killing; it's a dirty job that just needs to be done.
- In trial, less may be more, and more may be a bore, or worse.



USE WHAT WORKS FOR YOU

Don't just continue with your old ways. I encourage you to be aware of and test the various approaches. We all fear failure, but growth requires pushing yourself. Each approach is another alternative for your use. When your only tool is a hammer, every problem looks like a nail.

Like jury selection and closing argument, cross is one of those places in the trial where the lawyer's personality clearly intersects with content. With repetition you'll continue to refine and improve your skill in utilizing whichever approaches you select, and soon you'll make it "your own." If you aren't naturally extroverted, don't worry; there's a variety of effective cross within your natural range.

START WITH KNOWING YOUR JUDGE

Many lawyers think judges call "balls and strikes" and are as important as a baseball umpire. Personally, I think they're even more important. Ponder the ramifications of the answers to these questions:

- Does the judge routinely allow witnesses to explain their answers? (Think here of Younger's Rule #7, "Don't let the witness explain.")
- Will the judge strike a witness's gratuitous answer as non-responsive and instruct the witness to answer your yes/no question with a yes or no answer?
- What threshold of adversity will the judge require before declaring the witness hostile, allowing you to conduct your direct with leading questions?
- When it comes to the admissibility of evidence, is the judge inclusive or exclusive, meaning is the judge a gatekeeper? Pretrial motions in limine, including *Daubert* or Rule 104-type motions, will quickly answer this question. This also predicts how wide discretionary 403-type trial

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rulings will probably be.

- Does the judge allow re-cross or does the testimony stop at redirect as sometimes happens in federal court?
- Do the jurors get to ask questions of the witnesses? This practice is much more common in civil cases than criminal.

MY TRIAL PHILOSOPHY

Trials are about the generation, collection, consolidation and utilization of the intangible personal attribute of credibility. You're the most important witness in the trial even though you're unsworn. You testify during jury selection, opening, cross and closing. Your cross acquires special meaning when understood in this context. By your cross, and its effectiveness, you participate in the dynamic process of accruing the credibility you need to be effective during your closing argument.

You may lose with credibility, but you can't win without it. You can't see credibility, but you can see its effects, and certainly we all know its absence. If you've got no credibility then it doesn't matter what you say, for example: "The sky is blue." It doesn't matter if this is your position and if you're correct, because without credibility no one cares what you think.

You can do an effective cross with uncooperative witnesses, partly because of their obvious partisanship; however, this isn't true with direct examination because this aspect of trial definitely requires witness collaboration. We trial lawyers sweat cross more than any other aspect of the trial because when it goes poorly we look bad, while if direct goes poorly, the witness looks bad!

When conducting cross, what are your largest take-away points? Frequently, what's obvious to you is completely unknown to the jury. Time and again, the lawyer is smugly sure he or she has just made a major point during cross, yet your impeachment was on a minor point or took too long. The list goes on and on.

SOME DIFFERENCES BETWEEN CRIMINAL AND CIVIL TRIALS

Whether the case is civil or criminal, at the highest level, the importance of hard work, attention to detail, and use of a strong trial story and themes are similar. There are, however, lots of good reasons why few lawyers excel at both plaintiffs' personal injury and criminal defense work.

The differences between cross in criminal and civil cases are rarely articulated and discussed; however, there are important structural differences that impact the kind of skills you acquire. Whether you're a criminal defense attorney or a personal injury attorney, you quickly develop an approach that reflects your learned courtroom realities. You get used to trying your cases with little or no direct exam if you do high-end criminal defense because the defendant often doesn't testify. You'll soon learn to rely almost exclusively on your cross because that's often the only evidence you generate. If, however, you primarily do plaintiffs' personal injury work, you must learn to deliver a compelling direct exam or you will be out of business. Without a strong plaintiff's case-in-chief, even a stellar cross won't save the day, particularly in well-defended areas such as products liability and medical negligence.

Cross-exam in criminal cases is robust and visceral. Both sides deliver body blows, quite adamant the other side is a liar. Each side repeatedly fires at embedded targets. For the prosecution, it's crooks and the accused. For the defense, it's trained police officers who are motivated to arrest the bad guys. Yes, the witnesses also bleed to death in high-end civil work, but rarely are they "gutted out;" instead, it's done with a "thousand paper cuts." It's hard for criminal defense practitioners to cross over to the civil arena because they have to give up the boxing gloves.

Given the prominence and importance of cross in criminal defense, it's no surprise that some of the best new work on cross comes out of this arena. MacCarthy[30] and McComas[31] are two of this generation's newest writers. Both are talented and successful career criminal defense attorneys; however, in my judgment their eminently readable and excellent books are contemporary variations on past work.

SO WHAT'S MY APPROACH?

I usually start with hitchhiking and gaining admissions. I then switch to yes/no. This can be soft when I want to accredit myself, or "hard" when I want to discredit the witness. I next use Spence's constructive cross. I watch my tone and try to stay on the high ground by keeping it more in the "I understand" questioning mode. Often I unwittingly slip into an aggressive destructive mode when I'm intending to go soft. Leave your anger at the door. Beware of your instincts. Try lowering your voice, and get a little closer to the witness. These are

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intimate and personal truths you're sharing, so treat them that way. This is one of the times I tell my students "Do as I say, don't always do as I do." I know the right answer is to take the high road, and I also know it's difficult to consistently do.

I save destructive cross for the most important points, with only the most important witnesses. I position myself at a right angle in front of the witness squarely facing the jury. I don't look at the witness when asking questions; I keep my gaze fixed on the jury. I use no notes. I testify to the jury through the witness. Everyone knows when I assume this position I'm "going to quietly, but firmly bring just a little hell with me . . . ."

I then return during my closing to emphasize these points by standing on the exact place I stood during cross; this is called anchoring.

PARTING THOUGHTS

What do you think? I don't know of any other writer who has tried to generate a taxonomy of cross. Do you disagree with my categories, and have I left any out? Your thoughts and suggestions are welcome.

My email is:
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My phone number is: (541) 265-5377

ENDNOTES

[1] Kestler, Jeffrey L., *Questioning Techniques and Tactics*, 3rd. Ed., p.2-21 to 2-22, West Group Publishing 1999.

[2] Stern, Herbert J., *Trying Cases to Win: 5 Volume Set, Cross-Examination* Aspen Publishers 1993.

[3] *Id.* at 334.

[4] Stern, Herbert J., *Trying Cases to Win: 5 Volume Set, Cross Examination*, p.23, Aspen Publishers 1993.

[5] See also *Litigation* by James W. McElhaney, p.182 for a generous list of criticisms of the Ten Commandments.

[6] PEG's *Revisiting the Ten Commandments, A Contemporary Update of Irving Younger's Credibility and Cross-Examination*, Disk 1, by Stephen D. Eason and Irving Younger.

[7] MacCarthy, Terence F., *MacCarthy on Cross-Examination*, p. 44, American Bar Association, 2007.

[8] *Id.* at p. 65.

[9] *Id.* at p. 87.

[10] *Id.* at p. 42-43.

[11] Paul Levera holds this view. *Cross-Examining Experts The Warrior*, Fall 2008 p. 7, 11.

[12] Spence, Gerry, *How to Argue and Win Every Time*, St. Martin Press, 1995; Perdue, Jim M., *Winning with Stories*, State Bar of Texas, 2006.

[13] My favorite book on psychodrama is *Trial in Action*. Garcia-Colson, J., Sison, F, and Peckham, M., *Trial in Action The Persuasive Power of Psychodrama*, Trial Guides. *See*, chapter 9 at page 177, "Telling Your Client's Story Through Cross-Examination." The authors emphasize "soft" cross as a "humanistic" cross that's done with heart.

[14] Leach, James D., Nolte, John, and Larimer, Kaitlin, "Psychodrama and Trial Lawyering," p. 40, *TRIAL*, April 1999.

[15] *Id.* at 46.

[16] For more information on the Gerry Spence Trial Lawyers College, go to www.triallawyerscollege.com.

[17] McElhaney, James W., *McElhaney's Trial Notebook*, 4th Ed., p.444-445, American Bar Association, 2006.

[18] *Id.* at 447.

[19] Stern, Herbert J., *Trying Cases to Win: 5 Volume Set, Cross-Examination* Aspen Publishers. Stern's work is my favorite trial advocacy writing. Judge Stern served as a federal district court judge. The last edition of this seminal five-volume work was issued in 1993 and is now out of print. Until a few years ago the Judge could still be seen occasionally on the road lecturing, but like Jim Jeans and his work, Stern's work is now being lost by the next generation and quickly replaced with new faces such as MacCarthy, McComas and Pozner and Dodd.

[20] Sounds a little like the storytelling approach where you tell your story through the witness.

[21] Stern, Herbert J., *Trying Cases to Win: 5 Volume Set, Cross Examination*, p. 32, Aspen Publishers 1993. Compare this with the "safer" yes/no approaches!

[22] *Id.* at 56.

[23] *Id.* at 178-179.

[24] *Id.* at 62.

[25] *Id.* at 226.

[26] *Id.* at 247, FN 12. (David Ball makes this same point in *Ball on Damages*, 3d ed. at 218.)

[27] McComas, James H., *Dynamic Cross-Examination: A Whole New Way to Create Opportunities to Win*, Trial Guides, 2011.

[28] Id. at 71.

[29] Id. at xxv.

[30] MacCarthy, Terence F., *MacCarthy on Cross-Examination*, American Bar Association, 2007.

[31] McComas, James H., *Dynamic Cross-Examination: A Whole New Way to Create Opportunities to Win*, Trial Guides, 2011. ❐

Recent Significant Oregon Cases

Hon. Stephen K. Bushong
Multnomah County
Circuit Court Judge

Claims and Defenses

Paul v. Providence Health System-Oregon, 351 Or 587 (2012)

The issue in *Paul* was "whether a healthcare provider can be liable in damages when the provider's negligence permitted the theft of its patients' personal information, but the information was never used or viewed by the thief or any other person." 351 Or at 589. The trial court and Court of Appeals held that plaintiffs failed to state claims for negligence or for violation of the Unlawful Trade Practices Act (UTPA), ORS 646.605 to 646.652. The Supreme Court affirmed. The court found it unnecessary to "resolve the dispute between the parties as to whether common law tort principles or statutes concerning the protection of patient information provide a basis for plaintiffs' claims for economic damages." *Id.* at 594. The court explained that, "[t]o the extent that plaintiffs seek damages for future harm to their credit or financial well-being," the claim is foreclosed by *Lowe v. Philip Morris USA, Inc.*, 344 Or 403 (2008), because "'the threat of future harm, by itself, is insufficient as an allegation of damage in the context of a negligence claim.'" 351 Or at 594, quoting *Lowe*, 344 Or at 410. Emotional distress damages were not recoverable, the court explained, because "Oregon law does not provide a private right of action for emotional distress damages when those damages are based only on the risk of some future harm." 351 Or at 602. The UTPA claim failed because plaintiffs sought to recover monetary losses for "money that they expended to prevent or mitigate the possible future use or disclosure of confidential information by a third party. That expenditure of money is not the kind of loss compensable under the UTPA, because the expenditure is not based on any present harm to plaintiffs' economic interests." *Id.* at 603.

Eads v. Borman, 351 Or 729 (2012)

The Supreme Court granted review in *Eads* "to resolve when a nonnegligent person or entity may be held vicariously liable on an apparent agency theory for physical injuries negligently inflicted by a medical professional." 351 Or at 731. The trial court granted summary judgment for the defendant limited liability company (LLC) that leased a building to the negligent surgeon (Borman) and other medical providers, concluding that "the evidence was legally insufficient to hold the LLC vicariously liable for the surgeon's negligence on an apparent agency theory." *Id.* The Court of Appeals and Supreme Court affirmed. The Supreme Court agreed with authorities in other jurisdictions holding that, "in a proper case, a hospital or other entity can be held vicariously liable for a physician's negligence on an apparent authority theory." *Id.* at 745. The court explained that "the essential touchstones" for imposing vicarious liability in this context are: "(1) whether the putative principal held itself out, expressly or implicitly, as a direct provider of medical care so as to lead a reasonable person to conclude that the negligent actor who delivered the care was the principal's employee or agent in doing so; and (2) whether the plaintiff relied on those representations by looking to the putative principal, rather than to a specific physician, as the provider of the care, and not just as a situs in which a physician of the plaintiff's choosing provided the care."

Judge Bushong

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Id. at 746. Applying those principles, the court concluded that "the record is inadequate to permit a jury to hold the LLC liable for Borman's negligent surgery on the theory that Borman was the apparent agent of the LLC." *Id.* at 752-53. The court explained that "it is not enough that the LLC contributed to the appearance that the medical practitioners in its building were affiliated in some way with each other and made beneficial referrals to each other. Rather, for the LLC to be liable for the medical malpractice of the professionals in the building, plaintiff had to look to the LLC, not individual medical providers, for his treatment, including the surgery that Borman performed." *Id.* at 753.

Unifund CCR Partners v. Deboer, 249 Or App 136 (2012)
CACV of Colorado v. Stevens, 248 Or App 624 (2012)
Bell v. Tri-Met, 247 Or App 666 (2012)

The plaintiffs in *Unifund* and *CACV* sought to recover amounts owing on credit card accounts the defendants had with a bank incorporated in Delaware. In both cases, the defendant contended that the claim was barred by the statute of limitations. The Court of Appeals concluded in both cases that "application of Delaware's statute of limitation, and, as required by ORS 12.440, Delaware's tolling statute, would impose an unfair burden on the defendant by effectively depriving the defendant of any statute-of-limitation defense." *Unifund*, 249 Or at 138. As a result, the court concluded that, "pursuant to ORS 12.450, Oregon courts must apply Oregon's statute of limitation rather than Delaware's." *Id.*, citing *CACV*, 248 Or App at 638-40. In *Bell*, the Court of Appeals held that, "with respect to an action for personal injury brought by a decedent's personal representative against a public body, the two-year limitation for commencement of an action in ORS 30.275(9) precludes the application of the three-year limitation provided in ORS 30.075(1)." 247 Or App at 675.

Gest v. Oregon AFL-CIO, 249 Or App 234 (2012)

The plaintiff in *Gest* alleged that her former employer, defendant Oregon AFL-CIO, and its president (Chamberlain) "intentionally and maliciously sought to prevent her from gaining employment with the Oregon School Employees Association (OSEA)." 249 Or App at 235. Plaintiff's tort claim was based on allegations "that Chamberlain had interfered with her efforts to gain employment with the OSEA both because she had refused to accept what she characterized as a bribe—Chamberlain's alleged offer to pay her money if she helped get another employee fired—and because she had confronted Chamberlain about that bribe." *Id.* at 238-39. The Court of Appeals, affirming the trial court, concluded that the claim was preempted by the National Labor Relations Act (NLRA), 29 USC §§ 151-169, because (1) plaintiff's "confrontation of Chamberlain about the employee-firing issue" was at least arguably part of concerted activities for the purpose of mutual aid or protection and therefore protected under section 7 of the NLRA (*Id.* at 240); and (2) any retaliatory action that defendants took because of the confrontation was at least arguably prohibited by section 8 of the NLRA. *Id.*

Cortez v. Nacco Materials Handling Group, 248 Or App 435 (2012)

The plaintiff in *Cortez*, an employee of Sun Studs, LLC, was injured on the job by a forklift. He filed for and obtained workers' compensation benefits from Sun Studs's insurer. He then sued defendant, the sole member and owner of Sun Studs, alleging claims for negligence; violation of the Oregon Employer Liability Law (ELL), ORS 654.305 to 654.336; and noncompliance with the workers' compensation statute, ORS 656.017. The trial court granted defendant's motion for summary judgment, concluding that defendant is exempt from liability under the exclusive remedy provision of the workers' compensation law, ORS 656.018. The Court of Appeals affirmed in part and reversed in part, holding that (1) "the exclusive remedy provision of the workers' compensation law does not apply to 'members' of an LLC" (248 Or App at 439); (2) the ELL claim failed because "defendant is not in common enterprise with Sun Studs, plaintiff's direct employer; did not retain the right to control plaintiff's dangerous activity; and did not actually control plaintiff" (*id.* at 446); and (3) summary judgment was improperly granted on the negligence claim because "the provision that protects members from liabilities of an LLC under ORS 63.165 does not apply to the allegations of negligence that plaintiff makes against defendant for its own conduct." *Id.* at 449.

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DeNucci v. Henningsen, 248 Or App 59 (2012)

The plaintiff in *DeNucci* sued Washington County and a deputy sheriff (Henningsen) after she was arrested at the scene of an accident. When a young boy was hit by a car, plaintiff—who has some medical training and experience with trauma patients—assisted until emergency medical technicians (EMTs) arrived. Shortly thereafter, the boy's father sped to the scene; plaintiff and other neighbors "yelled at him, telling him to slow down." 248 Or App at 62. The father yelled back, and "[a]t some point during that exchange, the father called plaintiff a bitch." *Id.* The EMTs and Henningsen asked plaintiff to step back, and she did. As she stepped back, plaintiff "said to Henningsen, 'The dad doesn't have to be such an ass. I was trying to help his son.'" *Id.* A few minutes later, plaintiff asked Henningsen his name. Henningsen "turned and said, 'What?' Plaintiff, who is four feet 10 inches tall, took one step toward him and repeated her question in a louder voice. Henningsen said, 'That's it,' and arrested plaintiff. He handcuffed her and put her in his police car[.]" *Id.* She was later released and cited for interfering with an emergency medical services provider in violation of ORS 162.257. Ultimately, the charges were dismissed, and plaintiff filed a civil action for false arrest and civil rights violations. A jury returned a verdict in favor of defendants; plaintiff appealed and defendants cross-appealed. The Court of Appeals held that "the trial court did not err in denying defendant Washington County's motion to dismiss and motion for directed verdict on plaintiff's false arrest claim, but it did err in denying defendant Henningsen's motion for directed verdict on his qualified immunity defense to plaintiff's section 1983 claim." *Id.* at 183. The court reversed and remanded for a new trial on the false arrest claim against Washington County because the trial court "erred in instructing the jury regarding ORS 162.257 without clarifying that speech alone cannot violate that statute." *Id.*

Procedure

Anderson v. Dry Cleaning To-Your-Door, 249 Or App 104 (2012)

The defendant in *Anderson* initiated a contempt proceeding, alleging that plaintiffs violated the noncompetition provision in the judgments that allowed plaintiffs to terminate their dry cleaning franchise agreements. The trial court found that plaintiffs were not in contempt and awarded plaintiffs their attorney fees. The Court of Appeals reversed, concluding that the court lacked authority to award fees under ORCP 68 C(2) because plaintiffs did not assert an entitlement to attorney fees until they submitted a proposed form of judgment. 249 Or at 109.

Barber v. Green, 248 Or App 404 (2012)

The plaintiff in *Barber* alleged that the defendant insurance company breached a settlement agreement by failing to pay the agreed settlement. Plaintiff sought to recover damages in the amount of the settlement, plus consequential damages. An arbitrator awarded plaintiff the amount of the settlement, required the insurer to provide a release that was consistent with plaintiff's understanding of the parties' agreement, but did not award any consequential damages. The trial court upheld the arbitrator's award but declined to award attorney fees. The Court of Appeals reversed, holding that plaintiff, as the prevailing party on her breach of contract claim, was entitled to recover attorney fees under ORS 20.082(2). The court further held that the insurer's pre-litigation tender of the full amount of the settlement did not preclude a fee award as provided in ORS 20.082(4) because the insurer's tender "was contingent upon plaintiff signing a release that the arbitrator had implicitly determined was not consistent with the parties' intent." 248 Or App at 413.

Caldeen Construction v. Kemp, 248 Or App 82 (2012)
PGE v. Ebasco Services, Inc., 248 Or App 91 (2012)

In *Caldeen Construction*, the Court of Appeals held that the trial court abused its discretion in denying plaintiffs' request for leave to amend their complaint in response to defendant's first responsive pleading because there "was no indication that the amendments would have prejudiced defendant or affected the trial court's docket, nor was there any reason to believe that plaintiffs would not be able to amend the complaint to state a claim." 248 Or App at 90. In *PGE*, the Court of Appeals held that the trial court erred in declining to set aside a default judgment, concluding that the judgment was void because

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"the complaint did not seek any specific amount in damages, either on its face or by reference to the attached insurance policy." 248 Or App at 100.

Miscellaneous

Greenwood Products v. Greenwood Forest Products, 351 Or 604 (2012)

The plaintiff in *Greenwood* alleged that defendants breached an Asset Purchase Agreement "by erroneously accounting for their cost of inventory—causing plaintiff to pay some $820,000 more for the inventory than it should have." 351 Or at 606. The trial court denied defendant's motion for directed verdict, and a jury returned a verdict for plaintiff. The Court of Appeals reversed, holding that defendants were entitled to a directed verdict because "the contract did not impose any obligation on defendants to accurately account for the cost of the inventory." *Id.* The Supreme Court reversed, holding that (1) the trial court "properly rejected each of the grounds that defendants raised at trial for granting their motion for a directed verdict" (*id.* at 620); and (2) "the additional argument that the Court of Appeals relied on in reversing the trial court—that the obligation that Forest Products supposedly breached did not exist under the contract as a matter of law—was not preserved." *Id.*

Dew v. Bay Area Health District, 248 Or App 244 (2012)

The plaintiff in *Dew* brought a wrongful death action, alleging that defendants' medical malpractice caused decedent's death. The jury returned a defense verdict, finding that one defendant doctor was negligent, but his negligence did not cause the death. Plaintiff appealed, contending that the trial court erred by excluding a portion of defendant's deposition testimony—and barring any cross-examination based on that deposition testimony—in which defendant admitted that decedent "could have benefitted from having a nasogastric (NG) tube inserted[.]" 248 Or App at 246. The Court of Appeals reversed and remanded for a new trial, holding that the trial court erred by excluding the testimony, and that the error was not harmless because the error had "some likelihood of affecting the jury's verdict." *Id.* at 258. The court rejected defendant's argument that the correct "harmless error" test, adopted in *Shoup v. Wal-Mart Stores, Inc.*, 335 Or 164, 173 (2003), was "whether the error caused something more than the 'possibility' of a different result[.]" *Id.* at 257. The court explained that "the harmless error analysis varies depending on the context of the error[,]" and that the error in *Shoup* was "in submitting one of the plaintiff's specifications of negligent conduct to the jury[.]" *Id.* In that context, the court explained, "the *possibility* that an error might have resulted in a different jury verdict is *insufficient*" to establish that the error substantially affected a defendant's rights. *Id.* (emphasis in original). In contrast, "evidentiary errors substantially affect a party's rights and require reversal when the error has some likelihood of affecting the jury's verdict." *Id.* at 258. ❐

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