1 Introduction

Most trial lawyers and an even greater number of trial advocacy teachers, and even some casual trial observers, are in general agreement that cross-examination is the skill most lacking in trial lawyers.

My own experiences buttress this conclusion. Having taught trial advocacy to thousands of lawyers, I am convinced that cross-examination is the most difficult skill for a trial lawyer to learn. Interestingly, I believe direct examination to be the second most difficult trial skill.

My epiphany came not in a courtroom but while teaching other lawyers. I have had the honor of teaching at the National Criminal Defense College since its inception. In the early years, I lectured on opening statements. Teaching opening statements to my small breakout group (always eight lawyers) was a professional joy. I used the National Institute for Trial Advocacy (N.I.T.A.) teaching method. After the lawyers delivered their openings, I would invite critiques from the others in the group. What did the lawyer do well, and why? What did the lawyer do badly, and why? I would then critique. As intended and desired, the opening statements got better as we moved along. The day was personally and professionally fulfilling.

The day spent with the cross-examination group was a disaster. With the critique method, the results were far from satisfactory. The lawyers did not, as they did with opening statements, get better as the day went on.

In truth, the orientation lectures on cross-examination were more "this is what I can do," than "this is what you should be doing." Still, this alone would not explain the failure to improve.

The main problem, I accepted, was me. I was not a good cross-examiner, and therefore I could not effectively teach cross-examination.

Frustrated, I finally asked the dean for a "float" on cross-examination day to visit many of the practice sections. I purposely visited those I thought would have the better teachers of cross-examination.

To my surprise and disappointment, what I saw was essentially what I had experienced. If the lawyers improved at all, it was not by much. There was a problem, but it was not me.

The following year I abandoned the N.I.T.A. system of post-critiquing. Rather, I immediately interrupted the lawyer when he or she did something wrong. The amazing result was that I better appreciated how one should cross-examine. Also, I was demonstrating and teaching the group, which, similar to the opening statement group, did improve as the day went on. This was a wonderful experience.

Over the next few years, the teaching opportunities and several federal trials resulted in the development of my "contrarian" views about cross-examination. The system, though still developing, was born.

The actors and actresses at the college were the first to notice how well my cross-examination group was doing. Soon other faculty, those with "floats," came by to see what we were doing.

Next, the dean asked me to put what I was doing into a talk. Since then I have switched from lecturing on opening statements to giving the orientation talk on cross-examination. I have given this cross-examination talk in all 50 states.

In addition to teaching lawyers, I have also had the honor to sit for many years as a judge-evaluator in the finals of the ABA Criminal Justice Section—John Marshall Law School trial advocacy competition. The young men and women who participate in this excellent program are exceptionally well prepared. Indeed, they should be. They will have tried the same case several times before they appear in the finals. Their trial advocacy teachers, who are more coaches than law professors, do a wonderful job of preparing their teams.

That said, year after year, these committed law students deliver outstanding closing arguments and excellent opening statements. Yet once a witness is put on the stand, the quality of trial advocacy diminishes. The direct examinations are not done particularly well, and the cross-examinations are the weakest aspect of the presentations.

This book is the long-overdue result of my learning experience. If trial lawyers are not particularly adept at cross-examining witnesses, we must reconsider what we have been taught about the purpose, methods, and execution of cross-examination in order to change our methods for the better. That, then, is the purpose of this book. I encourage you to consider a different cross so you can cross with a difference. We can no longer afford to retain a neophobic fear of change.

One reason lawyers cross-examine poorly is that they do not understand the purpose of cross-examination. It is hard to perform well when you do not understand what, let alone why, you are doing what you are doing. Too often, lawyers stand up thinking "This witness has hurt our case; therefore, I must hurt him." But with that method of cross-examination, we can only hurt each other. In other words, witness hurts us, we hurt witness. The best we have done is to neutralize this witness, and that is only if we have done an outstanding cross of the hurting kind. If we do not do an outstanding job, the witness is a net negative for us. We want to turn the witness into a net positive for our case.

What, then, is the goal of cross-examination? Part of the problem is that leading lawyers, teachers, and commentators have filled us with incomplete or inaccurate answers. Now get ready to think about it in a different way.

The goal of any cross-examination always depends on the case and the witness. If you answered with things like "control," "extract admissions," or "discredit by challenging the witness's recollection," goals often suggested by a well-meaning evidence teacher, you get one star. Each of these goals is worthy, depending on the case and the witness. Many of these goals will have application to some part of most cross-examinations. However, none is relevant to every part of every cross-examination. To fashion a system of cross-examination that works well in all kinds of cross-examinations and in all parts of a cross-examination, we must broaden our thinking from the cross-examination itself to the trial as a whole.

Answer a broader question. What is the goal of the trial lawyer with respect to the jury in every aspect of the trial? From voir dire through opening, direct, and cross-examination to closing argument? PERSUASION. We are trying to persuade the jury in a jury trial, or judge in a bench trial, to accept our client's version of the facts as told by us, the lawyer. And because that is our goal with the jury in the trial as a whole, why would it not also be our primary goal in cross-examination (as well as in every other aspect of the trial)?

With this premise in mind, that our goal is to persuade, let us re-examine the many misconceptions about cross-examination drilled into our heads by well-meaning but misguided lawyers, teachers, and commentators.

The goals handed down from sermons on the mount by evidence professors are proper goals of some portions of some cross-examination. But we are looking for a system that fits our goal of persuasion in every portion of every cross-examination. What do everyday people like you and me associate with the goals the evidence professor provided? Do the word association yourself: *controlling*—ex-wife or ex-husband; *extract*—dentist; and *discredit by challenging*—insult. Ask yourself, do you want to be seen by the jury as controlling, extracting, and insulting? I hope not. As trial lawyers, we want to *look good* in front of the jury. Because to look good is more persuasive than to seem to be controlling, extracting, and insulting.

My experience demonstrated that lawyers are most adept at opening and closing arguments, and least adept at cross- and direct-examinations. Why? There are several answers to this question, including the fact that opening statements and closing arguments are done by the individual lawyer and do not require the cooperation of a witness, either friendly or hostile. If you gave that answer, it is important but not primary. This book will teach you how to look good and persuade even if the witness is not cooperating. The primary reason lawyers are more adept in opening statements and closing arguments is that they are able to use the most persuasive technique known—they are allowed to *tell a story*.

How, you must ask yourself, can one *look good telling a story* in cross-examination when you are required to ask questions and elicit answers from a hostile witness? Again, challenge your assumptions based on the teachings from the past. It would be easier if the witness

did not have to participate, but nothing in the rules says you cannot minimize the witness's involvement without appearing controlling, extracting and insulting. Use *short statements* and make the witness affirm everything you say.

A summary of my preaching on cross-examination is best captured in these three themes, themes that will often reappear throughout this book. To improve and to change your thoughts on cross-examination, I suggest you seek, in cross-examination, to:

Look Good
Tell a Story
Use Short Statements