How Far Can You Go in Your Cross of the Plaintiff?

Attack the Libel Plaintiff?

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What Is at Stake?

We've often heard it said that jury trials of libel cases are not trials at all, but instead are morality plays. Having tried ten of them, and for twenty years having conducted a survey of defense counsel in all media libel trials in the United States, I have to agree. Taking a passage from the libel jury trial survey that I present at the Media Law Resource Center conference that I repeat year after year in my analysis of the results:

> There is agreement [among responding counsel] that the following factors, probably in descending order, affect the outcome of a case: (1) which party the jury likes best (or least); (2) which party the jury feels is being most honest and direct; (3) which party is the most competent and conscientious at his or her endeavor in life; (4) whether the plaintiff's proof on liability and damages meets the requirements of the charge to the jury.

Stated differently, a libel trial to a jury is largely a battle of the parties' personas. A critical stage of that struggle occurs after the plaintiff has told her story, when her attorney sits down, and the jury is expecting you to do something. Whatever you choose to do, that choice needs to be made and executed after careful consideration and preparation.

Whether?

Of course, you may choose to do nothing. You may decide that you have no impeachment or evidence of bad acts that would show the plaintiff to be anything more or less than an individual subject to normal human frailties, with whom the jurors would have no difficulty identifying. However, if you stand up and declare that you have no questions of the witness, you should not let that come as a surprise to a jury. You should have explained from the beginning, perhaps in voir dire, certainly by opening statement, that this is not a disagreement about who the plaintiff is, what she did, or what happened to her, but instead is about whether the plaintiff can show that your clients, newspeople, abandoned the principles they built their lives upon, turned their backs on the truth, etc. For that reason, you tell them, they should not be surprised if you ask no questions of the plaintiff.

In mulling whether and how to cross-examine the plaintiff, the trial lawyer's biggest challenge is coming to see the plaintiff as most of your jurors probably will. To paraphrase Fitzgerald, let me tell you about ordinary folks. They are very different from you and me; they are more human. We rarely see things as they do. We, not they, are the freaks.

The most expensive way to understand how the plaintiff's persona, as well as other aspects of your case, will play to ordinary folks is to hire a jury consultant. But the cases in which members of our industry can afford a jury consultant are becoming rare. Besides, I think it is important for trial lawyers to develop their own intuitions and instincts about people, and how they are likely to react, based upon their personalities and life experiences. This skill might even help you in other aspects of your life.

If trying cases to juries is your line of work, you have a set of nonlawyer friends and acquaintances whom you trust for their reactions to the personalities and issues in your case. It takes people with a genuine interest in what you do to give your facts and personas the kind of attention and thought they need. Let these people look at the plaintiff's deposition videotape, hear your trial themes, and react to issues over plaintiff's credibility and quality of her story.

Your first choice is whether to cross-examine the plaintiff at all. In making this decision, you should assume that the plaintiff's trial performance will be a significant improvement over her deposition. The extent of the improvement will depend upon the quality of her lawyer. If you've done your job in your investigation and your deposition of plaintiff and others, you will have discovered most, if any, bases for a successful cross. Hopefully, there is enough there that not all of it can be fixed by even the best plaintiff's lawyer around.

In reality, trial lawyers seem constitutionally incapable of a no-questions cross of a libel plaintiff. I know of no defense lawyer in a libel case who has simply passed the witness. I know of some who they wish they had.

How?

In most cases in which you have a real lawyer for an opponent, there will be little use to cross-examining the plaintiff unless you are in a position to attack her. A good plaintiff's advocate will leave very little open to clarifying cross that detracts from credibility.

By attack, I should clarify, I mean doing something your opponent has not fully anticipated that demonstrates damning inconsistency in the plaintiff's testimony or some bad act relevant to the defamation or so clearly tending to show that she is not worthy of a good reputation, but without creating the impression that you've taken a cheap shot. The something has to be more than making you appear to be in control

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while making the witness appear uncomfortable. That is what the jury expects to happen. The something must go beyond what the jury is likely to see as a normal human foible or weakness. If you're not in a position to show the plaintiff is other than what she claims to be, you're wasting your time, at best, and, at worst, courting disaster. Your goal is to show the jurors that the plaintiff is not really like them, or at least that she is not so now, as an overreaching plaintiff.

In preparing for any examination of an important witness, I believe one should write the questions. This is not so that the questions might be read at trial, although every examination has a few turns of phrase that are difficult to memorize. The purpose of writing the examination is to make you know your case better, and cause you to see what can best be eliminated so that your cross is surgical, efficient, and memorable. I invariably eliminate two-thirds of the deposition impeachments I include in my first draft of a cross-examination of a libel plaintiff.

I also should emphasize that by attacking the plaintiff, I do not mean standing up and confronting the witness with an attack tone of voice. To the contrary, I've learned that my best crosses come from treating the witness with just a little bit more respect than she deserves. Using that demeanor, I prefer the McCarthy series-of-short-statements approach. *See* McCarthy on Cross-Examination (ABA 2007).

Of course, the respect deserved by a witness in the eyes of the jurors may vary during the examination. Thus, I always begin very respectfully, and continue so until I am comfortable I have shown some significant lack of credibility, candor, or forthcomingness, or, better yet, churlishness, deviousness, or dishonesty. It is only when you feel that you have brought the jury into a drama that is unfolding from the mouth of the witness that you should add your own sense of drama and indignation, i.e., attack.

You should begin with your more solid items of deposition admissions, impeaching in a staccato fashion where it works. This will discipline the witness to be wary of disagreeing with you.

Always, as Irving Younger exhorted, listen to the witness. If you have a libel plaintiff who is willing to overreach (and you do or you would not be attacking her, right?), it is inevitable that she will give you an answer that helps you more than what you are trying to goad from her with leading questions.

Here are some of the areas where overreaching by the plaintiff can typically be demonstrated.

Interactions Between Plaintiffs and Reporters

One of the most critical areas of cross-examination of the plaintiff is her interactions with the defendant reporter(s). A plaintiff should be examined about this carefully and when pressed will usually give you something that reflects favorably upon the reporter. If she does not, there is, hopefully, a credibility issue.

In a recent case I prepared that did not go to trial, the defendant reporter sent the plaintiff e-mails twice two days before the article was published, urging the plaintiff to respond to her critics and provide her side of the story. The plaintiff claimed that she only sporadically read her e-mail and had no recollection of receiving these e-mails. However, by obtaining a complete copy of the plaintiff's mailbox from her employer by subpoena, we found that plaintiff had responded to several e-mails sent and received immediately before and after those from the reporter, both of which were in her mailbox unanswered. This both bolstered the reporter's credibility and impeached the plaintiff. The same plaintiff also claimed that the reporters relied upon sources with axes to grind, but in support of that contention had to admit she was sure that the sources had given the information attributed to them. The plaintiff's unwillingness to respond to requests to respond to her critics also diffused her claim that the reporters should have questioned information provided by allegedly axe-grinding sources.

Loss of reputation. Typically, the plaintiff will be asked in deposition to identify any person who has formed an unfavorable opinion of her as a result of the article. At depositions, plaintiffs and their witnesses will usually admit to inability to identify such persons, but usually will be prepared to testify to having overheard conversations by unknown persons that reflect negative opinions about the plaintiff based on the defendant's publication. When opposed by an effective advocate, there is not much one can do about this. But you deflate the reputation damage issue if you can make it appear that the plaintiff, in the community of her friends and acquaintances, has a reputation unaffected by the defendant's publication, and that these people still support and care for her. When the plausible loss of reputation is limited to persons the plaintiff doesn't know, the claim of being mortified and embarrassed may ring of vanity.

Plaintiff's motive in suing. Plaintiff professional sports owner, excoriated by sports columnists for moving the hometown professional team to another city, uttered in his deposition, "I'm an old man; I don't have to put up with this kind of publicity." In truth, the plaintiff was more rich than old. This was classic attack material.

Defamatory meaning. All plaintiffs are likely to deny an innocent construction of the defamation, but most are also likely to insist upon an unreasonably disparaging one. For example, a plaintiff testified in a suit over an article depicting the plight of a police officer blinded while disarming a bomb that the statement that "[the officer's] wife divorced him after the accident" meant that the wife divorced him because of his blindness. Few plaintiffs can make this sound like anything but an overreach.

Emotional distress. Like reputation damage, this component of defamation/invasion of privacy damage needs to be controlled by keeping it in perspective in relation to other stressors in life, such as the loss of life or limb or a family member. When a plaintiff says that the emotional injury she suffered as a result of a mass communication is the worst emotional distress she has ever experienced, the plaintiff usually will be perceived as overreaching.

Usually, the written record will show evidence that belies the plaintiff's claim of severe emotional distress, such as post-publication doctor's visits in which no discussion of the offending publication is recorded, the failure to seek counseling or therapy, or that the lawyer is the first to be consulted. In privacy cases, the plaintiff's perception of the private nature of the material published or the injury caused by it can similarly be demonstrated to be exaggerated and overreaching.

One should keep in mind, however, that portraying the plaintiff's perception of her emotional distress damages as exaggerated can be a double-edged sword. A psychiatric expert can always

be found to testify that the plaintiff is, in effect, thin-skulled, with psychological susceptibilities that cause her to experience extreme emotional distress that would seem unreasonable to the ordinary person. So too, attempting to show that the plaintiff's emotional injuries were caused by stressors other than the defendant's publication may simply cause the jury to believe that the defendants aggravated or contributed to the severity of a prior or subsequent emotionally stressful event.

Parting Thoughts

In two of my libel jury trials, I remember vividly in each case the events of a recess during my cross-examination of the plaintiff. In one case, several acquaintances who had been watching the trial told me they thought I was cleaning up. In the second case, I got a similar kudo from the court reporter, who had been watching trials in that courtroom for more than ten years. Both cases resulted in directed verdicts. After being discharged, the jurors gave me their reactions to my cross-examination of the plaintiff, which ranged from resentment to low levels of appreciation for the points I appeared to be scoring. In each case, the jury as a whole had me about where I likely would have been had I chosen not to question at all. Thus, my warning is that you should not become overconfident during an apparently successful cross-examination of a libel plaintiff, or, for that matter, any other phase of the trial. You should be cautious in abandoning respect for the plaintiff at any time, including summation. The reality is that most jurors have higher expectations of media defendants and their lawyers than they do of libel plaintiffs.

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Figuring Out Where the Line Is

ROBERT D. NELON

Needless to say, effective cross-examination of the plaintiff can make or break a case; it may be outcome determinative more than any other factor in the trial. Careful planning for cross of the plaintiff is, of course, essential. But planning need not be difficult. A few practice pointers (think of yourself as a coach):

Evaluating the Playing Field

The first question you should ask is "Will the plaintiff be a sympathetic figure to the average jury you are likely to get?" How you answer that question will generally guide your entire approach to cross-examination. The answer will be pretty fact specific, but here are some questions to pose to yourself: "Was she really, seriously defamed or (in a false light privacy case) were the statements about which she complains really offensive to the average person?" In a private facts case, "How would the average juror relate to the plaintiff's assertion that your client published information that was nobody's business?" If the plaintiff has a legitimate beef about what your client said about her, jury sympathy, at least initially, may be high. "How close to the truth was the publication?" A plaintiff who may be able to establish only minor falsity—the publication was in fact wrong, but it wasn't far off the mark—can sometimes be made out to be a whiner and complainer for whom the jury has little sympathy. And if the publication is substantially true, and you're confident the evidence will show that, you may be able to cross-examine the plaintiff aggressively without risking alienating the jury.

Another question to evaluate the playing field: "How technical is your defense?" For example, if your defense of a libel case is based on the fair report privilege (because what was reported turns out to be wrong and the jury will have to decide whether your client accurately reported the official information), you should ask how the plaintiff's complaint will resonate with the jury in the face of a defense that, in effect, admits that your publication was wrong because the official source was wrong. Will that type of defense make the jury sympathize with the plaintiff because they can more easily relate to her plight than they can to your technical defense? Likewise, if the case turns on actual malice—a concept juries, and some judges, have a hard time grasping—will the plaintiff's claim she was damaged be more easily accepted than your defense that your client didn't actually know the information reported was wrong? Certainly the particular status of the plaintiff can make a difference. It is easier to evaluate how the plaintiff will relate to the jury if the plaintiff is a public figure whose reputation (good or bad) is known, as opposed to the private plaintiff who is not well known in the larger community.

Evaluating the Opposing Player

Presumably, you've deposed the plaintiff; you've seen her in action under your examination and perhaps that of her own counsel. How well did the plaintiff present herself in the deposition? Was she a soft-spoken, articulate witness confident of the facts, the kind of witness that is likely to warrant only brief and very focused cross-examination at trial? Or was she arrogant, with a chip on her shoulder, or a plaintiff who obviously wanted to shape the facts to fit her claim, despite what documents or other evidence tended to show? The latter kind of plaintiff gives you a lot more room to maneuver at trial.

A lot of your approach to cross-examination at trial will depend on how the plaintiff performed in the deposition setting. Was the plaintiff loose with the facts, was she prone to exaggeration, or did she overplay her injury? If she struggled with questions in the deposition, was it because she was just intimidated by the process (something the average juror might understand and relate to) or was she dissembling (something that, if it became apparent at trial, would not likely appeal to the average juror). Was the plaintiff glib, but not convincingly familiar or comfortable with the facts? Your assessment of the plaintiff's ability to handle cross-examination in the deposition room will be a major factor in how you approach her cross at trial.

Developing Your Game Plan

Now that you've deposed the plaintiff and assessed how she'll do in cross at trial, you need to decide how to maximize the opportunity cross-examination affords to make your case through your opponent. First, you need to identify the two or three themes of the defense, and decide what theme(s) you can best support through the plaintiff's cross-examination. In a recent trial we had, for example, the plaintiff had been erroneously identified by police as a suspect in a crime. The news reports broadcast by the television station defendants (and by other local media) in response to

information disseminated by police were "false" in the sense that the plaintiff had not committed any crime, but the defense was one of privilege, the absence of fault, and the lack of damage caused by any nonprivileged statement about the plaintiff. The defendants had four themes: (1) they were "good guys," aiding police and the community by putting out Crimestopper reports at the request of police; (2) they accurately reported what police said (even though, as it later turned out, the police were wrong); (3) they acted as professional journalists were supposed to act; and (4) the plaintiff suffered no harm to her reputation because of any nonprivileged statement, and the emotional distress the plaintiff claimed to have suffered was caused by the police investigation, not the television broadcasts. The plaintiff had virtually no knowledge of the facts regarding the first three themes, so cross-examination of her focused on the last theme. That's not to say that no questions were asked related to the other themes, but the focus was on the last one.

Game planning also requires you to decide what your main objective in cross-examination will be. That is, in order to support the defense theme(s) through cross of the plaintiff, do you treat the plaintiff as honest and knowledgeable, but try to use her credible testimony to establish as best you can key facts that weaken or destroy her liability or damages claim, or do you try to paint a negative picture of the plaintiff, without much regard for the plaintiff's knowledge of the facts?

We once tried a case brought by a former FBI agent who a magazine article said had bungled the investigation into the death of a federal prisoner. Our assessment was that any initial sympathy the jury might have for the plaintiff because of his status as an FBI agent could be quickly dispelled through aggressive cross-examination that painted a negative picture. We had lots of other evidence to show that the publication was either substantially true or expression of opinion; so, knowing that the plaintiff would dispute the truth of the article, we did not spend much time cross-examining him on the underlying facts. Because one of our themes was that the plaintiff was not credible and did not deserve to prevail, we used documents generated by the plaintiff himself to show that he had tried to cover up mishandling of evidence and lied to his superiors about it. Despite the plaintiff's sworn testimony regarding key facts, the documents proved otherwise, and detailed cross-examination of him regarding the documents (with liberal use of demonstrative exhibits) was devastating to his case. That approach must be used very carefully, however, and it could backfire if your assessment of the plaintiff is off the mark, or if you're not almost absolutely certain it will work.

One of the key judgments in developing your game plan is the length of cross-examination. No cross should go any longer than necessary, but with the plaintiff, you must decide whether you can best support your theme and achieve your objective with a short, focused examination that deals with the key facts within the personal knowledge of the plaintiff (usually with the genuinely sympathetic or articulate plaintiff or in a case in which your defense is technical), or whether you are likely to catch the plaintiff making inconsistent or incredible statements if you push the cross a little longer. That decision rests, in great part, on your assessment of her performance in the deposition and the strength of that record as an impeachment tool. In any event, after you have prepared an outline for cross-examination, identify the parts of the outline that you could cut if, at trial, the full cross seems like it would be more than you need. Be prepared at trial, as well, to make cuts in the outline as the case develops (or, if necessary, add a few other questions if unexpected testimony from other witnesses or in direct examination of the plaintiff necessitate it).

Executing the Game Plan

As any coach will tell you, the best game plan is no better than its execution, and good execution requires preparation. Obviously, you should prepare for cross-examination of all witnesses, but extra time should be spent in getting ready to cross the plaintiff. Here are some things to think about.

Lawyers have different approaches to preparation for examination and cross-examination of trial witnesses. Some will simply have an outline of key points, and the examination is essentially extemporaneous. Others (myself included) prefer a detailed outline of examination. Having been through the deposition, you ought to know what the plaintiff is likely to say, and it is easy to mark up an examination outline with precise references to the deposition transcript on each piece of expected testimony, even that which is relatively undisputed. You want to be able to engage the plaintiff in a conversation about the facts in which it becomes apparent to the jury—and to the plaintiff—that you know exactly what the facts are and what she is likely to say from the witness stand. After a short time of cross-examination, you will find the plaintiff agreeing with virtually every leading question you ask because she knows—as does the jury—that you already know the answer.

Don't forget that the plaintiff is biased. While she may be initially sympathetic to the jury, you should be prepared to point out to the jury, at least subtly, that her bias exists. Even the most endearing, credible plaintiff will likely have said something in her deposition that could be used to show the jury gently that her perception of the facts is colored by her interest in getting money from your client. Obviously, the less credible plaintiff, whom you have caught in numerous exaggerations or inconsistencies in the deposition, offers more opportunity to show that bias. (Keep in mind that inconsistencies can be shown not only within the plaintiff's own testimony but also with testimony of other witnesses, especially relatives or close friends who may testify.) Whichever type of plaintiff you face, you should pick the one or two facts or issues that give you a chance to expose her bias, and carefully prepare a line of cross-examination that sets up the opportunity to let that bias show through to the jury. The jury needs to be reminded that the plaintiff has a self-interest in the case, whether that reminder is given by the glove or the hammer.

Use demonstrative exhibits generously during cross of the plaintiff. Juries love pictures. For example, a time line of key events can be very useful at picking away at the plaintiff's version of the facts. Or if the plaintiff complains of having suffered severe emotional distress because of your client's publication, but her medical records contain no reference to such distress whenever she's seen a doctor in the interim, or the complaint is modest in degree in comparison to her trial testimony, display the key pages of her medical records to the jury and ask where she complained to a medical provider about her mental distress.

Always be polite to the plaintiff. Even in the most heated exchange during cross-examination, in which you are crushing the plaintiff's credibility with your incisive questioning, you must be polite. That should not be difficult, even for the most aggressive personalities among us, if through preparation you have the confidence to know what the plaintiff is likely to say and have immediately at hand the inconsistent deposition testimony or contradicting document (hopefully with a nice demonstrative exhibit to display to the jury) to show that you know the facts of the case better than the plaintiff. The last thing you want to do is increase the jury's sympathy for an already sympathetic plaintiff, or make sympathetic a plaintiff the jury doesn't particularly like, by being overbearing or brusque with the plaintiff. You can be firm and confident without being rude.

Be yourself. You have your own style of examination; mine is to be conversational with the witness. Whatever your style, keep to it so your cross-examination is natural and flows easily. Thorough preparation will make that possible.

Every case is different; every plaintiff has her own personality. In general, however, each case can be approached the same way: Evaluate the playing field, evaluate the plaintiff as the opposing player, and develop a game plan to achieve a specific objective that supports a theme or themes of your case. Keep in mind that you don't need to score a touchdown (or hit the home run) through cross of the plaintiff—although doing so can be very satisfying—so long as you can achieve the objective that you have designed, however grand or modest it may be. If you do that, you should be able to cross the plaintiff without crossing the line.

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The Playground

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For the true trial lawyer, the courtroom is a wonderfully exciting playground. It's not surprising, then, that most of what you need to know about cross-examining the plaintiff at trial you learned on an actual playground, long before you ever got a twinkle in your eye about the prospect of facing a jury.

I'm Rubber, and the Plaintiff Is Glue . . .

Good cross-examination preparation starts well before the plaintiff takes the witness stand. While this article is devoted to the actual examination of a plaintiff at trial, the old adage that you should never ask a question you don't know the answer to is especially important when cross-examining the plaintiff during trial. Do your homework before you get there, and make sure you've "stuck" the plaintiff with all the right facts you will need to elicit at trial so that those facts are already glued to the plaintiff when she takes the stand.

I'm Not Your Friend Anymore!

Far too many trial lawyers treat their main adversary with too much respect. I know it's scandalous to even suggest that you not be gushingly nice to the plaintiff. I'm not saying don't be polite or respectful. I'm saying, no one (especially the jury) expects you to be the plaintiff's BFF (that's "best friend forever" for those of you too far removed from the actual playground), so don't act like you are.

Where's the right balance in a defamation or privacy case where the jury might actually feel really sorry for the plaintiff? Unfortunately, there is no formulaic answer. In my experience, the truly sympathetic plaintiffs settle before trial (not necessarily because of defense compromises, but often these folks either are too nice to sue in the first place or don't anticipate the hassle the lawsuit brings on and eventually just want to move on). But if Mother Teresa is sitting at plaintiff's table, by all means govern yourself accordingly and, more importantly, good luck. Chances are, though, even the most sympathetic plaintiff has some character flaw you can communicate to the jury (he's an angry tyrant, a disrespectful jerk, a habitual liar, a money monger). Don't let professional courtesy make you afraid to communicate that flaw. If you treat the jerk of a plaintiff like Mother Teresa, you send mixed signals to the jury. This confuses the jury and contradicts the groundwork you've laid with all the other witnesses, groundwork showing that the plaintiff is a jerk, or a liar, or a whiner, or whatever other mud the witnesses have slung at the plaintiff. If he's such a jerk, why are you so nice to him?

Show Off!

Though you shouldn't cozy up to the plaintiff like she's your prom date, don't use the plaintiff as a punching bag either. The weaknesses in plaintiff's case may be glaring in your mind and wholly deserving of righteous indignation, but there is no sense beating a dead horse with these weaknesses or beating your chest about the First Amendment while the plaintiff is in the witness box.

Save the First Amendment outrage for your closing, or, better yet, leave it to the invisible audience you practiced your closing in front of because the real jurors don't particularly care about the finer points of constitutional law. Nor are they interested in watching you try to get the plaintiff to admit that he's trying to kill free speech. If the First Amendment plays such a big role, why are you at trial? Save that highbrow stuff for the trial judge (who obviously disagrees with you because you've got a jury in front of you) or the appellate court, if you find yourself in that sandbox after trial.

Do, however, use the plaintiff's testimony to expose the weaknesses of plaintiff's case from a factual perspective. Just be careful not to be the schoolyard bully. If you score the same point multiple times, the jurors start subtracting points from your scorecard. So sure, establish once or twice that the plaintiff was given the opportunity to sit down for an interview to set the record straight before the story was broadcast and refused the interview. After that, move on. Any further emphasis on this point and the jury is going to start to overthink the point, and may just come to the conclusion that it was plaintiff's natural-born right not to speak with your client.

The same thing is true of plaintiff's minor inconsistencies. By the time you get to trial, the offending publication was probably years ago, and the plaintiff's deposition months (if not years) ago as well. If you catch plaintiff in a "lie" each and every time something comes out of his mouth, the jury is

going to get annoyed with you. "Didn't you testify before that you were a member of the committee for five years instead of the three you just testified?" is a wasted question. But "Didn't you testify previously that the first broadcast didn't upset you at all?" is a golden one.

Sticks and Stones May Break Your Bones, but This Article Didn't Really Hurt You

You can make great progress in disproving causation and damages in the cross-examination of the plaintiff because the plaintiff provides a great opportunity to demonstrate what really has the plaintiff so upset. Often, it's not the purported falsity of the article itself, but the underlying truth that the article revealed. The truth hurts. If, by the time you get to trial, you understand the plaintiff's anger is really directed at what's true in the publication, use the plaintiff to make that point to the jury.

Here's how this works. Say the plaintiff is a city employee who had been promoted to a high position in the city even though she had a string of previous DUI convictions and a stint at rehab several years prior to the promotion (this much is true). She complains that the story falsely implied she received the promotion because she and the mayor are close friends (perhaps even BFFs). Chances are, the plaintiff isn't nearly as upset about the favoritism implication as she is about the fact that the whole world now knows she had a DUI conviction and a trip to rehab many moons ago.

If you discovered through her deposition and other discovery that the plaintiff is just as or even more upset about the truth of what is published (family members are particularly good at revealing the real source of a plaintiff's grief), elicit that through the plaintiff's own words at trial. If a plaintiff is not forthcoming on this point, it will be blatantly obvious to the jury ("You mean to tell me, Mrs. Smith, that you were not upset at all about the fact that everyone now knows you had a string of DUI convictions and spent time in rehab in 1985? Was it hard to tell your teenage children what happened before they were born?"). And, if necessary, impeach her on this point (see "Liar! Liar! Pants on Fire!").

Cry Baby!

The sight of someone crying makes everyone uncomfortable, so if the water works start while you've got the plaintiff on the stand, you need to navigate the situation carefully. Offering to take a break is one good option. This shows you are compassionate and also may work to your strategic advantage (your jury is going to listen to the sobbing plaintiff much more readily than one providing hours and hours of boring testimony, so a chance to calm down presents an opportunity to settle the jury back into its daydreaming). Another option is to muster whatever nurturing instincts you have within and help make the plaintiff feel better. Offer a tissue. Move as close to the plaintiff as you can without violating his personal space (or rules of courtroom etiquette). Lower your voice. Tell the plaintiff you know this is hard to talk about. You're not scoring any points with the jury while the plaintiff sobs on the stand, but don't lose any here either. And if you know from your diligence before trial that the source of the tears has nothing to do with your client's publication, it's a good time to bring that out of the plaintiff with a leading question: "It's upsetting to have to admit you had a drinking problem all those years ago, isn't it, Mrs. Smith?" A truly distressed and crying plaintiff has no inclination to filter her answers to serve her legal interests.

Liar! Liar! Pants on Fire!

While it is important to treat the plaintiff with respect, you must not forget two very important maxims. First, no one likes a liar. Second, and more important, everyone loves a confrontation. The entire reality television genre is premised upon the idea that Americans will actually choose to watch complete strangers confront each other. At a trial, jurors will awaken and lean forward in their seats at the slightest hint of a smack down. So, when the opportunity presents itself, you must not be afraid to take it.

The key here is that the opportunity must, in fact, present itself. To determine if you have reached the pinnacle point and are ready to impeach the plaintiff, you must have a thorough and complete understanding of every prior statement your adversary has made. Nothing is less climactic (and less effective) than catching the plaintiff in a, well, non-lie. You also must have an understanding of what's important in the case (if you're standing in front of the jury box, and you don't have that understanding, you are in need of more tips than this article can provide). It is a waste of time and annoying to the jury to impeach the plaintiff on every little nuance of his testimony (see "Show Off!"), but if you can catch plaintiff in a big lie, it's your turn to "stop being polite, and start being real."

Once you've determined that this is the moment, move calmly and confidently. When the lie escapes the plaintiff's lips, resist all urge to actually jump up and down, point, and yell, "Liar! Liar! Pants on fire!" Instead, calmly confirm what plaintiff has said. Your asking the plaintiff to repeat himself is going to perk up your jury. And in my experience, if you move in too quickly on the lie, the plaintiff tries to pass it off as a misstatement, and the jury is awake and alert, but confused about what the big deal is (and you're the one who woke them up!). Impeach as you would any witness. Then sit back, and watch the backpedaling begin.

Nani Nani Boo Boo

Whether you're playing at trial or on the merry-go-round, the same principles apply. With these tips—and a little luck—at the end of the trial you'll have your chance to say "nani nani boo boo" in the form of exiting the courtroom with your client's wallet intact.

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To Attack or Not to Attack

JEFFREY S. PORTNOY

To attack or not to attack, that is the question (with apologies to William Shakespeare).

How to effectively cross-examine a plaintiff, in a defamation case, simply comes down to essentially two factors: the personality of the plaintiff and his/her credibility. Although pundits often

like to tell us that jurors are most persuaded by the facts, in defamation cases, where reputations are at stake, it is my experience that they are just as equally persuaded by the personalities of the parties (and, I might add, their counsel).

If you have a likeable plaintiff, the jury may be predisposed towards believing that it is "not fair" that his/her reputation has been damaged by a media defendant, even if the substance of the objected to publication may reveal matters of public interest. If the plaintiff makes a good impression before the jury, or, on the other hand, if the jury believes that the plaintiff has been "abused" by opposing counsel during cross-examination, the jurors may fail to understand the constitutional protections provided to our clients, particularly in cases in which actual malice, and not truth, is the primary defense.

As defamation defense counsel, we always walk the fine line between obtaining the information required from the plaintiff during cross-examination while not appearing to be domineering, unsympathetic, and controlling, although all of the latter three are required to be an effective cross-examiner in most cases.

Demeanor: You can break down the analysis of effective cross-examination of a defamation plaintiff into several single words. The first is demeanor. If the plaintiff is permitted to appear confident, unshaken, and secure, the cross-examination will most likely fail. The trick is to disrupt the plaintiff's confidence, not with the "gotcha" question, although that is always effective, but with steady, polite, and piercing questions that will cause the plaintiff's body language and verbal tone to reflect the anxiety and uncertainty that you want to impart.

Content: The second word is content. Clearly, effective cross-examination brings to the jury's attention all the inconsistencies in plaintiff's testimony, whether it be by impeachment, or through deposition transcripts and exhibits, or just through simple factual discrepancies developed during trial examination.

Control: The third word is control. You cannot have effective cross-examination unless you control the witness, not vice versa. Sometimes this will be difficult, particularly with a judge who is "party and witness oriented," but it is essential. You need the direct rhythm of the cross-examination as its parameters, and make sure that, without appearing "unfair," you do not cede control to the plaintiff.

Sympathy: The fourth word is sympathy. In most cases, the plaintiff, not the media defendant, is going to be the sympathetic figure, at least initially. Depending upon when in the case the plaintiff is called to the stand, that sympathy may be either strengthened or eroded by the time plaintiff is cross-examined. This also depends on the status of the plaintiff. If the plaintiff is your next-door neighbor, she will have increased sympathy. If she is a public figure, that sympathy may be lessened. It is important to not allow the plaintiff to gain the upper hand by demonstrating through your cross-examination that plaintiff is not what she appears to be.

Credibility: The next critical word is credibility. An effective cross-examiner is one who can implicitly and impliedly suggest to the jury that the responses from the plaintiff are clearly biased and should be subject to critical review. Lack of credibility is often easier to address by way of skillfully worded cross-examination questions that pierce plaintiff's testimony like a sharp needle, rather than amputation of a limb. For example, in a recent case, there was a relatively minor issue of whether plaintiff had ever used drugs or abused alcohol (the article suggested he was a habitual substance abuser). He denied it, and we had no direct proof. After defending himself against these "scurrilous charges" under oath, we presented him with a prior published statement in which he bragged about engaging in a public activity while under the influence of alcohol, and his futile efforts to try to explain away the statement as merely being a joke severely damaged his credibility before the jury, albeit on a collateral issue.

Redirect: The next word is redirect. That's right; you do not have the last bite at the plaintiff's apple. His/her lawyer does. It is critical during cross-examination to remember that you cannot leave "open" a subject area that effective plaintiff's counsel will be able to close during redirect.

Impeachment: The next word is impeachment. That is the cornerstone of effective cross-examination. Hopefully you have set this up by way of the plaintiff's deposition or some document that will "gut" the plaintiff's case. Although this sometimes happens more often on *Perry Mason* than in real life, it is always a defense lawyer's dream. In a recent case, we knew from his deposition that the plaintiff had a volatile personality that we might be able to exploit during trial. As we assumed, on direct he appeared reasonable and non-emotional. However, when we began our cross-examination, we began by asking some fairly innocuous preliminary questions about how the plaintiff felt about the writer of the story. At first, he was controlled and noncommittal, but as we continued to hone in on the subject, he became agitated and his answers became more outrageous. Finally, without additional provocation, he blurted out that the writer was a liar, then a jerk, and completed his tirade by making fun of the author's appearance and personal characteristics. In talking to the jury after the defense verdict, the jurors indicated that they were very distressed and unhappy with the way the plaintiff characterized the defendant during cross-examination and that the plaintiff's "true colors" were a significant factor in finding for the defendants.

Hot Button: Can you develop an issue during the cross-examination that, although on the surface, does not appear to be "unfair" will get the plaintiff to forget all the rules she was taught by counsel so that the jury will be able to see her in all her glory? It may not be directly related to the facts and circumstances of the lawsuit, but if you can find that weakness in a plaintiff's "history," it is the cross-examiner's dream when that hot button issue causes the plaintiff to decompose on the stand.

Everyone will ultimately find their own comfort zone in determining both the substance and style of their cross-examination. Hopefully these few "tips" will lead the plaintiff to assist in his/her own demise.

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