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Mount A Killer Cross-Exam With These 4 Tactics

By **Daniel Siegal**

Law360 (August 16, 2019, 10:07 PM EDT) -- Every trial attorney knows a case can hinge on their cross-examination of a key witness, and courtroom veterans say the way to sway a jury is to take your adversary's best efforts and turn them around to make them work in favor of your client.

Each trial and witness have their own unique set of facts, but beyond thorough preparation and thinking on your feet, trial attorneys can point to specific cases where they secured a win by taking down a witness on cross-examination — and learned lessons that have proven their worth over and over again.

Here, veteran trial attorneys discuss verdict-winning cross-examinations and what they reveal.

Keep It Clear and Concise

Morrison & Foerster LLP partner James Schurz, who previously co-chaired the firm's commercial litigation group, said a successful cross-examination needs to do three things: be simple, be straightforward, and have an impact that is plainly evident to the judge or jury deciding the case.

"The ability to crystallize a cross-examination down to a sentence, even a short sentence preferably, is significant in terms of measuring its impact," he said.

Schurz pointed to his representation of hardwood flooring retailer Lumber Liquidators in a suit accusing the company of failing to warn consumers that a flooring product contained formaldehyde in violation of California's Proposition 65, which requires products containing certain chemicals to include warning labels.

In that case's bench trial, Schurz said he was able to sink the plaintiff's key expert on cross-examination by pursuing a simple point: The expert, a Canadian professor, had never stepped foot in a Lumber Liquidators store or spoken to an actual California consumer.

"It's not complicated, it's simple, everyone understands it intuitively makes sense," Schurz said. "The fundamental point is he formed a series of opinions that were based upon what he accomplished at his desk ... the whole thing began to look like an ivory tower academic exercise that was completely untethered to reality."

Schurz said he was prepared for the cross-examination thanks to his deposition of the expert, and went to his key point early, drawing out the answers he needed in six to eight questions.

"I went through other questions, examining on reasonableness and accuracy of ultimate opinions, but by that time, the judge was done, it didn't matter," he said.

The judge entered judgment in Lumber Liquidators' favor at the end of the plaintiff's case because of the limited value of the expert's testimony, Schurz said.

Make the Witness Eat Their Own Words

When it comes to putting the screws to a witness during cross-examination, it's much easier to make hay with their own words than putting your client's position in front of them and hoping they admit

its merit, according to James Neale, co-chair of McGuireWoods' foodborne illness litigation practice group.

"Whether it's an expert from a prior report, or a party from a deposition, you're just on a lot firmer ground," Neale said. "And the confidence with which you can go after that person — I find to be much higher than if you're inching out on a thinner and thinner limb trying to get them to agree with you."

Neale recalled his experience representing a food manufacturer in a case stemming from a global salmonella outbreak from roughly a decade ago. Neale's client had sued its insurer for $40 million worth of coverage and defense costs, and he went to London to depose its key underwriter. While spending a sleepless night in his hotel, Neale came up with a crucial find — a much-photocopied document the underwriter had written over a decade prior, in which he explicitly said the food company's interpretation of the policy was valid.

Rather than trying to get the underwriter to agree during cross-examination that his client's interpretation of the policy was applicable based on his own reasoning, Neale was able to point to the underwriter's own words in the document.

When he was confronted with the document, the underwriter sat silent for a full eight minutes. The deposition was videotaped and Neale played the whole sequence to a Delaware jury, which found for his client after only 35 minutes of deliberations.

"When you tighten the noose around a witness with his own words, I think human nature takes over, and we're all defensive about what we said or did," Neale said. "I think the jury understood exactly what was happening, and really punished them for saying one thing in 1999 and then doing exactly the opposite in 2010."

Get Them Laughing With You

Allan Kanner of Kanner & Whiteley LLC said he learned an important lesson early in his career: No matter how esteemed and well-credentialed an expert may be, a jury won't feel compelled to listen to them once they've laughed at them.

"I always thought people had a lot of respect for experts, and that's why I thought you make people laugh at them," Kanner said. "You get rid of that guy's stature and you empower the jury to render independent judgments when you do that."

That lesson was made clear during a trial roughly 35 years ago, in which Kanner was representing plaintiffs suing over their alleged exposure to the toxic chemicals trichloroethylene and tetrachloroethylene.

The defendant's expert was highly qualified, and had over 500 published scientific papers to his name. But Kanner realized during trial prep that over two-thirds of that work pertained to so-called pigeon breeder's lung disease — which is, as Kanner said during his cross examination, "an allergy to pigeon shit."

"And then the jury starts chuckling, because they're in this trial with all these lawyers and suits being serious and the judge is being serious," he said. "When I put it out there like that they were like, 'Oh OK, this is on my level."

Take Aim at Credibility

Phelps Dunbar partner Peri Alkas said that when cross-examining a witness, the No. 1 goal is of course to undermine the other side's story. And she noted it's just as effective to attack the little details as the big points.

"Sometimes it's the littlest things that will kill somebody's credibility, and once somebody's credibility is shot with a jury, it's gone," she said.

Alkas said this was made clear during a solicitation of prostitution case she took to trial roughly 20

years ago, during her years working in the district attorney's office in Harris County, Texas.

The defendant, whom she recalled as a "handsome, clean-cut, country-and-western" type guy, was accused of soliciting an undercover police officer. But at trial, the man took the stand to claim he had just stopped on his way home from a date to see if a woman, who turned out to be a police officer, needed help, Alkas recalled.

Alkas said she put a map of Houston in front of the witness, and had him point to where his date lived, and where he lived — and then asked him to point to where he was arrested.

"It's not even close to the same part of town, it's 17 miles out of the way. And I was like, 'No further questions,'" Alkas said. "He'd gone there intentionally knowing that was going to be an area where he could [find prostitutes] and the jury convicted him. That was not the way home."

--Editing by Rebecca Flanagan and Marygrace Murphy.
