FEBRUARY 2015



The right cross

An effective cross needs visuals, and visuals demand reliable technology


Cooper

By Miles B. Cooper

The lawyer began his adverse witness cross-exam. The lawyer handed the witness a document. "Mr. Witness, I'm handing you what has been marked as Exhibit 32, a contract between you and XYZ Corp." He got the exhibit admitted quickly. But two hours later, the lawyer was still asking questions about the contract without the jury having seen it. The jury tuned out – the bailiff had to wake juror 11 twice. It was not going well.

The Rule of 65

Why weren't they listening? Because a majority of people learn visually. If you think you've seen this before in past columns, you have. It is so important that I frequently harp on it. A study I read recently noted that 65 percent of the population learns visually. The study also indicated that 65 percent of the population retains information three days later when it is presented audibly and visually. This versus 10 percent if only audible and 35 percent if only visual. Want your jury to remember the evidence? Show as well as tell. Remember this as The Rule of 65.

Plan when using technology

Most lawyers know they need visuals. This usually means technology. When using technology, remember Murphy's Law. Technology is fickle. Success requires familiarity, testing, and anticipating failure. Cross-examination's rapid-fire exchange makes this even more important. Nothing kills pacing like a technical issue. And a good cross demands pacing. Subscribe to the five-P principle: **p**roper **p**lanning **p**revents **p**oor **p**erformance. Playing a video? Make sure there's a way to play it (simple, but frequently an overlooked issue).

Avoid using cool new toys or making last minute changes before trial. Using an iPad as a wireless presentation tool with local Wi-Fi hotspot is fine and dandy until the hotspot fails. Wired devices fail far less frequently than Wi-Fi. Simplicity reigns supreme.

Lay the foundation

Prior to trial, anticipate the exhibits you need for your cross-examinations. Then work to make sure they are at your disposal, without evidentiary dispute, at cross time. How? Have an exhaustive trial exhibit list and pre-mark the exhibits. Work with opposing counsel to obtain pre-trial evidentiary stipulations. Most lawyers won't require a custodian of records to lay the foundation for a Business Record Exception. But one needs to ask – and know – before trial. If opposing counsel won't stipulate, use other witnesses early in the case to admit evidence. This may create some dull points. But not all of trial has to be riveting. Your cross should be.

One also knows what will upset opposing counsel. Bring it up prior to the exam. If you can't agree, request a ruling prior to the exam so the issue does not become a sideshow. An example: one low-tech visual evidence display is publishing to the jury – making 12 copies of an exhibit. Old school, but because it is rarely used, it can be charming. Using this method can surprise your opponent, draw an objection, and potentially a sidebar. If you let counsel know before though, it is usually agreed to without a concern.

I have omitted video from this discussion. Videos and video depositions are incredibly useful – if one has them, use them. But they add tremendous complication. That topic is weighty enough to require its own future column.

Well-planned technology brings brevity and pacing

Irving Younger was a masterful (and animated) trial practice professor. Pull up his Ten Commandments of Cross on YouTube – you'll thank yourself. His first commandment – be brief. A long cross dilutes key points. A juxtaposition of how technology helps:

Standard cross: A lawyer requests that Exhibit 32, a contract, be marked. The lawyer walks over to the clerk. The clerk takes 90 seconds to write out a tag and staple it to the exhibit. The courtroom is quiet but for creaking chairs and shuffling papers while this occurs. The lawyer shows the exhibit to opposing counsel. The lawyer asks for permission to approach the witness. The lawyer then asks the witness to identify the document and spends five minutes laying the Business Record Exception foundation. The lawyer gets the exhibit admitted. The lawyer then asks detailed questions about the second paragraph on page 12, without displaying the exhibit.

Technology-based cross: The lawyer states, "Mr. Witness, I'm displaying the second paragraph of page 12 of your contract with XYZ Corp., which was previously admitted as Exhibit 32. I want to ask you some questions about this sentence (highlighting it).

Whether one uses an Elmo, Trial Director, or displays a pdf, the second cross's pacing and presentation has more impact and won't put the jury to sleep.

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Retooling

Back to our lawyer's cross-examination. During the lunch break, his clerk, who was helping in the courtroom, talked with him. They made 12 copies of the contract. As court resumed, the lawyer asked permission to publish copies to the jury. The jurors perked up as each one received a copy. They were able to see what the lawyer was referencing. An effective low-tech solution to the problem.

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