STRITMATTER KESSLER WHELAN COLUCCIO

Real Justice for Real People

CROSS-EXAMINATION

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ABOUT THE COVER ART

The artwork on the cover is entitled "Boycott." Boycott is inspired by the marches, walkouts and rallies organized by the working class, people of color, immigrants and individuals looking to build a new world.

ABOUT THE ARTIST

Jose Ramirez is an artist, teacher and the father of 3 girls, Tonantzin, Luna, and Sol.

He received a BFA (1990) and an MFA (1993) in art from UC Berkeley. In 2001, he received the Brody Award/Getty Visual Arts Fellowship.

Jose has illustrated seven children's books, including *Quinito's Neighborhood, Frog and Friends Save Humanity, Zapata para los Niños, Papito Dios, and Quinito Day and Night.*

Among his commissions, he has worked for several non-profit organizations, hospitals, cities, film and television companies and cultural centers across the country. In addition, he has lectured and exhibited his work in museums, universities, galleries and cultural centers in New York, Washington DC, San Francisco, San Diego, Texas, Japan, and Mexico.

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"This booklet is a gem from a trial master; all you need to start becoming an effective cross examiner. Paul offers the techniques and motives that get you way beyond the three P's of polite, prepared, to the point, highlighted by examples from some of his brilliant work." –Jan Eric Peterson

"Twenty-three years ago, I sat in court watching Paul Stritmatter cross-examine my expert. The doors to the courtroom were propped open. Paul had one end of a tape measure. My expert had the other. Paul was out in the hallway, out of sight, his questions reverberating down the hallway and into the courtroom. The focus and the precision of the cross was just as impressive as the theatre. The jury was in rapt attention. As was I. It was a powerful, if expensive, lesson, from one of our state's best lawyers and best teachers." – Jeff Tilden'

"John Henry Wigmore famously stated that 'cross examination is beyond any doubt the greatest legal engine ever invented for the discovery of truth.' If there is anyone who knows what they are talking about when it comes to cross examination, it is this small town lawyer from Hoquiam, Washington. Paul Stritmatter has achieved national recognition for his greatness as a plaintiff's advocate. His multi-million dollar verdicts, including his record verdicts and settlements, speak volumes about his legal talent. His selection for membership in all the leading trial organizations demonstrate the high esteem he is held in by his fellow lawyers. He knows what he is talking about. Paul's advice about cross examination should be required reading for any lawyer who wants to learn how to cross examine skillfully." –Paul N. Luvera

"As a judge, when I had a personal injury case, I knew hundreds of fine lawyers; I chose Paul Stritmatter because of his command in the courtroom, particularly on cross-examination."
–The Honorable Faith Ireland (Washington Supreme Court Justice, Retired)

"I have the greatest respect for Paul Stritmatter. When he speaks, I listen. When he writes, I read. Paul's cross-examination booklet contains wisdom. Put that wisdom to work on your next cross exam."
–Robert Dawson

ABOUT STRITMATTER KESSLER WHELAN COLUCCIO

Stritmatter Kessler Whelan Coluccio (SKWC) is a premier Pacific Northwest law firm devoted to representing plaintiffs in personal injury and wrongful death claims. Experienced in trial, SKWC attorneys welcome tough, complex cases. Our verdicts and settlements include product liability, nursing home, government liability, medical negligence, highway design, premise and construction site, class action, vehicle crashworthiness, major vehicle collision, maritime and aircraft crash cases.

The attorneys at SKWC are committed to making a difference in the lives of our clients, in helping to ensure justice for the injured, and in contributing to the legal community through leadership and education.

ABOUT PAUL STRITMATTER

Few attorneys can engage an audience of 12 with the energy and compassion of Paul Stritmatter. He enjoys presenting to juries and winning justice for his plaintiff clients against major auto makers, state and local governments, product manufacturers, contractors and parties in auto collisions.

Paul takes a personal interest in each client's situation. He builds a relationship of trust and understanding, supporting clients through the entire litigation process. Fervently working on behalf of his clients, Paul has successfully achieved dozens of verdicts and settlements of more than several million dollars each.

Paul has been a leader in the legal community for decades. He is a founding member and was 2003 president of the Trial Lawyers for Public Justice. He also was president of the Washington State Trial Lawyers Association and the Washington State Bar Association. The American Bar Association awarded Paul its Pursuit of Justice Award in 2003 for his lifelong devotion to the profession and for significant contributions to the pursuit of justice.

While his cases and legal association duties take him across the country, Paul is happy to work from the firm's office in Hoquiam, Wash., where he was born and raised.

CROSS-EXAMINATION

By PAUL L. STRITMATTER

Be mild with the mild; shrewd with the crafty; confiding with the honest; merciful to the young, the frail or the fearful; rough to the ruffian; and a thunderbolt to the liar.
–Francis L. Wellman

INTRODUCTION TO CROSS-EXAMINATION

Our culture believes that the truth is best found if trial testimony is subject to a searching inquiry by the opposing counsel. Cross-examination techniques exist to ferret out facts that may have been omitted, confused, or overstated. The necessity of testing by cross-examination the "truth" of direct examination is an essential portion of the trial. It is beyond any doubt the greatest legal engine ever invented for the discovery of truth. *5 Wigmore*. The fundamental importance of cross-examination was recognized by our Founding Fathers when they incorporated it into the confrontation clause of the Sixth Amendment of the United States Constitution.

Good cross-examination is the work of an experienced trial lawyer skilled in the methods of witness examination. There are facts to be introduced, points to be made, theories to be supported, and opponent theories to be undermined. Cross-examination is a science. It has firmly established rules,

guidelines, identifiable techniques, and definable methods, all acting to increase the cross-examiner's ability to prevail. But it is also an art, and experience more than anything, helps develop the artistic components of cross-examination.

In direct examination, the trial lawyer is working with a witness rehearsed by the lawyer and who ordinarily agrees with the lawyer's goals. None of these circumstances describe cross-examination. The cross-examiner controls all aspects of questions asked. The cross-examiner controls the number of questions asked and the speed with which the questions are put to the witness. The cross-examiner may compel the witness to move about the courtroom by referring to demonstrative aids. The cross-examiner may compel the witness to remain seated. It may be fair to say that this is the phase of the trial in which the advocate is freest in the courtroom.

There are elements of attack within some cross-examinations. But more fundamentally, cross-examination is an opportunity to elicit favorable facts as opposed to simply attacking unfavorable testimony. The object is to score on the factual points. To make witness devastation a goal is to place the ego needs of a cross-examiner over the factual needs of the case. Cross-examination is simply another opportunity to build or teach your case and thus, persuade the trier of facts. The trial lawyer views the opponent's witnesses as equal opportunities to develop your own theory of the case.

Preparation is the single best method of controlling the dangers of cross-examination. By phrasing questions in a short, concise, one-fact per-question manner, the cross-examination actually moves faster. The rule of one new fact per question means that there are no compound questions, and therefore no objections to compound questions. The techniques of leading question formation support the cross-examiner's control of the witness.

Adopting a theory of the case is crucial to a lawyer's preparing for trial. Only by adopting a theory of the case can a lawyer meaningfully conduct the various phases of a trial. Only by understanding a theory of the case can a fact finder appreciate the significance of the facts produced by an advocate and apply those facts to the instructions of law given by the court. The verdict belongs to the lawyer who has provided the fact finder with a theory of the case and has armed the fact finder with the facts necessary to support the theory. These theme lines will be integrated and used repetitively through voir dire, opening, direct, objections and responses to objections, closing, and, most importantly, the advocate's cross-examination and resistance of the opponent's cross-examinations. "Attack that theory." Not "attack that witness." Witnesses are not attacked. Opponent's theories are attacked. Cross-examination offers unusual opportunities and challenges in building support for the cross-examiner's theory of the case.

Cross-examination can be both constructive and destructive. The portions of cross-examinations that are

termed destructive are those that attack the opponent's theory of the case. The constructive element of cross-examination is the use of the opponent's witnesses to build the advocate's theory of the case.

The introduction of favorable facts in cross-examination allows the trial lawyer to remind the jury that it was not your witness who has testified to the favorable fact, but a witness called by your opponent. Furthermore, a fact adduced in cross-examination is less subject to attack. Cross-examination is simply another opportunity to establish facts that assist in supporting your theory of the case.

It is in cross-examination rather than direct examination that fundamental facts to your theory of the case are best proven. A fact finder expects that a witness in direct examination will support the side of the case responsible for calling that witness. This expectation of a bias in favor of the side calling the witness does not hold true for witnesses taken on cross-examination, or witnesses called for purposes of cross-examination. Here the expectation is that the witness will admit a fact helpful to the cross-examining lawyer only if that testimony is factually accurate. As a result, it is better to establish fundamental facts through the mouth of a witness perceived by the fact finder to be aligned with your opponent.

It is in cross-examination that the theory and theme lines become most visible to the jurors. The thrust of the cross-examination is to support the theory of the case. But in

cross-examination, the cross-examiner also encounters the best opportunities to ingrain theme lines. It is in cross-examination that the lawyer can cause opposing witnesses to affirm the cross-examiner's theme lines and require a "yes" answer to such theme phrases or any other such theme lines.

Cross-examination is not an exercise based on emotion, presence, and oratory. It is not the cross-examiner showing the witness and all of those who observe, (but primarily the witness) that the cross-examiner is smarter, quicker, louder, more demonstrative or more fearsome. It is about teaching the cross-examiner's theory of the case to the fact finder. Why is it necessary to tell cross-examiners what cross-examination is not about? Because too many cross-examiners view the cross-examination as pitting his/her skills, preparation, intelligence, and techniques against those of the witness.

But in a larger sense, cross-examinations are not about a performance by an advocate, but rather the teaching of facts that are critical to the cross-examiner's theory of the case. When the lawyer realizes that a cross-examination teaches the cross-examiner's theory of the case, pressure is reduced. The focus is shifted from the cross-examiner's ego to the cross-examiner's ability to convey to the listeners the logic behind the cross-examiner's theory of the case.

I. THE ART OF CROSS-EXAMINATION.

1. Psychological factors.

a. The jury expects cross-examination. They expect a trial to involve a fight between two lawyers and they feel they have a ringside seat.

b. Jurors expect the cross-examiner to be aggressive and hostile toward the witness, trying to take everything he or she says apart.

c. Remember, however, the jury identifies with the witness as another layperson unskilled in the ways of the courtroom.

d. The jury thinks and expects the lawyer will maneuver the witness, try to confuse and browbeat the witness.

e. The witness expects to be attacked and looks at every question with suspicion trying to find ways to counter it. The witness will usually become defensive as a mechanism to this attack. The body language changes as the cross-examination lawyer gets up. A witness will shift in the chair; grip the arms of the chair; the back gets stiffer; he/she clears the throat; lifts the chin; and gets organized for the onslaught.

f. The temptation to the lawyer is to "make a kill" in cross-examination. There is visibility and the

thrill of performance. There is excitement. There is power. There is breaking the case wide open in a Perry Mason/Law & Order style, reducing the witness to a mere quivering shell. The jury, however, may well see you as a bully, ganging up on a layperson by using legal tricks.

g. The jury sometimes can get so busy picking sides in the battle and feeling defensive about the witness, that they forgive the witness for admissions and don't accept the impact of the cross-examination.

h. However, with an expert witness, the jury waits for the fun. They have no sympathy. They want to see the battle. And the expert witness on the other hand, is far more prepared to deal with the onslaught and may be more experienced than the lawyer in handling the cross-examination.

2. The purpose and goals of cross-examination.

Cross-examination is one of the safeguards of the law to accuracy and truthfulness. It is a matter of right. *Alford v. United States*, 282 U.S. 687; 75 L. Ed. 624: 51 S. Ct. 218 (1930). Cross-examination is the highest and most indispensable test known to the law for the discovery of truth. 81 Am. Jur.2d Witnesses, §510.

The purpose of any aspect of a trial is to persuade. Persuasion of the trier of the facts is the only ultimate

goal of cross-examination. If cross-examination is not attaining that goal, it is a waste. Too often lawyers set a goal of destroying the witness and end up with an ineffectual cross-examination, or a cross-examination that is disastrous.

Wigmore said that the goal of cross-examination should be to "soften the impact of a witness by confrontation." Persuading the fact finder by softening the impact of the witness may take many forms:

a. Forcing the witness to admit certain facts or agree with certain basic principles;

b. Destroying all or a portion of the testimony of a witness;

c. Discrediting the witness personally. ER 607 and 608;

d. Separating falsehood from truth;

e. Separating hearsay from actual knowledge;

f. Separating opinion from fact. ER 701;

g. Separating inference from recollection;

h. Eliciting contradictions, modifications or retractions of material testimony;

i. Discrediting the witness because of bias, prejudice, or perjury;

j. Discrediting the witness because of lack of qualifications or other deficiencies;

k. Destroying or weakening the jury's favorable impression of a witness;

l. Establishing that the witness is lying on one or more material points;

m. Showing that the testimony is improbable or that the witness has a lack of knowledge, lack of opportunity to know or lack of opportunity to observe;

n. To impeach a witness by showing that he/she has given a contrary statement at another time. ER 613;

o. To show that a witness has been convicted of a serious crime. ER 609;

p. To obtain necessary evidence to establish the case through examination of another witness;

q. To corroborate other testimony on your side of the case;

r. To build up a witness on your side of the case.

3. To cross-examine or not to cross-examine.

The general rule should always be "If there is nothing to gain, do not cross-examine." Cross-examination is more often over-used than under-used. Too often lawyers forget the rule and get themselves in trouble.

While the witness is under direct examination you must be analyzing and evaluating the testimony and its impact upon the jury. When your opponent says "Your witness," your mind must work fast and answer the following questions:

a. Do I really need to ask this witness any questions, or can I save it for another witness?

b. Has this witness hurt me? If yes, where exactly?

c. Can this witness really help me? Where?

d. Can I really reverse or weaken the harm caused by this or some other witness by questioning this witness?

e. Is this witness basically honest?

f. Is this witness knowledgeable?

g. Is this witness vulnerable? Where exactly?

If the witness hasn't hurt you, why gamble on asking anything? Why try to convert the witness into a

"more helpful" witness? The witness has already been "helpful" by not hurting you. Besides, your "most helpful" witnesses should have been those called by you in your case in chief, not those called by your opponent.

Where are the land mines? Here, one false step brings self-destruction. Has your opponent set you up for ambush or booby trap? Has your opponent purposely done a sketchy direct examination hoping you will barge in and get killed on the cross? If you say "No questions," your adversary usually can't reopen the direct to ask more questions to bring out what he/she has failed to cover on the initial direct (unless, of course, the court gave permission to "reopen.")

What makes you confident you can do anything about reducing the harm with this particular witness? What makes you think you can persuade the witness to "change" observations, recollections, opinions, or give "confessions"?

1.) Do you expect to do it by "sheer logic?"

2.) Do you have a writing actually in your possession, or available to you before this witness leaves the witness strand, to force favorable answers (admissions, confessions, contradictions, deposition testimony) or are you just shooting in

the dark and "hoping to turn the witness around" by luck or logic?

3.) If you do not have an impeaching writing (deposition, signed statement, letter or other writing), and if you ask questions, and the witness disagrees with what you want the witness to say, how are you going to rebut the adverse testimony?

What points, if any, must you make with this witness? Why can't you make those same points better, or as well, with your own witnesses?

II. PLANNING THE CROSS-EXAMINATION.

1. The psychology in preparation.

Prepare your own witnesses for cross-examination. Explain the form and substance of cross and what the other lawyer wants to accomplish and why. Explain that the lawyer doesn't necessarily want to kill you or make you look stupid; but that the lawyer will seek admissions to support his or her theory of the case.

a. Tell the witness what points you expect opposing counsel to cover. Explain what you do and how you prepare for cross-examination.

b. Explain that the jury will see him/her as one of them—with sympathy and understanding. Talk

to your witness about the fact that juries enjoy a witness who holds his or her ground.

c. Explain that the witness should not get defensive.

d. Use role-playing and practice a cross-examination. Be threatening and aggressive to show the worst of all possible worlds. Use videotapes for review. Take the witness to the actual courtroom to learn to get comfortable with the surroundings.

e. Teach body language and how to sit in the chair. Talk about how to speak to the jury.

f. De-personalize the opposing lawyer's attacks by emphasizing that the questions are attacking the issues, not the person.

g. Discuss counter-techniques. Explain that the witness should not be influenced by leading questions. Discuss examples of asking for questions to be repeated to break the rhythm and asking "Which part of that question do you want me to answer first" to complex questions. Teach the witness how to qualify answers and explain, not just follow the leader.

h. Teach the witness to listen thoroughly and critically to the questions and not volunteer answers.

i. Start each critique with compliments and emphasize what the witness did right so as not to discourage or frighten the witness.

2. The lawyer's preparation.

a. It is, of course, fundamental that you must have done a complete investigation of the case, the facts and the law in order to prepare properly for cross-examination. This should include interrogatories, depositions, and requests for production of relevant documents.

b. Rule – Generally you should not be cross-examining during a discovery deposition. This is the time to collect facts and information, not to educate the opposition as to how you intend to cross-examine their witnesses.

c. Index and outline depositions so that they can be properly used during trial.

d. Determine objectives for your cross-examination of each witness.

e. Prepare questions in advance. Prepare a thorough outline of the objectives and areas to be covered. List the points you are sure you can make and separately list those you may not be able to make.

f. Determine and list the strongest points to start with and end with. Always try to start and end strong.

III. TECHNIQUE OF CROSS-EXAMINATION.

1. Psychological Factors.

a. How you begin often sets the tone and the jury's attitude toward how you and your examination will be perceived.

b. Lift the jury's energy for the cross-examination. Move into position energetically, with enthusiasm and purpose. Take your space and secure the focus of attention on you. Use delay to heighten the drama.

c. Arrange your notes and place them properly. Arrange exhibits you will refer to unless surprise is important. Set up visual aids.

d. Stand or sit? Use a podium with wheels. Use the power of the podium but break away for emphasis.

e. Make eye contact with the witness. Take control.

f. Make a transition from the direct examination. Let the other lawyer's voice and images die down.

g. Start subtly. Let nothing in your body language, your voice or your energy level betray that this will be an attack unless you have a bombshell to drop. Just begin by suggesting you'd like to discuss a couple of points.

h. Don't give the jury reason to doubt your sincerity throughout the whole trial by affecting exaggerated warmth at this point. Be courteous and considerate. Don't patronize.

i. Start with benign, clear and short questions.

j. If you have decided not to cross-examine, explain to the jury. "There is no need for a cross-examination now." Body language should also be used to indicate that the testimony of the witness was of no consequence to your case.

k. Don't feel hostile to the witness. It will show. Feel secure enough in the idea that your points are so clear that you don't need to be angry.

l. Maintain eye contact with the witness. Stare the witness down. It keeps the witness focused and concerned. It makes you seem on solid ground if you wait for the witness to flinch. It will energize you.

m. Be careful of the witness' space. Don't intrude because it heightens the look of aggression and belligerence.

n. Don't be nasty or name-calling. It is perceived as unprofessional and the jury will discredit you.

o. When opposing counsel objects, don't look at the objector. You give the objection too much

importance and credence. Look only at the jury or judge.

p. Hold a series of questions for just before a break. End examination before a break on a high note.

2. Commandments of cross-examination.

a. Be brief.

b. Use short questions with plain words. Don't use legalese.

c. Use leading questions whenever possible. ER 611. However, mix it up with open-ended questions when you are not concerned about the answer.

d. The strongest point should be made early in the cross-examination as well as a strong point at the end to follow the principles of primacy and recency.

e. Impeachment in cross-examination is very effective on strong points; it will probably antagonize the jury on minor matters.

f. As a general rule, you should only ask questions to which you already know the answer.

g. Listen to the answers. You may be surprised at what you hear.

h. Generally you should not argue with the witness.

i. Rule – Don't let the witness simply repeat the direct examination.

j. Avoid one question too many.

k. Rule – If a helpful admission has been made on direct, don't ask for a simple repeat of the admission or you give the witness the chance to waffle. The admission is in the record, live with it! Don't try to perfect an already good response.

l. Don't ask the witness to explain the testimony.

n. Don't ridicule or be sarcastic or discourteous with the witness unless you are positive that the witness' credibility has already been totally destroyed before the jury.

o. Don't let the witness give a speech.

p. Don't show outwardly that you have been hurt by an answer.

q. Don't lose your control or get mad.

r. Don't exaggerate.

s. Try to recap when possible. Repeating the substance of the testimony that is favorable to your case will, in a repetitious manner, reinforce your points.

t. If a witness persists in avoiding answering a question, don't bicker with the witness. Repeat the exact same question, not changing any words. Continue to repeat the question if necessary. Consider writing the question on a tear sheet and tell the witness "That's the question I asked you." Under it write the rephrased question identified by the witness and state "That's the question you are answering." Then look at the witness and quietly ask, "Now you can answer my question, can't you?"

u. Don't ask the judge to direct the witness to answer. You appear weak and as though you cannot handle the situation yourself.

v. Control the witness with your questions. Do not ask questions that permit a witness to give a narrative form answer. Let the witness know who is boss and who is in control. Hold the reins tight enough so that the witness does not get "his head" and an opportunity to run away with you and your case. When the witness starts to stray, choke up on the reins. Move to strike the answer as non-responsive and remind the witness that your question only asked for a "Yes or No" answer.

w. Act in a gentle fashion during cross-examination. If the witness fears and respects you, cross-examination will frequently be more effective than if the witness fears and hates you.

x. If you are way ahead in your case, cross-examination may merely be sparring and jabbing to build up more points. Be careful you don't get over confident and get decked.

y. If you have been getting killed and you are losing big, you need to slug. You have to take the chance of taking some big punches in order to land some bigger punches.

z. You may attack the witness' qualifications, the basis of an opinion or the accuracy of an opinion. Whichever route you take, however, be sure you can sustain the justification for the attack itself, or you will lose ground.

aa. Try to compel "Yes" answers. Force agreement with general principles. For example, "Doctor, will you agree with me that _____?" "Doctor, do you accept that _____?" "Doctor, do the authorities in your field agree that _____?"

bb. Always consider whether or not to make use of the rule excluding witnesses from the courtroom. ER 615.

cc. Never lose sight of your purpose to persuade.

IV. OTHER PRINCIPLES OF PSYCHOLOGY AND CROSS-EXAMINATION.

1. Seeing and hearing.

We know from studies that people remember 10% of what they have only heard, 20% of what they have only seen, but 65% of what they have both seen and heard in tests given three days after the event. While more recent testing may change these percentages, the concept is still true. Try to use demonstrative aids including writing on the tear sheets in connection with cross-examination. If not overused, a PowerPoint presentation can be very effective.

2. Primacy and recency.

We tend to accept what we hear first as being true, and remember longest what we hear last. Therefore, lawyers should open with strong points and close with strong points in cross-examination.

3. Attention span.

The attention span of people is limited by virtue of modern media. Television lasts seven to ten minutes between commercials. People tend to have shorter attention spans. Timing, therefore, is important in cross-examination.

4. Stories.

   People tend to remember illustrations and stories, as well as more firmly grasp points made in connection with stories, than any other way. Examples should therefore be used whenever feasible in cross-examination.

5. Organization.

   Be organized in your presentation. A lawyer who is not well organized is not perceived as professional by the jury. Have your paperwork in order; have depositions marked and ready to go; have the exhibits lined up for easy reference.

6. There is no requirement of reasonable medical probability on cross-examination. Take advantage of this fact to point out facts favorable to your case.

   a. Doctor, is _____ possible?

   b. Doctor, with what degree of certainty can you rule out _____?

   c. Doctor, when do you assure me that my client will be back in the same state and condition he was prior to this crash?

7. Do not overlook in cross-examination the wonderful advantage that exists at the resumption of a court session, or where there has been an interruption, of asking the

court "If Your Honor please, in the interest of continuity and in order to avoid repetition, may I have the reporter repeat the last two or three questions and answers?"

8. No one should forget the substance of the Harry Philo cross-examination question applicable in every products liability case:

    a. Do you agree with the design and engineering principle that the risk of death or serious injury is always unacceptable and always unreasonable if reasonable acts would have minimized the risk?

9. Use of Depositions.

    a. The jury does not generally know what a deposition is. Make a word picture so that the jury can really understand what is involved:

        • You remember you came to my office to give a deposition?

        • You were protected by your lawyer, who was there
        with you?

        • Your lawyer prepared you for the fact that you were going to do this?

        • I told you it could be read in court?

        • A court reporter took everything down?

- You swore under oath, at the beginning, just as you did today, to tell me the whole truth?
- You read it and signed it?
- This is your signature, isn't it?

b. The witness' deposition should be an effective document for cross-examination. However, unfortunately lawyers frequently lose the impact of using the deposition because:

- The deposition is not properly indexed for instant reference and retrieval. Every deposition must be indexed by points as well as chronologically;
- The deponent has not been effectively tied down and committed; hence the deposition doesn't impeach. The deponent has an escape route;
- Lawyers overuse the deposition and read too much losing the impact of the few main points, which are really impeaching of the trial testimony; and
- Lawyers try to use the deposition for impeachment on matters that are unimportant or not really impeaching.

c. Proper use of a deposition for impeachment should include the following procedure:

- Lay the foundation and explanation for the jury as shown above;
- Refer the court, opposing counsel and the witness to what pages you are referring to;
- Ask, "Do you remember when you were asked (read the deposition question)?"
- Ask "Was your answer (recite the deposition answer)?"
- Make sure you read everything that is pertinent in the colloquy or opposing counsel will bring it out and make it look as though you are merely playing games; and
- Don't give the witness the opportunity to explain the contradiction. If the material is indeed impeaching, it should speak for itself. Move on.

A CASE EXAMPLE WITH FIVE EXPERT CROSS-EXAMINATIONS

We sued Yamaha for its defective design of a 250cc Enduro motorcycle. The allegation of the design defect was the failure of Yamaha to provide a kill switch. A kill switch is a

button mounted on the handle bar to allow the immediate "killing" of the engine when one confronts an emergency. The reason for this is that motorcycles, especially dirt bikes, encounter stuck throttles often because dirt gets into the throttle linkage. An Enduro motorcycle is both street legal and a dirt bike. Yamaha did supply kill switches, but did not for street bikes and more importantly for our case, did not for the Enduro bikes. They only supplied them for dirt bikes.

This was admittedly a difficult case. The motorcycle was manufactured in 1972. In 1971, the National Transportation Safety Administration proposed a Federal Motor Vehicle Safety Standard that would compel kill switches on such motorcycles. The proposed rule was published in 1971. However, the rule did not go into effect until 1973. Thus, while the safety and engineering concept was very valid, and supported by engineering principles, we had no violation of an existing rule or regulation.

CROSS-EXAMINATION OF THE COMPANY REPRESENTATIVE

Mr. Leo Lake was the first witness for the defense. He was a Yamaha Company representative. He had a long background with Yamaha. Ninety minutes of his testimony was regarding the history of the company. The attempt by the defense was to make sure that the jurors felt good about this foreign corporation. There was nothing in this testimony that would cause any need for cross-examination.

However, at the end of his testimony, this all changed. He testified that Yamaha had never had a letter of complaint and had never been sued for failure to provide a kill switch on one of its motorcycles.

It is important that we understand the value of the ATLA/AAJ exchange. This exchange allows networking with other plaintiff lawyers across the country who deal with similar fact patterns, legal theories, or defendants. I took advantage of the availability of documents from the exchange and I had discovered three prior lawsuits alleging failure to provide a kill switch that had been filed against Yamaha. Completely separate lawsuits had been filed in Illinois, Pennsylvania, and California. I also obtained copies of two discovery depositions in support of those cases. One of them was of Leo Lake.

I asked, "Did you say that you had never been sued?" using the greatest indignation I could exude. "Is your name Leo C. Lake?" After answering both questions affirmatively, I pulled out the transcript from the deposition of the case in Illinois and then laid a foundation for its admission through Mr. Lake. Having completed the foundation questions, I offered the deposition as an exhibit. The defense counsel said that he wanted to read it and suggested that I proceed with my cross-examination. Normally, you would not want to do this. You would want to milk all of the drama possible with defense counsel reviewing the deposition with the courtroom in silence. But defense counsel did not know that I had other evidence regarding this improper claim

that Yamaha had never been sued so I barged on. Further in the process of cross-examination I introduced an exemplified copy of the complaint from the Pennsylvania and the California actions. (During the rebuttal phase of the trial, I called Plaintiff's counsel in the California case as a witness in the trial.)

It can safely be said that this cross-examination completely destroyed the credibility of Mr. Lake and of Yamaha. We were off to a great start in our cross-examination phase of this case. While normally making a "kill" of the witness is not an appropriate goal, in this instance, that is what we accomplished.

AN EXPERT TESTING A SIMILAR MOTORCYCLE AT THE SCENE

Yamaha hired an expert from Yakima, Washington who it took great pains to show was the only American to have ever won a European Grand Prix motorcycle race. This expert was a highly qualified, professional motorcycle rider. One cannot say the same for his qualifications as an expert witness.

This rider had been given a similar motorcycle of the same vintage and he performed 36 jumps at the scene. All 36 jumps were videotaped. The jumps were at various speeds and the distance of each jump was measured and recorded. During some jumps, the throttle was on full force; in some the throttle was dialed down during the jump.

The basic purpose of this testing was to support a defense theory that the throttle was not stuck. It was the theory of the defense that if the throttle was stuck, the attitude of the motorcycle in the air would be nose up. But if the throttle was not stuck then the attitude of the motorcycle in the air was nose down. The only witness, a 14 year old boy (our client, suffered a closed head injury and had no memory of the event), had testified that the nose of the motorcycle was pointed down before the crash. Thus, the experiments involved in these jumps were to support the claim that the throttle was not stuck and therefore, there was no need for a kill switch. All of the information and measurements were recorded and put together in a chart. I of course had this chart in discovery. I studied this chart for hours and days. What I found was that there were many inconsistencies in the jumps. There was never any absolute correlation as suggested by the defense. I created my own chart in planning my cross-examination. For every question that I asked, I charted at least one jump result that would be consistent with their position and at least one jump that would be inconsistent. Armed with this thoroughly prepared chart of my own, I began the cross-examination.

I gently and naively would ask this young, professional motorcycle rider what would happen if the speed would increase? Would it mean a longer jump? His answer was yes. Then I would use one or two examples and then say, "So this is what you mean?" He would enthusiastically agree knowing that he was doing the job of supporting Yamaha as

he was paid to do. I asked him if that would always happen. He said yes. But then I pointed out an inconsistency where a jump at a higher speed did not result in a longer jump, but in fact, a shorter jump. He was very confused and had no explanation. I passed it off in a dramatic fashion as if it were just an anomaly.

I followed this same format with regard to throttle position. I asked him how throttle position would affect the distance of his jump. He dutifully, on behalf of Yamaha, testified that with the throttle wide open, the jump would be longer and with the throttle closed down, the jump would be shorter. Once again, I gave him more rope to hang himself by showing him two examples that supported his claim. But then I sprung on him two more examples with precisely the opposite result. Now it was getting interesting.

The next line of questioning related to the attitude of the motorcycle in the air. With this line of questioning, I included his body position on the bike. This had not been charted by the defense. Eventually, by showing him the inconsistencies, I got him to admit that body position was more important than throttle position as to the attitude of the motorcycle in the air.

By the time we concluded the cross-examination, he had admitted our entire theory of the case. He was one of our best witnesses. Securing admissions in cross-examination to your theory of the case is a basic goal in any cross-

examination to ultimately persuade the fact finder of your position in the case.

EXPERT ON INDUSTRY PRACTICE ON KILL SWITCHES

We did a great deal of research into what other manufacturers were doing in regard to kill switches. Were they including them on all 1972 motorcycles? What was the practice if they were Enduro motorcycles to be used both off-road and on the highway? We were very pleased to find that the industry practice at the time, for the most part, was to provide kill switches. Thus, it was rather shocking when the defense called an expert on industry practices and he purported to testify about how many manufacturers do not include kill switches on their motorcycles. He had been very selective in his work. He had presented evidence of a number of motorcycles without kill switches. However, he conveniently ignored many more examples of kill switches being provided, which were in fact in the majority of sales. Did he think we had not done our homework?

The defense had used very fancy charts showing the manufacturers and which motorcycles did not have kill switches. Because of our research and hard work in looking into this issue, I had in front of me considerable material, including written documentation, showing that many manufacturers had kill switches that were being used at that time. I forced the expert to clutter up his own fancy charts with inserts for manufacturer after manufacturer and motorcycle after motorcycle with kill switches.

This expert's "cherry-picking" of the facts, as you can imagine, did not sit well with the jury. Once again, his credibility was totally destroyed and the defense of the case was severely damaged. It might easily be called a "kill" of the witnesses. Two in one trial.

AN EXPERT ON MOTORCYCLE CRASHES

The defense called Professor Harry Hurt, a preeminent expert on motorcycle accidents and reconstruction from USC. His background and experience was so extensive that they spent 90 minutes just on his qualifications. He has more experience in motorcycle accident reconstruction than anyone in the world. He first did a study of 500 motorcycle accidents. That, in turn, led to government funding for a study of 10,000 motorcycle accidents. He had a full staff to support him. This included pathologists, medical doctors, troopers, biomechanics, etc. He was indeed well qualified.

Boiled down to its essence, his basic opinion was that people do not need kill switches because there are far better ways to kill the engine. "You slam on the brakes. The brakes will overpower the engine. It is like hitting a fly with a sledgehammer."

I was scared of Harry Hunt. He was a polished witness. He had fantastic credentials. He really knew his business, or at least he thought he did. He had testified often with great success on behalf of the motorcycle industry. After the success that I had had in cross-examining the other witnesses, the jury

leaned forward as I stepped to the podium to cross-examine this witness. I jabbed and sparred with him for a period. I showed that his funding was primarily from the motorcycle industry and that all of his work was for defendants. He had also been paid large sums of money for his testimony. It was a good cross-examination for showing witness bias. But I had what I considered to be a knockout punch.

"Are you familiar with the Motorcycle Safety Foundation?" He rambled on for three minutes telling the jury about what a wonderful organization this was. "Do they put out any publications?" Once again, I am sure that his rambling answer went on for another three minutes. He applauded the Motorcycle Safety Foundation for the publications they put out to promote safety in the operation of motorcycles. "Are their publications any good?" He once again spent several minutes applauding their efforts. "Do you consider those publications authoritative?" He agreed that they were indeed authoritative. "Have you ever seen their publication on safe motorcycle operations?" He rambled on about all the publications that he had read and about how important they were to him and how important they were to the safety of the public. I offered, as an exhibit, one of the publications from the Motorcycle Safety Foundation after he agreed that that publication was authoritative. I asked that he turn to page 147 and read it aloud. It read as follows:

> Sometimes when you operate a motorcycle you will encounter a stuck throttle. It is inevitable. You must be prepared to properly deal with this emergency.

Rule #1 – Don't hit the brakes. Hitting the brakes will take the motorcycle out of control and create the danger of a fall.

Rule #2 – Hit the kill switch.

Rule #3 – Put in the clutch and bring the motorcycle to a controlled stop.

Two of the jurors laughed. Mr. Hurt then volunteered, "I know Mr. Featherly, who is the Executive Director of the Motorcycle Safety Foundation and I am going to call him and tell him to correct this." I said, "I will tell him to expect your call." The jury laughed.

I stopped my cross-examination at that point. I had more material, but could not have closed on a higher note. You always want to try to close on a high note. With a bang! Even if you have to leave something behind.

While Mr. Hurt did not author this publication, I felt like Patton when he defeated Rommel. "I read your book!!" Always read the expert's book. It will often give you great cross-examination material. Or, as in this case, an industry written book.

THE PSYCHOLOGIST/ACCIDENT RECONSTRUCTIONIST

Bill Otto was a well known accident reconstructionist called upon to testify nationwide in cases. He was hired to testify in this case, however, not to directly reconstruct

the accident, but to testify about an experiment he had conducted and an article he had written about that experiment. The conclusion of the article was that people do not use kill switches when confronted with a stuck throttle emergency.

The experiment was conducted at a county fair. A motorcycle was set up on blocks so that its wheels did not touch the ground. Participants were solicited from the fair crowd and told that they were going to be monitored in their operation of the motorcycle. In fact, after a short while on the motorcycle, the throttle was remotely jammed into full throttle. Measurements were made as to how long it took for someone to use the kill switch.

People were not told the real reason for the test, the fact that they would be encountering a stuck throttle or that the speed of the use of the kill switch was being measured. They were never in any danger because the motorcycle was not moving. It just made a lot of noise. It took one person two minutes to hit the kill switch. That time was included to calculate the averages. People had various reactions to the throttle being remotely pushed to the limit. Everyone was very casual about it because they were in no danger.

I deposed Mr. Otto for a full day. I came armed with material from two experimental psychologists who told me that the experiment violated fundamental rules of conducting experiments and that the results were both inherently flawed and invalid. I found out Mr. Otto's only education

in experimental psychology was in reading through his daughter's college freshman psychology text. Armed with his lack of controlled testing background, the violation of industry rules and declarations from my two experts, I moved prior to trial to have his testimony excluded. I was armed with significant and voluminous material in support of my claim that this experiment and its conclusions were invalid. To my significant surprise, the Court denied my motion. So I prepared to cross-examine Mr. Otto at trial. I certainly was loaded with far more material for his cross-examination than I had for any of the others.

As the trial approached the defense moved for a continuance because Mr. Otto was going to be unavailable for trial. In support of their motion Yamaha claimed that Mr. Otto would be the most important witness in the trial and that his presence and testimony were crucial to the defense. The judge granted a 90-day continuance over my vehement objections.

When the trial started, defense counsel, in opening, told the jury of the testimony they expected from Mr. Otto. They told me and the Court on several occasions that Mr. Otto would be testifying and predicted the date of his appearance. In fact the night before they told me and the Court that Mr. Otto would testify the next day. But after seeing what we had accomplished in the cross-examination of their other experts, and knowing from my Motion in Limine how much material I had for cross-examining Mr. Otto, the next day

they rested without calling him to the stand. How about that for an effective cross-examination!!

AND THE BAND PLAYED ON

In 1990, most of Aberdeen stunk! It was horrible! It was a combination of the smell of sewage, rotten eggs, and as one witness described it in his testimony, "The vomit from 60 sick kangaroos".

People of South Aberdeen had been putting up with this for many years. It wasn't constant, because it was dependent upon which direction the wind was blowing. The source of these terrible odors? The wastewater treatment ponds of a local pulp mill.

The pulp mill is actually several miles from South Aberdeen. In the pulp-making process, wastewater is created that is discarded. The pulp mill ran this effluent through a pipe three miles to a series of large ponds. It was nearly a mile and a half from the east end of the first pond to the west end of the last pond. The wastewater was chemically treated and aerated in order to remove dangerous and illegal chemicals before it was flushed into the harbor and then sucked out into the Pacific Ocean.

In 1990, the aerators had been turned off. This resulted in the ponds going anaerobic. Considerable bacterial action was taking place causing the horrible odors. It was a disgusting experience for everyone in the vicinity.

But the problems were more than just the odors. The people in South Aberdeen had been suffering from the effects of these chemicals that had been thrown in the air for years. People commonly had headaches, eye irritation, nosebleeds, sinus problems, sore throats, and coughs, as well as the nauseating odor. The legal team also believed that some of the serious illnesses of lung disease and cancer were also contributed to by exposure to those chemicals. We filed a lawsuit against the pulp mill on behalf of 240 South Aberdeen residents.

The case was very technical, difficult and long. The trial itself took three months. The length of the trial was due to the need to present a tremendous amount of scientific information to the jury to understand the issues of medical causation. In order to describe the wastewater and what was in it, we presented an expert on how a pulp mill and the pulp making process works. We had experts on how the chemicals and gasses in the wastewater got into the air. We had experts on quantifying the amount of those chemicals and gasses. We had experts in how the offending materials then moved from the wastewater ponds through the air into the community where our clients lived. We had experts on the amount of exposure that they suffered and the quantity of the chemicals that they inhaled. We then had medical testimony about the health effects from inhaling these amounts of noxious materials. It was an expert witness's dream; it was a trial lawyer's nightmare.

We had great difficulties finding qualified experts in the United States to testify against the pulp mill. American experts in the field, in the form of university professors and industry personnel, assured us that our case was viable and correct, but that they didn't want to stand up to this big corporation because everyone had some contact with them. Thus, we had to go to Canada and Europe to hire our experts. This case was going to be expensive to present.

This type of litigation is called "toxic litigation" or a "toxic tort". The various issues required testimony from experts in a broad range of fields, with nearly all of them required to be on a PhD. level. We had one expert from Canada, who between himself and two others in his firm, ultimately cost us more than $1 million in expenses in presenting their work and findings.

The defense didn't have it any better. They hired experts of their choice and their primary expert prepared a 520-page report. The lead defense counsel was furious; he did not believe that it was necessary to go to that extent in the defense of the case. Their expert also cost them in excess of $1 million. Frankly, both Plaintiff and Defense counsel were so embarrassed about the amount of money that had been spent on the experts, that the usual questions of how much the experts were being paid to show bias were not used by either side during the trial.

As is the standard practice with the use of experts in litigation today, we took a pretrial deposition of the defense

expert to find out what he had done and what conclusions he had reached. It turned out to be a very strange deposition. While it probably should have lasted one day, taking maybe six to eight hours, the deposition lasted for three days. The reason is that when a question would be asked, the expert would sit and think about the question, often stand up and walk around the room, sometimes stare out the window, and then come back and sit down after a delay of three to five minutes before he would answer the question. I had never seen anything like this before from an expert. I wondered how he would handle testifying at trial under cross-examination. We were soon to find out.

As we went over in detail the defense expert's reports and testimony from his deposition, we discovered that he had made a significant and fatal fundamental mathematical error. This mathematical error resulted in numbers that undercut all of his opinions. It was the sort of error that should have been discovered by a high school math student. Having made the mathematical error, he then had premised all of his opinions and ultimate conclusions on the figures that were invalid. I knew, more than I had ever known before, that my cross-examination of him would result in his being completely discredited. It was rather exciting preparing for his cross-examination.

He was on the stand for a day and a half for the direct testimony. Fortunately, he had not discovered his mathematical error. All of his testimony was given consistent with his earlier reports and his deposition testimony. He was polished and

professional in his presentation and, of course, there were no delays between the questions by defense counsel and his answers. My cross-examination was to start first thing on Wednesday morning.

I had prepared in detail an outline of how I was going to go about this cross-examination. There were a large number of matters that I wanted to question him about before I got to the coup de grace. I didn't want to just stand up, point out his mathematical error and be done. I anticipated about a three-hour cross-examination. As I began the cross-examination, as one would expect, no longer were there delays like we had seen during his deposition. He remained polished and confident, conceding some of my points, sparring with me on others, but I felt I was making inroads.

I need to set the scene. The trial was in Montesano, Washington, a small town with lovely surroundings toward the east end of Grays Harbor County. The courtroom I consider to be the most beautiful courtroom I have ever had the pleasure of working in. It was built around the turn of the century. It is elaborate and ornate. Beautiful ornamental wood cornices and elaborate crown moldings line the room. Huge murals on the walls admonish the witness to tell the truth. Large windows cover two walls of the courtroom. It is truly splendid. But they don't have air conditioning. This trial was in late August and had now gone into early September. It was an uncommonly warm period

of time. So, they ran the courtroom with the windows open. Otherwise, the heat would have been unbearable.

The local high school students had not yet returned to school, but the first football game would be in a couple of weeks and so the band members had returned early to practice for their opening football game. This included practice of marching while playing. And on the morning of my cross-examination, the band was snaking its way toward the Grays Harbor County Courthouse.

I was about one hour into my cross-examination when we first heard the band, probably two blocks away. It was marching straight up First Street toward the courthouse and toward the open windows. As I continued my questioning of the defense expert witness, we could all hear the music playing louder and louder as the band approached. It soon became apparent that when the band got all the way to the courthouse, we were going to be unable to continue. The music would drown out my questions and any answers. The jury started to become a little restless because they figured out this was what was going to happen. I was trying to figure out what I would do. Just about the time I figured I would need to stop and have my cross-examination interrupted, the band stopped playing. I continued with my questioning. Three or four questions later the band once again struck up, this time playing the Montesano fight song. It was so loud that I was forced to stop. The jury began laughing, as did the witness and myself. I stood there for about a minute and the band didn't seem to be moving. Then they stopped.

I turned to the witness and I said, "The next time you hear the cymbals crash, boy do I have a question for you." The jury laughed and I began questioning him again. I had not gotten out more than two or three questions and once again the band started up. Everyone began laughing and once again I was forced to interrupt the cross-examination.

The band then turned and began marching away and after a couple of minutes I was able to resume my questioning. Having put out the threat, I felt I was forced to follow through with it. So I jumped down to that portion of my notes at the end of my planned cross-examination to force him to admit his mathematical error which would undercut all of his opinions.

I asked the question in some detail and at some length. However, it was quite apparent to everyone what I had found and what I was asking. The witness just stared at me. It is hard to really measure time in instances like this. Initially, I would estimate that he just stared at me for a full minute. He then began fussing with his paperwork, which was sitting on both sides of him. He reorganized the papers, which took at least another minute. He then stood up, turned in a complete 360-degree circle, sat back down and began staring at me again. This lasted another minute. I said nothing during this entire time. He then asked, "Would you please restate your question." I went in for the kill! He knew he had made a monumental error. He knew there was no way to get out of it. He crumbled on the stand. The million-dollar expert for the defense had been totally destroyed!

The defense did not know what to do, and made no attempt to rehabilitate him. It had now become obvious that all of his opinions had been undermined. We went on to the next witness.

The next day, I had an opportunity to speak to the defense lawyer in private. I said, "I would like to have been a fly on the wall during your luncheon meeting with your expert to hear what was said after his testimony." Defense counsel said, "You didn't need to be a fly on the wall, you could have stood out in the middle of the street and heard me screaming at him. I gave him a plane ticket and told him to go home and I didn't ever want to see him again."

Defense counsel then said, "I knew that you were going to "hometown me", but I sure didn't know that you were going to get the use of the local high school band to accompany your cross-examination. That's a new one I've never even heard of before."

Well, if the truth be known, my million dollar expert witness didn't come off very well either. The jury found the defendant liable and awarded a significant sum for each of my clients for their minor injuries, but the jury found that there was no causation from these exposures on the serious illness claims we presented. But, I must say, I will never forget the day that during my cross-examination, the band played on.