

How To Rattle A Witness While Winning Over The Jury

By **Cara Salvatore**

Law360, New York (February 10, 2015, 5:17 PM ET) -- A superstar trial lawyer knows something other lawyers don't: how to keep the jury wrapped around his or her finger while unraveling the other side's witnesses. To thread the needle of cross-examination and come out gleaming, experts advise keeping your eyes sharp and your tongue dull.

The first thing to know: You need to understand the mentality of both jury and witness.

"Psychologists would probably make better cross-examiners than most lawyers. And the ones who have a knack for those ... skill sets are the ones that are going to do best," said Jason Bonk, a commercial litigation partner at Cozen O'Connor.

Beyond that, be prepared. Most trial lawyers spend the bulk of their time prepping favorable witnesses and then whiff when it comes to prep for cross, says Benjamin Naftalis, a federal prosecutor who left the U.S. Attorney's Office for the Southern District of New York just weeks ago for a partner post at Latham & Watkins LLP.

He and others say that extra prep should focus on a few key precepts.

Stay Calm and Kind

Francis Wellman, author of the seminal book "The Art of Cross-Examination," named one "golden rule" for the art. "Hold your own temper while you lead the witness to lose his," Wellman wrote.

Despite having been published more than a century ago, the book still holds a lot of water for the lawyers we talked to — as does that single rule. Get the witness on your side. Be honey, not vinegar.

At the start, consider using constructive cross as a foundational technique. Ask nonthreatening questions to get the witness agreeing with you. Much like a practiced pickup artist, a good trial lawyer can engineer a situation in which a witness feels he or she has common ground with the cross-examiner and gets used to saying the word "yes."

And make sure you're not putting on airs or testing out new personality traits. Assuming a grand or pompous air will alienate the jury, but being authentic will earn you personality capital to spend during a difficult session, experts said.

"[Some lawyers] are afraid to smile. Be human. Be a person," Bonk said.

Naftalis, too, said it's important to be yourself. "If you're not a yeller, the time to become a yeller is not now," he said.

Movies like "A Few Good Men" may show lawyers singeing the floorboards with invective, but you shouldn't follow that tactic, experts say. There's no way to lose a jury faster than looking like Goliath to the witness's David.

"Juries don't like it when they see lawyers beating up on a witness, even when a witness's account is not credible. The way that I approach a witness is I kill them with kindness," said David Miller, also a former Southern District of New York prosecutor, now with Morgan Lewis & Bockius LLP.

Give the Jury Credit

Experts said it's essential to give the jury plenty of credit. They're regular people with the normal faculties of perception, and they're paying close attention — hopefully. Lawyers are, understandably, accustomed to making points as clearly as possible. But cross is the one area in which implication, obliqueness and even vagueness can be your helpmeets.

Have faith that the jury will notice, just as you did, the witness's uncertainty or ill-disguised tension. At the end of the day, those are the only things you need to show them.

"[Witnesses] can make themselves targets by virtue of appearing as assholes themselves to the jury, and then you look like the good guy," Bonk said.

If the witness is rattled, just make sure the jury has the opportunity to notice that. Let them watch the witness's body language, energy and tone of voice. Trust that jurors will put stock in that legendarily high percentage of communication that's nonverbal, Naftalis advised.

"If they see someone looking down, they see them shaking, they see them being evasive, that kind of stuff is not lost on them. So you don't need to hammer every point," Naftalis said.

Let the Witness Do the Work

Far from pushing and shoving key witnesses toward the gallows, a good cross-examiner steps back and lets the witness walk there willingly.

"If you can succeed in tiring out the witness or in driving him to the point of sullenness, you have produced the effect of lying," Wellman wrote. It's a tack that worked for Miller in one of his trials as a Southern District of New York prosecutor, where he was cross-examining "a very proper, mild-spoken woman," a colleague of the defendant's — "the kind of witness that comes off as extremely credible," Miller said.

Miller put in serious time with constructive, foundational questions to get the witness on his side. But he says that when the judge called lunch, the break eroded all of that work, and the witness realized what was going on. By the time they returned, her demeanor had changed completely.

"She's a different person. She's defensive, she's hostile," Miller said. "And it's palpable. It's noticeable to

everyone. Lunch wasn't two days; it was 45 minutes ... clearly either someone had gotten to her or she realized that she was helping us and not the other side."

But what she didn't realize was that the new truculence continued to help him.

Hostility is not wholly unusual for opposing witnesses, for obvious reasons. The trick is to capitalize on it. Don't fight fire with fire, becoming hostile yourself. Instead, showcase the juxtaposition between the witness's tone and your own by becoming even quieter and calmer than you were before.

If they're hostile, "You know what? Let them be that way," Miller said. "If that person is being difficult and perhaps even obstructionist, they're going to come off looking not credible."

The wisest cross-examiners work like jazz musicians, using the space in between the notes. Step back, be calm and friendly, and give the witness space and time to reveal their weaknesses — their uncertainty, their hostility or any other point that will discredit them in the eyes of the jury.

Be Targeted and Use a Breadcrumb Trail

Cross-examination is a unique moment in which leading questions are actually allowed. Seize on that.

You should ask a limited set of very specific questions, experts say. Be sure you know with absolute certainty the answer to each. Rifle off questions with "yes" replies in rapid succession. The witness will be caught off guard when you slip in something they would have said no to under different circumstances.

"Get the nuggets that you need," Miller said. "This is particularly true when you have a witness whose account you have to discredit: You have to pick your questions very carefully."

Miller and Naftalis say you shouldn't dally on cross. Don't try to match your opposing counsel for time spent examining a witness: You don't need to spend four days just because they did.

At the same time, if there's something important you need, don't come right out and ask for it, Bonk said. Start on safe ground and slowly move toward what you need before the witness knows where you're going. Conceal the endpoint and lull the witness into a false sense of security.

Bonk recommends using the "patience and artfulness of walking someone down the path that ends at the edge of a cliff," he said. Slowly, "by body language or in their responses, [they'll] start to give off the impression of someone who's a liar or nervous or isn't confident in what they're talking about," he said. "Their confidence level goes from 100 to 20."

Save the Head-On Points for Summation

"You don't need to ask that last question. Save it for summation," Naftalis said. Why? Because that last question could hand the witness a chance to deny you.

Instead, rewind and think about your penultimate question. It's probably designed to create a missing puzzle piece in the jury's mind. You want to leave that negative space hanging in the air until you place the piece there yourself at the end.

Naftalis used an example from "Serial," last fall's hit podcast investigating the circumstances of a murder conviction, which included a contentious point about the location of a pay phone in a Best Buy parking lot. A witness had insisted the phone was there in 1999, the year the murder took place, but host Sarah Koenig had her doubts.

The best way for a cross-examiner to handle this kind of situation, Naftalis said, would be to stop after the question, "You don't remember where the pay phone is, right?" — not to press on for that last clincher, something like, "That's because there was no pay phone, right?"

Doing the latter is a classic mistake that hands the witness a chance to say it would be impossible for a human being to remember, Naftalis said. That shunts the burden of proof back to you — whereas if you had ended with the prior question, it would still be on that witness.

So implication is your friend. Let jurors take that last mental step on their own, because they will.

Moreover, if you've been fortunate enough to clearly win a point, stop. Don't repeat the key question, giving the witness a chance to change his or her answer.

"If you go, 'Oh, maybe I want to ask that again because it's so powerful,' they may recant or may realize you care a lot about it and change their answer," Naftalis said.

"There are probably 10 people in the world that can really cross-examine someone. It is the hardest thing to do well," he said. "The people that can really do it, historically, they're the legendary trial lawyers."

And they're going up against an unpredictable foe, according to Miller.

"It's important to project confidence and strength at all times, but in a respectful manner," he said.

"Witnesses do strange things when they're in a courtroom with people watching them and they know somebody's on trial for their liberty."

--Editing by John Quinn and Katherine Rautenberg.
