



**SUFFOLK ACADEMY OF LAW**  
*The Educational Arm of the Suffolk County Bar Association*  
560 Wheeler Road, Hauppauge, NY 11788  
(631) 234-5588



## **TRIAL PRACTICUM SERIES: LECTURE 4**

### **Cross-Examination**

#### **FACULTY**

**Hon. Peter H. Mayer**  
**Hon. John B. Collins**  
**Michael S. Levine, Esq.**  
**Daniel A. Russo, Esq.**  
**John Manley, Esq.**

**PROGRAM SPONSORED BY:**



**AFFORDABLE BAILS NEW YORK INC.**

**YOU PAY. WE POST & YOU'RE OUT!**

**April 10, 2018**  
**Suffolk County Bar Center, NY**



**TRIAL PRACTICUM LECTURE #4**  
**CROSS-EXAMINATION – APRIL 10, 2018**

**Justice Collins: 6:00-6:45 (this includes times for Q&A)**

**Mike Levine: 6:45-7:30 (this includes times for Q&A)**

**Justice Mayer: 7:30-8:15 (this includes times for Q&A)**

**8:15-8:25 Break**

**Criminal Cross Demonstration: 8:25-9:00**

**Suffolk County Bar Association  
Academy of Law**

**Lecture IV  
CROSS EXAMINATION**

**Hon. John B. Collins  
Justice of the Supreme Court  
210 Center Drive  
Riverhead, New York 11901**

**April 10, 2018**

\*\*\*\*\*

**I. INTRODUCTION**

- Juror Expectations
- Voir Dire
- Summation

**II. FAMOUS QUOTES AND RANDOM THOUGHTS**

- JBC
- Breitbart
- Pete Mayer
- Yogi Berra
- Calvin Coolidge
- Abe Lincoln

**III. PREPARATION**

- (Mark Twain)
- Witness type dictates preparation  
Lay witness v. expert witness (Levine)
- Resources

**IV. TYPE OF CROSS**

- Yes or No? (Hippocrates)
- Questions to ask yourself
- Control
- Set up your own witness (concession based)
- Impeach?
- Scorched Earth?

**Cross Examination of Technical Experts**

**Michael S. Levine, Esq.**

## CROSS EXAMINATION OF TECHNICAL EXPERTS

Michael S. Levine  
Rappaport, Glass, Levine & Zullo, LLP  
1355 Motor Parkway  
Hauppauge, NY 11749  
(631) 293-2300  
[www.rapplaw.com](http://www.rapplaw.com)  
[mlevine@rapplaw.com](mailto:mlevine@rapplaw.com)

### I. BACKGROUND

No other part of a civil jury trial presents as much opportunity for potentially impacting the jurors in choosing sides as the cross-examination of expert witnesses. It is the time in the trial when borderline cases are often won or lost. A well prepared attorney can often enlist strong jury support as she/he exposes and discredits the direct testimony of one who has been offered as having special knowledge and experience. The arguments that can be made for occasionally not cross-examining do not apply to experts. The failure to challenge authoritative opinions will be noted by jurors and will provide the basis for a devastating closing argument by one's opponent.

### II. SIMPLIFICATION

The real challenge to the trial lawyer is in translating extremely complex concepts from the language of science to the common experience of a judge and lay jury.

K.I.S.S. -- that is, "Keep it simple, Stupid," is almost always the best rule to follow in meeting the challenge.

To consider simplifying and making a complex case believable and understandable, one has to ask how jurors reason and to what degree that process conflicts with the way in which evidence is usually presented. Jurors, and all of us in our daily lives, tend to rely upon deductive

logic to reach conclusions. They make decisions relatively early in a case, and typically stick with them from that point on. Therefore, the way in which the evidence is viewed depends upon the framework set by their original premise. "Does this item of evidence make sense" often means, does it fit into the framework for evaluating evidence that they have already adopted.

It therefore becomes vitally important to present a credible premise or theme for the case early on, and to reinforce the theme throughout the trial. It is equally important that that premise makes sense to the jurors in terms of their preconceptions and attitudes about life and what is right and wrong.

Keep appealing to the common sense logic of the jury. No matter what the witness says, if you can structure your examination so that the adverse expert, when faced by the fact that it looks like a duck, acts like a duck and sounds like a duck, continue to insist that it is an eagle, your case is half won.

### III. PURPOSES

Four general categories of purposes may be stated as follows:

1. **NEUTRALIZING THE IMPACT** of a credible and persuasive witness who is not subject to impeachment, by eliciting admissions and concessions. Such a witness can be asked to agree to a sequence of general principles. This can be followed by short questions that relate directly to the examiner's theory of the case. Phrasing the questions in the language of a previous expert of the examining lawyer or of the opening statement is a persuasive technique for lending weight to one's interpretation of the facts. If the questions are skillfully put, the witness must agree or appear biased and, thus, less credible. Sometimes this is the only method for neutralizing an otherwise devastating witness. It can leave the impression that the sum total of

the testimony was not of great importance, thereby directly affecting the weight, if not the credibility.

2. **DIRECT ATTACK** upon the foundation or conclusions of the witness. Demonstrating that one lacks sufficient qualifications and adequate knowledge is an effective way of neutralizing testimony. An examination of this type considers, for instance, educational background, experience, personal biases of which the witness is unaware, and faults and weaknesses with the expert's investigation, research and/or methodology. Proof that the witness may not be entitled to hold the opinions that have been given can be extremely effective.

3. **IMPEACHMENT** by the use of prior testimony, depositions, statements or writings is an incredibly effective way of discrediting an expert witness. Impeachment should not always be thought of as directly insinuating a lie. It may also demonstrate a lack of knowledge or credibility on the part of the expert witness; or a lack of believability on his/her part.

4. **COLLATERAL CROSS-EXAMINATION.** On occasion, the only cross available is collateral, in that it does not really touch the main issues or ultimate facts of the case. It ranges from a subtle discrediting of the witness's ability, all the way through to a demonstration of bias. When appropriate, it can be the most devastating of all examinations, because it calls into question the integrity of opposing counsel for having called such a witness.

#### IV. PREPARATION

The successful cross-examiner must first be a diligent researcher and effective gatherer of facts. In preparation of effectively cross-examining an expert witness, his/her background, work history, writings, areas of specialization and limitations should all be known. The societies,

references and texts upon which he ordinarily relies should be checked. Previous testimony and reports rendered in other cases should be obtained. The more thoroughly one delves into this area, the more likely one is able to obtain valuable, impeaching material.

All of the discovery and investigation must be correlated and cross-indexed. There should be easily usable summaries to which the witness has previously testified.

Literature in the area of the expert's field should be carefully studied to find points on which the testimony is inconsistent with generally recognized principles. Learned treatises, not written for purposes of litigation, are always an extremely useful tool in cross-examination.

#### V. TECHNIQUES OF EXAMINATION

In commencing the cross-examination, one should realize that no fact finder, no matter how sophisticated, is going to assimilate large numbers of highly technical points elicited during the course of the cross. For that reason, demonstrative aids, models, lists, maps, graphs and charts, particularly those that can go to the jury room, should be used.

If counsel wants the jury to remember specific glaring discrepancies, they should be sufficiently limited so that they can be recalled.

The more technical the subject is, the more necessary that it be presented to the jury in a way that they can understand it and incorporate it into their usual frame of reference. This can only be done if, as in all cross-examinations, the attorney controls the examination, uses short, concise questions, appropriate word choice, controls the witness, and demands a specific answer.

The expert witness should be committed to those facts upon which she/he bases her/his conclusion, so that she/he cannot later color her/his testimony to meet a developing logic of the cross-examination.



The fact that an expert witness has testified before, and the amount that she/he is being paid for her/his testimony, if it is large, can be valuable points to develop. The amount of income received from testimony is meaningful if such sums would indicate bias and a financial interest in providing a certain kind of testimony.

Questioning about previous testimony in similar kinds of cases is also a good method of cross-examination.

## VI. SUMMARY

To conduct a good cross-examination of an expert, the trial lawyer must be flexible, have goals, control the examination, be selective in language, and be sensitive to anticipatable psychological sets by the particular jury. Most of all, he or she must be completely prepared.

## **HON. PETER H. MAYER**

The Hon. Peter H. Mayer received his B.S. degree in 1970 from Ithaca College and his J.D. degree in 1973 from St. John's University School of Law. From 1973 to 1981, he worked as an Assistant District Attorney in Suffolk County, serving under District Attorneys George Aspland, Henry Wenzel, Henry O'Brien and Patrick Henry. During his tenure there, he served as Chief of the Career Criminal Prosecution Unit and Deputy Chief of the Major Offense Bureau.

Justice Mayer entered private practice in 1981 under the firm name of Clayton & Mayer in Suffolk County, New York, focusing in the area of federal and state criminal defense. While in private practice, he served as Hearing Officer for the Town of Riverhead and the Village of Westhampton Beach, presiding over Civil Rights Law §75 disciplinary hearings against police officers. He also served as special counsel for the Town of Riverhead and Town of Babylon.

In 1994, Justice Mayer relocated to Glenwood Springs, Colorado, where he continued to maintain his private practice in federal and state criminal defense. He returned to Suffolk County in 1997 and accepted a position as Assistant County Attorney, defending the County of Suffolk in federal and state cases, including matters alleging Civil Rights violations by police and correction officers. Thereafter, he returned to Suffolk County private practice, concentrating in federal and state criminal and civil matters.

While maintaining a successful private practice, Justice Mayer was appointed as Special Counsel to the Town of Babylon, defending the Town in personal injury lawsuits and suits alleging constitutional violations by the municipality. In 2002, he left private practice to serve under Suffolk County District Attorney, Thomas Spota, as Bureau Chief of the Case Advisory Bureau and the Major Crimes Bureau. During that time, he supervised and trained Assistant District Attorneys in the prosecution of serious felonies.

In January 2006, Justice Mayer took the bench as a New York State Supreme Court Justice for the Tenth Judicial District, Riverhead, New York, where he presides over civil matters. He has been a member of the New York State Bar since 1974, and the Colorado State Bar since 1991. He is admitted to the Federal Courts in the Eastern & Southern Districts of New York, the District of Colorado and the District of Arizona. Justice Mayer is a former Director of the Suffolk County Bar Association and is presently co-chair of SCBA's Veterans Committee.

On the Bench, Justice Mayer presides over medical malpractice, land use and commercial cases as well as a variety of tort litigation.

## **PERSPECTIVES FROM THE BENCH ON CROSS-EXAMINATION**

### **I- Preparation**

- A. What is my theory of prosecution or defense
- B. Theory really means “story.”
- C. All cross must be prepared to tell a compelling story that translates to a theme that slowly brings the fact finders to the conclusions you wish them to draw.
- D. Cross should be designed to give you the ammunition you need for summation.
- E. Determine the story you wish to tell on summation and work backwards to prepare the cross.
- F. Working backwards also determines the scop of everything from type of jury to opening to direct as well as cross.
- G. Weave the power of the “story” with the weaknesses which need to be explained or defended in a compelling narrative.
- H. Notwithstanding the above, be prepared to modify on the fly depending on the proof.

### **I - CROSS v DIRECT**

- A. Direct- witness is the star-not you.

B. Cross-you are the star-not the witness

C. Best cross does not consist of questions

- 1) short statements calling for yes, no, or I don't remember.

### EXAMPLES OF BAD QUESTIONING:

Q- Now Doctor, let me jump ahead and without going through all the records, etc., we failed to mention that you utilized or you did utilize a tourniquet during the surgery, isn't that right?

(No objection)

A-Yes

- 1) yes what-we failed to mention use of a tourniquet- or yes I actually used one.
- 2) Never use etcetera-it has no meaning in an evidentiary sense. It's also just plain sloppy.

Q- How long was it up or inflated?

(Once again, which is it? Is there a difference medically between an "inflated" tourniquet and one that is "up")

A- 30 minutes

Q- And is that , is that an acceptable time period, or how did you come to the point of 30 minutes?

(No objection)

A- Two questions there (smart witness)

This is an actual transcript from one of my trials and the questions are from a very experienced lawyer.

## **II - CROSS IS ABOUT CONTROL**

A. You control the witness, never let the witness control or take over.

B. Dealing with an out of control witness.

- 1) These witnesses are non responsive or over responsive to the question.
- 2) Ask the court for an instruction to the witness.
- 3) Make sure you're asking questions in yes or no format that are capable of being answered in a yes or no format.
- 4) After witness gives a non responsive narrative, ask the court to strike all that was non responsive.
- 5) After a narrative by the witness, simply ask, was that a yes or a no.

## **III - COLLATERAL CROSS**

A. Retained physician experts

- 1) Materials reviewed
- 2) When were they received
- 3) Was there a cover letter
- 4) Did he make notes on them
- 5) Did he bring file to court?
- 6) Was he told not to

- 7) If you've testified before, you know if you brought the file, I would be able to review it and ask you questions concerning your notes
- 8) You choose not to bring it

**B. Payment for coming to Court**

- 1) Payment for review of records
  - a) ask for invoices
- 2) Payment for court time
- 3) Tactical consideration -- your expert will be asked the same questions

**C. How many times testified as retained expert**

- 1) What states
- 2) How many times for Plaintiff? for Defendant?

**IV - AFFIRMATIVE CROSS**

- A. Has the witness hurt you
- B. What can the witness give you that helps your case
- C. Not all cross need be destructive

**V - LISTEN TO THE ANSWER**

- A. Don't be addicted to the script
  - 1) Example - Dr. writes letter on behalf of patient to Medicare with a diagnosis different from the diagnosis testified to. when questioned, Dr. says patient asked him for this.
  - 2) Possibilities - Dr. lied to Medicare so he could get paid or patient asked him to lie. Does chart or any note state that patient asked for a false diagnosis. Only objective evidence is that Dr. made a false claim or, the diagnosis

in the letter is true, which helps plaintiff's case.

**B. Unacceptable Answers**

- 1) "Not really"
- 2) Yes, to the best of my recollection
- 3) I would assume so

**VI - STOP TRYING TO POLISH THE DIAMOND**

A. When you get a favorable answer, stop.

B. Trying to further hammer the point gives the witness an opportunity to undo or explain the favorable answer he previously gave.

**EXAMPLE:**

Q. Did you hear anything when you left Murphy's Bar?

A. Not that I remember.

Q. Are you sure?

A. Pretty sure.

Q. So, we can agree that you heard absolutely nothing when you left Murphy's.

A. Well, nothing except this victim yelling at your client to please don't beat her when they get home.

**VII - CROSS PLAINTIFF FROM EBT**

A. Not permissible to ask "Isn't it true that in your EBT you said it took 30 seconds from the time you saw my client's vehicle to the time you entered the intersection.

B. Form must be - were you asked this question and did you give

this answer.

**C. No negative impeachment**

- 1) "you didn't say it took 5 seconds in your EBT, did you?"
- 2) Above question assumes witness was asked a precise question that called for him to answer the amount of time involved

**D. Tactical Considerations**

- 1) Set the hook
- 2) Do the impeachment
- 3) Post Impeachment
  - a) Memory better now
  - b) Call witness' attention to fact that he received transcript and could have changed any answer and chose not to.

**VIII - CROSS FROM DOCUMENTS**

A. If they are voluminous, consider bates stamp so you and witness can go right to the entry.

B. Focus the witness on the entry -- you can lead here

- 1) Do not ask, "when was the next time you saw her." The witness will say I don't remember the dates as she was my patient for 2 1/2 years.
- 2) Don't ask, "did she complain of pain on April 6, 2006" without having the witness focusing on that entry which should be placed in front of the witness.

**IX - EVIDENCE- Know these rules**

A. Rule 4514 - CPLR

B. CPL § 60.35 - CPL