Cross Country

BY LARRY POZNER

Challenge the allegation. Ignore the alligator.

Trials are not contests between lawyers. They are contests between facts and the applicable burden of proof. We frequently but wrongly analogize trials to sporting events, lawyer versus lawyer. But the sports analogy does not hold up to even a cursory examination. Sporting events begin even — 0 to 0.[1] But cases begin with facts largely already dealt. The jurors do not yet know any facts, but we do, and we know that they are generally stacked against us. But are they sufficient for the prosecution to meet its burden? That is why our growing arsenal of trial techniques greatly matters.

In a sporting event, the abilities of the opponent or the opposing team largely determine the outcome. We are happy but not surprised when the American women's soccer team wins the World Cup. They are the best team. Their combined talents exceed the combined talents of the opposing teams. But trials are not sporting events. We can have very little impact on our opponents' performance. Our motion practice and trial objections guard against the improper admission of facts. With those exceptions, the opponent gets to put on its case. The admissible evidence will come in. Yes, a sloppy opponent might omit something of importance and the less talented opponent might do a poor job of explaining how the evidence fits together, but those are faults within their control, not ours.

But even a very skillful and well-prepared opponent is not the primary obstacle to our success. Our ability to win acquittals is dependent first on the facts available and second on our abilities to make use of those facts. A trial is not a contest of the relative abilities of the lawyers. Our challenge is not to be the "better lawyer" — whatever that means — but to become more proficient at using the available evidence. We study and practice trial techniques not to become "better" than a given opponent, but to become "better" as measured against where we were. As we acquire and improve our trial techniques, we improve our ability to assemble, explain, and undermine facts. We seek to improve our trial skills so that we become more proficient at demonstrating the gap between the facts and the prosecution's burden of proof. And just as we can do relatively little to interfere with our opponent's utilization of the available evidence, our opponent is powerless to interfere with our growing abilities. The opponent is largely a spectator to our use of the science of cross-examination.

By way of example, the techniques of modern cross-examination call on us to make better use of the opponent's witnesses. Constructive cross-examination means using cross to cause the prosecutor's witnesses to admit facts that they have left out or understated. We are adopting their witnesses as our witnesses, at least to the extent that we can use their witnesses to admit or expand on facts that support our theory or which undermine the prosecution theory. When we use the techniques of goal-oriented chapters that make our points, we dramatically diminish the need to call our client and our witnesses. This in turn allows us to more sharply focus the jurors or judge on the problems with the prosecution's case that amount to reasonable doubt. When we focus our techniques on the missing evidence, the changed stories and the gaps in investigation, we give the jurors what they need for an acquittal. We are not asking for a vote of "innocent" but a vote of "unproven." We do this not out of weakness, but out of strength. Our Constitution entitles us to this standard. Trying to prove a client is innocent is not only difficult, but it is also a complete shift of the burden of proof. This we cannot afford. In trying the prosecutor's case, we rightly focus on the burden, not the lawyer.

We learn and practice techniques because they make us better at what we do. The contest is not our abilities versus the prosecutor's abilities. A trial is about our abilities to utilize evidence as measured against a fixed burden of proof. Our attainable goal is to become better at handling the largely predictable trial scenarios. And there is not a thing our opponents can do to stop our growth as trial lawyers.

So challenge the allegation. Ignore the alligator.

Note

1. The exception is polo. But few criminal defense lawyers give a damn about polo. ■

NACDL Past President Larry Pozner will be a presenter on May 8 at the 2020 NACDL Spring Seminar in Charlotte, North Carolina.

About the Author

NACDL LIFE MEMBER Larry Pozner is a recognized authority on cross-examination. His book, *Cross-Examination: Science and Techniques* (Lexis, 3d edition 2018, Pozner and Dodd), is a well-regarded resource on cross-examination theory and practice.

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