Miller & Chevalier

What Michael Jordan Can Teach Us About Cross-Examination

Last year Gatorade released three new "Be Like Mike" commercials, each paying homage to the 1993 ad campaign in which kids and adults confessed to wanting to be like Michael Jordan. Gatorade is gambling that people still want to be like His Airness. It is a pretty safe bet. Jordan was, as one sportswriter put it, "an artist on the basketball court, every bit the equal in his milieu of any of the great masters [of art] in theirs." Mike Greenberg, *His Airness: 'Michael Jordan: The Life,'* by Roland Lazenby, N.Y. Times, May 29, 2014, http://nytimes.com/2014/06/01/books/review/michael-jordan-the-life-by-roland-lazenby.html.

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But Jordan's artistry was merely one element of his game. Jordan never stopped practicing the fundamentals. His preparation for each game was flawless. He made good decisions with the ball. These were the reasons that during games he could use his artistry to paint masterpieces. In other words, not only was Michael Jordan an incredible basketball player, he also had all of the ingredients to succeed in another court: he could have been a great trial lawyer.

The best trial lawyers—the Michael Jordans of trial—often refer to themselves as artists in the courtroom. This is especially true when it comes to cross-examination. In 1903, Francis Wellman wrote the classic text, *The Art of Cross-Examination* (MacMillian & Co. 1903). Nearly 75 years later, Irving Younger's lecture on the art of cross-examination became an instant classic and the standard to which most trial lawyers aspired. In 2014, the ABA published a collection of essays that purports to cover "all aspects of the art." *The Art of Cross-Examination, Essays from the Bench and Bar*, at ix (Charles B. Gibbons, ed., 2014)

Although none of these teachings defines "art," there is no question what message they are trying to convey—that cross-examination "is subtle and difficult and complex beyond description." Irving Younger, The Art of Cross-Examination, reprinted in *The Art of Cross-Examination, Essays from the Bench and Bar*, at 19 (Charles B. Gibbons, ed., ABA Publishing, 2014). Consequently, few can do it well. Wellman wrote, "The conduct of a case in court is a particular art for which many men, however learned in the law, are not fitted." Wellman, *The Art of Cross-Examination*, at 16. Younger went even further: "The number of trial lawyers who are brilliant cross-examiners is probably fewer than ten in the country." Younger, *The Art of Cross-Examination*, at 19. As a result, his first "commandment" of cross-examination is "Be Brief." Why? Because "chances are, you are screwing up. The shorter the time you spend on your feet, the less you will screw up." *Id*. at 25. (After reading Younger, one wonders why the lawyer should even start the cross-examination in the first place.)

This trial lawyer exceptionalism is rooted, I believe, in a chip that sits on the trial lawyer's shoulder. Trial work is hardly respected in law school. In core classes, Supreme Court opinions are dissected by tenure-track professors who have never set foot in a courtroom, much less cross-examined a witness, and top students are herded to law review, appellate clerkships, and white-shoe firms that never go to trial. Trial advocacy is usually a pass/fail elective taught by a non-tenure-track professor whose office is located in the basement of the law school. If a legal education is, as Professor Duncan Kennedy contends, "training for hierarchy," students learn quickly that trial work is near the bottom of that hierarchy.

Pop culture also promotes the notion that anyone with some street smarts can be a good trial lawyer. Consider three of the more famous fictional trial lawyers in cinema: Vincent Gambini (Joe Pesci in *My Cousin Vinny*), who took six tries before he passed the bar; Elle Woods (Reese Witherspoon in *Legally Blonde*), who went to law school to win back her ex-

boyfriend; and Frank Galvin (Paul Newman in *The Verdict*), who drank and chased ambulances. And they won their trials!

Against this backdrop, trial lawyers have embraced the idea that they are different from other lawyers. By referring to cross-examination as art, trial lawyers mystify the craft and elevate themselves above other members of the bar.

The problem with thinking of cross-examination as art is that it fails to capture the technical skill, hard work, and judgment necessary to do it well. And because every criminal defendant has a constitutional right to cross-examine the government's witnesses, any lawyer can become an artist simply by representing someone charged with a crime. In a sense, cross-examination ends up looking like a Jackson Pollock painting: a piece of art that everyone thinks they can do but few actually can.

To make matters worse, aspiring trial lawyers are left without much guidance on how to conduct an effective cross-examination. Art can hardly be taught; at most, it can be taught to be appreciated, which is why so many practitioners who teach cross-examination end up telling war stories instead of teaching the craft.

There are, of course, those who reject the notion of cross-examinations as art. According to Larry Pozner and Roger Dodd, "Cross-examination is a science. It has firmly established rules, guidelines, identifiable techniques, and definable methods." Larry S. Pozner and Roger J. Dodd, *Cross-Examination: Science and Techniques* 1-4 (Matthew Bender & Co. 2d ed. 2004).

Pozner and Dodd deserve credit for emphasizing the rigor involved in cross-examination. Most lay people and even some lawyers think—wrongly—that cross-examination is only about being quick on one's feet. Once again, we have pop culture to thank for this fiction. One of the most indelible—and incredible—cross-examinations in movie history took place in *A Few Good Men*. Lieutenant Daniel Kaffee (Tom Cruise), a rookie Judge Advocate General attorney with no trial experience, got Colonel Nathan R. Jessup (Jack Nicholson), a high-ranking marine, to implicate himself and exonerate Kaffee's clients in a murder of a marine. How? By outfoxing him on the fly in the courtroom, something that only he, and not his more studious co-counsel played by Demi Moore, could do. (Jessup was actually called by Kaffee in the defense case. But Jessup was adverse to the defense and the examination was treated like a cross-examination.) But as entertaining as the scene is, in the real world the judge would have shut down the examination long before Kaffee shouted (for the fourth time) "did you order the code red?" because nearly every question leading up to that last one was speculative, argumentative, compound, and lacking foundation.

Still, it is inaccurate to think of cross-examination as purely a science. Instincts, creativity, and charisma matter in the courtroom but not in the laboratory. And while both science and cross-examination may reveal the truth, the truth is not what the cross-examiner is after. The cross-examiner seeks, above all, a victory for her client.

To that end, cross-examination should be thought of as sport. Not in the sense that cross-examination is a game, but in the sense that cross-examination has much in common with most sports. Because it falls within a trial, it is like most sporting events, a contest between two sides competing to win under a set of rules enforced by a neutral third party. The cross-examination is one side's chance to advance the ball and score points against an opponent who is trying to stop him and score her own points. The cross-examiner gets to call the first play—the question that he thinks will advance the ball. But the other side has prepared for the cross-examination and will do her best to scuttle the cross-examiner's efforts. Opposing counsel may try to block the cross-examiner's question by yelling "Objection!" Or the witness may avoid answering the cross-examiner's questions. As a result, the cross-examiner must read, react, and adjust to the situation. He must also exercise good judgment. If he is too reckless with his questions, he may do more damage than good. But if he is too cautious, he may make no progress. Meanwhile, the pressure is on the cross-examiner. This is the championship game for his client.

The analogy between cross-examination and sports is not perfect, of course. Justice is much more important than any trophy or pennant. Still, a trial is a competitive contest between two sides fighting tooth and nail to win and nowhere is that competition more intense than during cross-examination.

Cross-examination as sport accurately captures the craft as something that most lawyers can do but few can do well and none can do perfectly. It encapsulates both the scientific and artistic elements of cross-examination. And best of all,

it provides guidance on how trial lawyers can become better at cross-examination. They need only look to how athletes succeed in sports: They practice the proper technique; they prepare intensely for a game; and they make good decisions during the game. The same is true for trial lawyers during cross-examination.

Practice the Proper Technique

A 2007 *New York Times Magazine* article examined why so many of the top professional athletes in the world come from the same places—tennis players from Russia, women's golfers from South Korea, and baseball players from the Dominican Republic. Daniel Coyle, "How to Grow a Super-Athlete," *N.Y. Times*, Mar. 4, 2007 (Magazine). It found that athletes in those countries develop the proper technique at an early age and practice that technique over and over again. They do not play competitive games until much later on. *Id.*

Similarly, trial lawyers should practice the proper cross-examination technique long before they cross-examine a real witness at trial. The proper technique is hardly a mystery. Most law students are taught the same basic "rules" of cross-examination: (1) ask leading questions, (2) never ask a question to which you do not know the answer, (3) focus on facts, not opinions, and (4) never ask the ultimate question. *See, e.g.*, Younger, *supra*, at 24-37; Thomas A. Mauet, *Trial Techniques*, at 251–254 (New York, Aspen Law & Business Publishing, 5th Ed., 2000).

Knowing the rules is not the same as being able to execute them, however. A lawyer can no more become a good cross-examiner simply by knowing to ask leading questions than an athlete can become a good tennis player simply by knowing to follow through on a forehand. Younger's claim that "technical mastery is the easiest to meet . . . [because] you need only go to the library and study" is therefore dead wrong. Younger, *supra*, at 19. To develop the proper technique, a lawyer needs to learn the rules *and* practice them repeatedly.

Over time—after countless hours of practice—a lawyer may learn that the rules themselves may not be as sacrosanct as once thought. Take, for example, the rule that a lawyer "should never ask a question to which [she] does not already know the answer." *See, e.g., id*. at 27. This rule is at best vague and at worst misleading. A lawyer can never be certain what answer a witness will give. At most, a lawyer can know what the witness said in the past. Witnesses change their answers all the time. Witnesses say things that the lawyer knows are untrue. The better rule is that a lawyer should never assume that a witness will say yes to any question.

My point is not that there are no rules of cross-examination. Indeed, there are. But a lawyer can learn the rules only by practicing them repeatedly, which over time may even lead the lawyer to come up with her own rules of cross-examination.

It seems simple enough, right? And it is—but so is hitting a golf ball off a tee, yet most golfers cannot break a 100. Only by developing the proper technique and practicing it repeatedly can a lawyer develop into a great cross-examiner.

Prepare Intensely

Peyton Manning just retired as one of the greatest quarterbacks of all time. He won the NFL's Most Valuable Player (MVP) award 5 times and was named to the Pro Bowl 14 times. Manning was never the most athletic quarterback, however. Nor did he have the strongest arm. But he was always the most prepared.

Manning's pregame preparation is legendary. First, he reviewed film of his opponent, but not just film of one or two games, but an opponent's last few seasons on film. Brian Costello, "Peyton's Film Studying Is Stuff of Legend," *N.Y. Post*, Jan. 30, 2014. Then, he and his coaches developed a game plan—the plays that exposed and took advantage of their opponent's weaknesses. After that, he practiced those plays until he executed them flawlessly. He even simulated game conditions; if the temperature on game-day was expected to be below freezing, he soaked his hand in a bucket of ice to get used to throwing with a numb hand. Dan Pompei, "Inside Manning," *Sports on Earth*, Aug. 25, 2014.

The trial lawyer should take a page out of Manning's playbook. First, the lawyer should scrutinize the witness's prior statements. By the time of trial, the lawyer should be more familiar with the witness's prior statements than the witness himself.

Next, the lawyer should devise a game plan. This is where great cross-examinations are made. As one practitioner stated, "the real power of cross-examination is the examiner's ability to choose the point of attack." Michael R. Doyen, "On Breaking Commandments," in *The Art of Cross-Examination, Essays from the Bench and Bar, supra*, at 77. The point of attack is typically where the witness is weak and vulnerable. A common mistake is to try to cover every issue on cross that was discussed on direct. A cross-examination should never mirror the direct examination. Instead, it should delve into only those (few) areas where the lawyer is able to advance his or her case.

After devising a game plan, the lawyer should draft the questions that will advance that game plan. In doing so, the lawyer should consider every possible answer to a question. Even the simplest leading question—"the light was green?"—could elicit up to seven answers: (1) "yes"; (2) "no"; (3) "maybe"; (4) "I think so"; (5) "I don't know"; (6) "I don't remember"; and (7) something non-responsive, like "your client was drunk!" The lawyer must consider what she will do in response to each of those answers.

Finally, the lawyer should moot the cross. Most lawyers moot their openings and direct examinations. Few moot their crosses. This is a mistake. Cross-examination is more difficult than an opening statement or a direct examination—and usually more important. A lawyer should always moot the cross-examination.

Make Good Decisions

In sports, the team that is favored to win does not always win. The team that wins is usually the team whose players make better split-second decisions during the game. Athletes in almost every sport have to make quick decisions throughout a game. When a quarterback steps back to pass, for example, he must quickly decide whether to throw the ball to the wide receiver or to the tight end or whether he try to run for a first down. Each decision is informed, in part, by the actions of his opponent. That is not to say that there is only one correct decision in any situation. Two great athletes might make very different decisions on the fly, each of which plays to that athlete's strengths.

Likewise, the cross-examiner must read and react to the witness and make good decisions on the fly. The first decision is whether to cross-examine the witness at all. Sometimes the best decision is to ask no questions.

If the cross-examiner decides to cross-examine the witness, she must decide quickly where to start. Should she start with the first question in her outline, or she should "call an audible" and focus on an unexpected answer from the direct? If the prosecutor objects, should she rephrase the question or argue with the judge? If the witness equivocates, should she follow-up or move on? If she moves on, where to? Even the most straightforward cross-examination involves countless split-second decisions.

So how does a trial lawyer learn to make good decisions during a cross-examination?

First, the lawyer should be prepared. If she is prepared, her brain will be freed up to read and react to the witness and to make good decisions. But if she is trying to remember what the witness said before the Grand Jury two years ago or how to impeach the witness with a prior inconsistent statement, she will not have the mental energy to evaluate the witness's testimony and make good decisions.

Second, the lawyer should be flexible. She must not be wedded to a script. The value of intense preparation is that it allows the lawyer to go off script without throwing caution to the wind.

Third, the lawyer should listen to the witness. Too many lawyers spend the cross-examination staring down at a script of questions. They forget to listen to the witness's answers. This is a huge mistake. A lawyer who focuses on her notes instead of on the witness will miss the witness's answers. She will also lose the jury's attention.

Fourth, the lawyer should block out the noise. Opposing counsel will object and the judge may try to limit cross-examination. Though objections must be addressed and rulings followed, the cross-examiner cannot lose focus. The only people that matter are the witness and the jury. A lawyer should avoid lengthy bench conferences so that she—and the jury—can stay focused on the cross-examination of the witness.

Finally, the lawyer should learn from her decisions. One of the reasons why Peyton Manning improved from a quarterback who threw 28 interceptions in his rookie season to one who was MVP in his sixth season was that he reviewed film of every pass he threw. Jeff Legwold, *Peyton Manning's Offseason Rituals*, ESPN, July 17, 2014, http://espn.go.com/nfl/story/_/page/hotread140717/denver-broncos-quarterback-peyton-manning-dissects-film-pursuit-super-bowl-xlix-championship. He assessed the initial play-call and then determined whether his on-field decision was the right one. *Id.* The lawyer, too, should learn from her in-court decisions. After the trial, she should review the transcript of each cross-examination and ask herself, "Was this the right question to ask?"

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The best cross-examiners are fun to watch. They incorporate movement, voice, and expression in their cross-examinations. They dance around objections and flirt with the jury. They disarm witnesses and charm judges. There is, without a doubt, an element of artistry to effective cross-examination.

The same can also be said of the best athletes. But it is important to remember that athletes do not set out to be artists. Long before "His Airness" became an artist, Michael Jordan was a high school sophomore who got cut from the varsity basketball team. He was always very talented. But he became a great player by applying a strategy for success. He practiced the fundamentals. He prepared intensely for each game. He made good decisions with the ball. The rest came later.

Like most sports, cross-examination is incredibly difficult to do very well. Approached only as art, cross-examination can be appreciated but not learned. Approached only as science, cross-examination can be learned but not performed well. Approached as sport, cross-examination can be performed well and used to win trials.

Originally published in the American Bar Association Trial Practice Newsletter, Spring 2016 Issue.