



The “cross whisperer”

Leading a jury to verdict and a horse to water have a lot in common



Cooper

BY MILES B. COOPER

Today, a horseman teaches us about cross-examination. Some time ago, I took a course on communication that focused on horses. I'm not a horse person, nor do I aim to be one. So, “why horses?” one might ask. As I learned, horses are herd animals, prone to flight when startled. They look to you as a leader and notice changes in your energy instantaneously. Perfect feedback mechanisms. For one exercise, we were asked to go into a ring with the horse and while staying on the ground, get the horse to walk and then canter around the outer edge of the ring in one direction, stop, turn, and then do the same in the other. Our only tools were a halter with a rope, a stick and ourselves. We had ten minutes for the evolution.

It sounds easy, but horses will only do what you ask them if you make your intentions clear. Several people went through the exercise with varying degrees of success. Then another participant walked into the ring. In the space of less than three minutes, he and his horse completed the tasks effortlessly. He looked up at the instructor, who said, “What do you want to do? You have another seven minutes if you want them.”

Apply pressure

Let's leave the ring for a moment and talk about pressure. Cross-examination and pressure run hand-in-hand. Applying it, releasing it and being aware that you are under it. Applying it is straightforward. A witness, like a horse, needs clear communication to know what you want the witness to do. This is done by applying pressure. You need to apply pressure right off the bat to demonstrate the desired direction. That you are the leader. And that you two are going down a particular path of questioning. The easiest way to do this? Start with very short leading questions on matters the witness can't dispute. By way of example, assume you are examining the defendant's person most knowledgeable.

“You're employed by Defendant Company.” Wait for the yes.

“You've worked for Defendant Company 35 years.” Yes again.

You've started the endeavor, clearly communicated that you want yes/no answers and begun developing a bias theme. Be aware that too much pressure, call it heat, anger or a heavy hand, can be disastrous. With a horse, it may cause it to bolt. A witness can do the same thing. The result may startle the jury and cause them to identify with the poor witness you are abusing rather than with you. My former boss, an excellent trial lawyer, used to say, “Don't start hating 'em until the jury hates 'em. It takes a while for that pot to boil.” If you come in hot before the jury dislikes the witness, you risk losing the jury for the examination *and* the rest of the case.

Release pressure

Constant pressure without release can be tiring for anyone watching. And even worse, dull. As a young lawyer, I made the mistake of believing that every sentence needed to be short and leading. Every now and then, once you've established that you are the leader, an open-ended question can break up the examination and keep the jury interested.

Our person most knowledgeable again:

“What type of products does Defendant Company make?” The question, posed far enough into the exam that the witness understands you are the leader, releases the pressure on defendant's person most knowledgeable without giving the witness too much leeway. It also alters the flow from the staccato exam, keeping the jury's interest.

Breathe

When talking about pressure, don't forget you're under it, too. No matter how many times you step to the podium, cross-examination is stressful. You never know what that witness is going to do. Remembering to breathe (or making a note of it in bold on your outline) does two things. By reducing your tension, you reduce the tension in the room. And it will slow you down. Remember that those short leading questions, without sufficient breath, can fire out like bullets from an automatic weapon. This gives no time for the jury to process those key points you have worked so hard to elicit.

Wondering whether you're going too fast? Watch the court reporter. If the court reporter is working hard, scowling at you, telling you to slow down, or throwing a stack of Post-its at you (as happened during my first expert cross-exam), you are going too fast. Most reporters these days have a word per minute counter and, if you're nice, will tell you your speed during a break. If you are over 150 wpm, you are going faster than most jurors can process. In fact, 100-120 wpm would be better.

Brevity

This is a frequent theme in my columns and equally applicable here. You want to be clear in your intentions. Short sentences tend to be clear. Short sentences don't give the witness room to quibble with the question. And short sentences, again with breath, are easily digestible by the jury.

The horseman

An abrupt segue, for which I apologize. But our lesson lies in our horseman's choice:

“I got what I needed. I'm done,” he said. He led his horse out from the ring, cool, calm and collected.



The trainer, a trial lawyer in a former life, remarked, "A lot of lawyers could learn from your decision."

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