Is there a different way to cross-examine at trial?

Yes! Using open-ended questions to keep feeding rope to the defense expert witness until she hangs herself

By Brian Beecher
& Benny Khorsandi

You are at trial. The defense expert is on the stand. She is a doctor well known for calling all plaintiffs liars and fakers and being handsomely paid for it by insurance companies. She is lying to the jury. But she is charming them, too. Defense counsel finishes the direct examination. The witness turns her attention to you. She knows you are up next. It's time for cross-examination. Everyone knows it too. The witness smiles at you. You stand up. The jury is watching. The judge is watching. Everyone is watching.

There is an imaginary pile of rope on the floor of the courtroom. The rope is in between you and the defense expert. You have two choices: (1) pick up that rope and whip the witness; or (2) keep feeding the rope to the witness until she hangs herself. This article is our case for option two. Or, at least, our case for a combination of both options and a caution to remember that no cross-examination should be "all whip." The intent is to allow the witness to have his or her say and, as a result, to become an active participant in the demise of the defense case. (Notably, this is not necessarily the demise of the witness. Through cross-examination, the witness may actually align with the plaintiff's story.) And the only way to do this is with open-ended questions.

Open-ended questions

This article is in defense of open-ended questions. There are many books, treatises, lecturers, and others in the community who advise that cross-examination should only involve "yes or no" questions and only when you already know the answer. That adage is anathema to our process. Set forth below are some of the reasons why open-ended questions should be incorporated into your trial cross-examinations and when you should fearlessly ask them.

We also provide examples of these concepts from the cross-exam of the defense-retained neurologist Sara Siavoshi, D.O., from Brian Beecher's jury trial against Walmart, which resulted in a $41.95M verdict against Walmart in the Riverside Superior Court on June 22, 2023. The entire video of the cross-exam can be found at: https://netorg4573608-my.sharepoint.com/:v:/g/personal/brenda_arashlaw_com/EXc3rehfq_hBoKj_

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In the examples below, the objections and rulings by the Court have been omitted for ease of review. Our analysis will be found in brackets.

1) **Open-ended questions do not telegraph what you expect the answer to be.**

A leading question tells the witness (and the jury) what you expect the answer to be. Open-ended questions give no such clues. Without knowing the perceived battleground, a witness will often just tell the truth. This concept alone should be reason enough to incorporate open-ended questions into your cross-examination toolbox.

Remember, you can ask an open-ended question and then follow up with a leading question. There is also the added bonus that open-ended questions require the witness to know an answer, while leading questions can be answered with a simple "yes or no." Your open-ended questions will require the witness to provide a coherent response. The mental machinations a witness needs to perform on the stand – (in front of the jury, in a time-sensitive manner, and without assistance of counsel) – can be their undoing. Imagine doing a pop quiz with an audience. Would you rather it be a quiz where the questions were "true or false" or essays?

2) **When the jury sees something happen with their own eyes, they believe it.**

If you want the jury to view a witness as dishonest, then you need to make that witness lie *to the jury*. If you want the jury to view a witness as not competent (either on the facts of this case or in general), then you need to make that witness get the facts wrong *in front of the jury*. If you want to prove a witness is biased, you need to have them act in a biased manner *in front of the jury*. Things that happened outside of the jury's presence often do not have the same effect. Showing the jury that a witness has changed his or her story prior to trial is not the equivalent of the witness changing his or her story in real time and in front of the jury's watchful eyes. Trial is performance art. And witnesses are part of that performance.

3) **When any answer will be good for our case.**

We pick the questions to ask a witness. Often, a good open-ended question will have only a few possible answers. You can deduce what they are and prepare for them. And if all the possible answers are good for your case, then the open-ended question can be fearlessly asked at trial.

4) **The "what" wins the door prize, but the "why" wins the jackpot.**

Hammering a witness into agreement with a fact will move the needle with the jury – but only so far. Having the witness explain the reasoning for why a fact is true will often win the day.

5) **Open-ended questions are the way a witness will provide you with a "gift" response.**

Yes or no answers rarely provide "gifts." It is when the witness is put on the spot with open-ended questions that the witness is forced to demonstrate accuracy, credibility, knowledge, and/or competency – and this is when the witness will give you little "gifts." You need to listen, listen, listen for them. Sometimes the gift is obvious. Other times, the gift is just a new word inserted into the answer or omitted. You need to become a hyper-aggressive listener.

6) **When you have a "clap back."**

We routinely ask questions at trial that we do not know the answer to. We understand this allows the witness to try to hurt us with his or her answer. One tactic for this approach is to be ready with what we call a "clap back." This means having a retort ready that the witness absolutely cannot handle. It needs to be more than just a plain old rebuttal. A "killer comeback" is another description.

You will see an example of each of the above six concepts in the transcript below from the Walmart trial. For purposes of this article, all you need to know about the Walmart trial is that the injured plaintiffs both had suffered brain damage when they were attacked by an assailant at a San Jacinto, California, Walmart store. Plaintiff contended that Walmart's negligence caused the attack. Walmart unsuccessfully disputed both liability and damages. Dr. Siavoshi's testimony during direct examination was that neither plaintiff – (Carlos or Rosalia Fernandez) – had any serious ongoing problems from the incident and had instead fully recovered. During her direct exam, Dr. Siavoshi bragged about her extensive review of 4,000+ pages of medical records and deposition transcripts. This was part of the cross-examination on that point with analysis in brackets.

Q. And why, when you were reviewing thousands and thousands of medical records in this case did you choose not to make any notes?

[Open-ended question. There is no good answer to this question. Any answer will help our story of the case: that Dr. Siavoshi's opinions are based upon a haphazard and biased review of the evidence. Dr. Siavoshi's failure to take a single written note speaks volumes. And we want to know *why* she made this choice.]

A. So, while I was reviewing medical records, I was making many, many, many, many mental notes.

[The comment about "mental notes" is a gift from Siavoshi. Her efforts to justify her lack of any written notes are not helping her look good and it appears like she is trying to dodge the question about why she failed to take a single written note.]

Q. I'm not talking about mental notes.

A. Yeah.

Q. I want to know why you didn't make any written notes?

[Now the jury really wants to know why!]

A. I didn't know that it was required of me, and I don't think that it was.

[Siavoshi tries to hide behind what was "required" of her. We do not believe that her response was helpful for her, but Mr. Beecher is ready with the clap back anyway and he uses it.]

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Q. When you're with your own patients, you take notes every single time. True?
A. When I'm a treating physician, yes.
[A live demonstration of Dr. Siavoshi's bias. In her own words, she just explained how she treats real patients differently than when she is a hired gun for the defense.]
(*Fernandez v. Walmart*, Riverside County Superior Court Case No. RIC1904598, June 13, 2023 trial transcript, pp. 109: 9 to 110: 6.)

Remember, the jury is not here to watch you beat a witness. The jury's job is to decide between two competing stories. The story of your case versus the story told by the defense. If the testimony from a defense witness matches up best with your story (or does not match up very well with the defense story), that is a "win." And while the witness is testifying, the witness might not understand how or if his or her testimony matches up with the competing stories being told to the jury. It is your job to make sure the jury knows that the testimony you are obtaining is good for your side. Are two defense experts in disagreement on an important fact? Does a defense witness have an important fact wrong? If so, open-ended questions are the perfect tool for having the witness explain more and more about these discrepancies. It will feel like an inside joke exists between the jury and you. Jurors will start to smirk and smile as the witness yammers on, blissfully unaware of the inaccuracies and/or contradictions he or she is speaking into evidence.

7) If the witness needs to know the answer to avoid looking incompetent or unprepared. Or, if "I don't know" is helpful for your case.

There were many times that open-ended questions were posed to Dr. Siavoshi. Her "I don't know" answers were no doubt a reason that the jury's verdict appeared to reject her testimony. Also, she appeared to be upset by her own inability to remember important facts. Here are examples of the above concepts during Mr. Beecher's cross-examination of the doctor:

Q. Do you have any understanding of what sort of brain rehab Rosalia Fernandez has undergone after she got hit in the head with a baseball bat?
[A pure open-ended question. The witness is not provided any clue about where this line of question is going.]
A. Yeah. She underwent some sort of cognitive rehabilitation, so cognitive therapy in addition to obviously, the other therapy that she's undergone as well, the vestibular.
[Is this a gift? The words "some sort" do not imply a good understanding of the medical records. Mr. Beecher probes further to understand the depth of Dr. Siavoshi's knowledge on this issue.]
Q. Do you remember where she went to – ?
A. No.
[It is never a good look for a witness to be ignorant of important information and then to "double down" by also being angry about it. Equally important, the jury does know where Rosalia went for rehabilitation therapy and the jury also knows that it helped Rosalia a great deal. Rosalia and her treating doctors had both testified about how the rehabilitation was successful in providing Rosalia with almost a full recovery on this part of her injuries.]
Q. You don't remember that?
A. No.
Q. Do you remember for how long she went to the brain – ?
A. No. No. Remind me, please. Is it pertinent? Do you have a question about it?
[Yeesh.]
Q. Well, do you remember if it helped her, the brain rehab? Do you know if it helped Rosalia Fernandez?
A. I believe I saw from the note that there was maybe some marginal improvement. But what it looks, from the serial notes, is that for the most part, she stayed the same and was continuing to suffer from the same symptoms throughout time.
[Uh oh. Dr. Siavoshi better check her "mental notes" because the jury knows that this answer is not accurate. Rosalia had tremendous improvement from this therapy. This testimony does not match with the defense story, i.e., the story that Dr. Siavoshi should be trusted over all the treating doctors. Dr. Siavoshi is getting basic facts of this case dead wrong.]
(*Id*., at 122: 18 to 123: 10.)

8) When it is an area of agreement.

In every case and with every witness there are some areas of agreement. You can fearlessly incorporate open-ended questions during blocks of a cross-exam where the witness agrees with your case.[Dr. Siavoshi had just tried to deny evidence of the client suffering brain damage. Let's hit her with a clap back question about g-force, which she will have to agree was a devastating amount of force to enter a person's brain.]
Q. Do you remember at all about how much g-force would have gone into Carlos's brain from this depressed skull fracture?
[A clap back, plus more pop quiz time for Dr. Siavoshi, equals honest testimony and agreement with our story of the case.]
A. So, I do remember now talking about the g-force and hearing about the g-force. And irregardless, my opinion stands that he did suffer a traumatic brain injury. Right? So, regardless of whether or not there was any evidence of brain tissue damage, which there wasn't on radiology, I agree that a bat attack severe enough to cause a skull fracture absolutely caused a traumatic brain injury in this case. So, I have no disagreement there.[Let's make sure the jury knows Dr. Siavoshi just agreed with us on such a major point.]
Q. And I think what you're saying and that our side of the case certainly agrees with is that you can have a brain injury without being able to see any of that on the imaging. True?
[A smooth transition into a leading question after the witness has already locked herself in.]
A. Absolutely.
(*Id*., at 130: 22 to 131: 18.)

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9) **Open-ended questions reduce the aggressive atmosphere of trial.**

Too often, a tricky witness turns the courtroom into a combative atmosphere. The attorney keeps asking for a "yes or no" answer and the tricky witness keeps evading the question. This cycle then repeats with both participants getting more and more angry. The jury doesn't necessarily understand what is happening other than the fact that these two people – (the attorney and witness) – hate each other. We believe that when you are fighting the witness, you are losing the trial. And in a long trial, if you are fighting every single witness for weeks, sometimes months, this spells disaster for your injured plaintiff. Jurors want to get the answer right, not to get pulled into a fight. We find that jurors appreciate a presentation that highlights issues while also treating witnesses with respect (and sometimes when they do not deserve it). Immediately below, Dr. Siavoshi is impeached with open-ended questions. This impeachment could have been more aggressive, but doing so would have also risked alienating the jury. Instead, the cross-examination makes the same point while taking the high road.

Q. There are facts, though, in this case that certainly suggest Carlos suffered a loss of consciousness. True?

A. I did not see any facts that were clearly suggestive of loss of consciousness, but you can correct me.

[Here comes the impeachment. By asking to be corrected, did Dr. Siavoshi just concede that her "mental notes" are not working as well as she had expected?]

Q. When you read that section of Carlos's deposition, how would you know him saying, "I remember going to the ground, and then the next thing I remember is paramedics," how can you say that's amnesia, that's not a loss of consciousness? How do you make that opinion in your mind?

[There is no good answer here for Dr. Siavoshi. The truth is that it could have been a loss of consciousness and she cannot prove otherwise. But since trial is a performance art, let's show the jury in real time all the mental acrobatics that Dr. Siavoshi needs to perform for her opinions to fit with Walmart's story that Carlos Fernandez did not suffer a brain injury when he was bashed in the head with a baseball bat.]

A. Because all he said there was "I don't remember." That's the fact of the statement.

Q. . . . How do you know that that's not – how do you prove that that's not a loss of consciousness?

[There is still no good answer here for Dr. Siavoshi. Instead of more mental acrobatics, she chooses to just tell the truth. The jury saw how long it took her to finally do so.]

A. I don't think you can prove it either way. Yeah.

[Now let's ask our clap back question. We had it ready and waiting, why not use it?]

Q. Okay. And then, do you know what Rosalia said she saw when Carlos was on the ground?

[Why can't the clap back question also be a pop quiz? Here, Dr. Siavoshi's struggle to remember important facts continues live and in front of the jury.]

A. Please, remind me.

Q. She said she thought she saw a dead body. Did you know that?

A. I do remember that. I recall that now.

[Clap back successful. Now, let's repeat the words "dead body" again for the jury.]

Q. Okay. A dead body, what's the GCS?

A. A dead body, GCS is zero.

[A gift from the doctor. She got the GCS scale wrong. Dead wrong.]

Q. No, it's not. . . . The lowest GCS score you can get is a three?

A. Three, sure.

Q. Even a dead body would get a three?

A. Sure. Minimum three.

(*Id.*, pp. 133: 19-23; 135: 4-24; 136: 24 to 137: 1-16.)

Witness examination should be a waxing and waning of open-ended questions and leading questions. Both tools are necessary for maximum effectiveness. If you are at all hesitant to use open-ended questions in trial, then dip your toe in the water by trying it out during deposition. It can be scary to live in a world of uncertainty. It does take more preparation to write a cross-examination where the outcome is dependent upon the choices the witness makes in the moment. But the result is often an examination that produces testimony which is more truthful, informative, and revealing for your jurors. Our jury system works because our jurors are trying to find out the truth. Open-ended questions are often the best way to reveal it. They need to be in your trial cross toolbox.

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