

PRAISE FOR *THE FEARLESS CROSS-EXAMINER*

“How often do you see a law book that is both revolutionary and laugh-out-loud funny? *The Fearless Cross-Examiner* is. Chock-full of innovative tips, real trial transcript examples, and fresh approaches to cross-examination, Malone’s book takes the panic out of cross-examination and puts you back in the driver’s seat. This one is a winner.”

—Zoe Littlepage, 2015 winner of the American Bar Association’s Pursuit of Justice Award; Top Ten Jury Verdict in 2007, 2009, and 2010; member of the Inner Circle of Advocates

“In this definitive Bible on the most effective truth-revealing tool in a lawyer’s arsenal, Pat Malone rewrites Irving Younger’s ten rules of cross-examination for the modern courtroom. The lesson? If you are still crossing witnesses the way you learned in law school, you are probably doing it wrong. Whether you have been a practicing lawyer for years or are brand new to the profession, this book is a must-read.”

—Randi McGinn, president of the Inner Circle of Advocates, author of *Changing Laws, Saving Lives*

“As usual, Patrick Malone challenges the traditions many trial lawyers have inherited and forces us to examine whether there is a better way. He brings tools that will heighten anyone’s game, from beginner to seasoned pro, and I heartily recommend this book.”

—Mark Lanier, Trial Lawyer of the Year 2015, AAJ Lifetime Achievement Award

“*The Fearless Cross-Examiner* is a really excellent book. Despite having taught the art of cross-examination for more than forty years, I learned a lot from Malone about how to become a more strategic, analytical, and effective cross-examiner.”

—Stephen Wizner, William O. Douglas clinical professor emeritus and professorial lecturer at Yale Law School, dean of the faculty at the National Board of Trial Advocacy, and recipient of the Richard S. Jacobson Trial Advocacy Teaching Award and the Theodore I. Koskoff Award

“Pat Malone, a gifted trial lawyer, teacher, and author, adds to his list of excellent trial strategy books with one that is destined to become a classic. I will keep it close at hand during deposition and trial preparation, and our clients will benefit from his willingness to share what he has learned.”

—Roxanne Conlin, past president of the
American Association for Justice

“This down-to-earth book features practical tips and helpful examples of proven, effective cross-examination methods that even experienced lawyers will benefit from knowing.”

—Paul Luvera, member emeritus of the Inner Circle of Advocates,
listed in *Best Lawyers in America*

“Malone once again takes ‘conventional wisdom,’ shows how unwise it is, and makes us all better trial lawyers with his new approach. He makes the journey useful, readable, and even fun.”

—Bart Dalton, president elect of the
American College of Trial Lawyers

“[It’s] the bible to twenty-first-century cross-examination. Any attorney, or any person for that matter, who is asking questions and searching for information must read this book. This is what they should be teaching in law school.”

—Jordan Merson, listed in the *New York Law Journal* Hall of Fame for medical malpractice, obtained the largest verdict in Westchester County in 2014, listed as a *Super Lawyers* “Rising Star” for 2015

“This is the finest book on cross-examination I have ever read.”

—Mark Mandell, member of the Inner Circle of Advocates,
author of *Case Framing*

“I was skeptical before I opened this book. What could be added to a subject covered almost as much as the presidential campaigns? Then Malone grabbed my attention and never let go. Now, having read through it, I can only say this is brilliant, genuinely insightful, and thought provoking.”

—Hon. Marcus Z. Shar, judge, Baltimore City (Md.)
Circuit Court, and former trial lawyer

THE FEARLESS
CROSS-EXAMINER
Win the Witness, Win the Case

PATRICK MALONE



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ALSO BY PATRICK MALONE

BOOKS

Rules of the Road: A Plaintiff Lawyer's Guide to Proving Liability by Rick Friedman and Patrick Malone

Winning Medical Malpractice Cases: With the Rules of the Road Technique by Patrick Malone with Rick Friedman

The Life You Save: Nine Steps to Finding the Best Medical Care—and Avoiding the Worst by Patrick Malone

VIDEO

Rules of the Road: Roadmap to a Winning System by Patrick Malone

To Vicki, always

There are only two mistakes one can make along the road to truth: not going all the way, and not starting.

—Anonymous (wrongly attributed to the Buddha)

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PUBLISHER'S NOTE

This book is intended for practicing attorneys. This book does not offer legal advice and does not take the place of consultation with an attorney or other professional with appropriate expertise and experience.

Attorneys are strongly cautioned to evaluate the information, ideas, and opinions set forth in this book in light of their own research, experience, and judgment; to consult applicable rules, regulations, procedures, cases, and statutes (including those issued after the publication date of this book); and to make independent decisions about whether and how to apply such information, ideas, and opinions to a particular case.

Quotations from cases, pleadings, discovery, and other sources are for illustrative purposes only and may not be suitable for use in litigation in any particular case.

The majority of cases described in this book are real cases and are cited appropriately. Sample questions and testimony, if not cited, spring from the author's brain only.

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INTRODUCTION

The Old Way, and a Better Way

In the scary, thrilling roller-coaster ride that we lawyers call “trial by jury,” no moment has our hearts seized in our throats more than when we stand up to cross-examine a difficult witness. We teeter between humiliation and triumph, abject failure and heroic rescue. And because humiliation and failure seem a lot worse than the possible rewards, we often give up long before the witness might give us what we seek.

It doesn't have to be this way. Cross-examination can be exhilarating, fun, and productive. Never easy, but nothing worthwhile is easy. With the right strategy and sound methods, we can conduct cross-examinations that bring us a lot closer to the victory line than the usual mediocre, cautious crosses we have been taught to do. And there's the problem—we grew up with bad advice.

Cross-examination has always nagged at me. It never felt natural, the way it was taught by the usual rules. It felt like putting on a massive suit of armor and hardly being able to walk under the mass of all the rules—not just rules, but commandments! Engraved in stone!—about never doing this and always doing that. Now and again, if I left the suit of armor in the closet and just engaged with the witness on a subject I knew well and felt passionately, the cross

would turn out fine. Why is that? Is it possible that the conventional wisdom is all wrong?

THE OLD WAY

The teachers who have indoctrinated the modern conventions of cross-examination are a dour, cheerless, self-absorbed lot. They start with the idea that the cross-examiner is always about to screw up, and the main task is for the lawyer to avoid looking bad. Not much solace there for your client. What could be worse than losing the case? Well, according to the commandment teachers, the lawyer looking like a buffoon on cross-examination. So they teach a hyper-cautious, superficial approach. Forget about trying to actually establish positive points for your case through the witness. All that stuff about cross-examination being the greatest invention for the discovery of truth—that works only for the genius lawyers. You ordinary souls: Concentrate instead on trying to rough up the witness with a few trick jabs, then sit down quickly before anyone realizes what you're up to.

Probably the worst aspect of the old cross teaching is the way it feeds lawyer egos by insisting that it's the lawyer's words that count in cross—that the best cross is all lawyer talk, punctuated by the occasional timid "yes" from the witness. This technique can be persuasive, if you can pull it off, but it's just about impossible to do for anything longer than three to four questions. Yet we're taught that we fail if we do not maintain rigid control with all-leading questions that demand simple one-word responses and that do not—ever!—tolerate explanations from the witness.

A BETTER WAY

After many years of trying cross-examination the commandment teachers' way, and then venturing to try it the way I see real trial lawyers win cases, I think these teachers are all wrong. I think we can do a lot better. I think we can win cases by preparing ourselves and preparing our cases in a different way, liberated from the usual

restraints. And effective cross-examination is a central piece of the new way of conducting trials.

I see the trial lawyer as a builder. We build our cases out of all the materials on hand, including whatever we can borrow or steal from our adversaries. Of course, every builder also does demolition work, so we do some of that too, but fundamentally, we are builders, not destroyers. That's especially true of lawyers on the plaintiffs' side, but it's true for defense attorneys too.

The first and fundamental mistake we make launching any cross-examination is thinking of the cross as demolition work, tearing down the witness. No, if we want to win the case, we must build, not simply tear down.

TEN TRUTHS

Here are ten truths I plan to demonstrate in this book:

1. Cross-examination is important. It may not turn around an otherwise losing case, but a good cross can lock in a victory margin and a bad one can seal your case's fate.
2. Much of the received wisdom about cross-examination—"don't ask one question too many," "ask only leading questions," and the like—is wrong, impossible to follow, and ill-focused.
3. Any smart, hardworking lawyer can become a good cross-examiner.
4. Cross-examination is a game of skill, not chance, that rewards practice and preparation. See number 3.
5. Excessive caution has ruined far more cross-examinations than excessive vigor.
6. An excess of ambition, on the other hand, can make a cross fall short, where more modest goals could have produced a successful result. Judgment and humility are important assets for the cross-examiner. They're difficult to cultivate because,

- at the same time, to be a good cross-examiner you must develop the self-confidence to face any witness without fear.
7. There is no such thing as an overly planned cross. Yet the peril and exhilaration of the process is the inability to plan everything. All the same, you can usually anticipate the witness's answers and plan for good rejoinders.
 8. A case-specific, witness-tailored strategy for cross-examination is far more important than obsessing over the style you use to ask questions.
 9. Cross-examination is a game of wits, something like a tennis match, but one the jury scores not on points but on the overall impression you and the witness create. Thus, the need to focus hard on your best topics, hit each sharply, and not waste time on the petty stuff.
 10. Instead of the old lawyer-talk, always-leading approach, what's far more persuasive, I believe, is when we can get witnesses to agree with what we want, and to say that in their own voices with their own words. Leading questions are an overrated tool.

Note that these are truths, not commandments. I reject the idea that anyone can distill a subject as complex as cross-examination to simple Must and Never commandments. I preach advice. Yes, there are some rules to follow, but you can profitably break these rules on occasion, except for the rules of evidence and procedure that the courts impose.

Speaking of rules, the Rules of the Road® method that I've written about twice before has much applicability to cross-examination.¹ Rules, as described in the prior two books, are nothing more than simple truths of human behavior. When we can boil our cases down to a set of simple rules and the principles behind them, winning

1. Rick Friedman and Patrick Malone, *Rules of the Road, A Plaintiff Lawyer's Guide to Proving Liability* 2nd ed. (Portland, OR: Trial Guides, 2010) and Patrick Malone with Rick Friedman, *Winning Medical Malpractice Cases: With the Rules of the Road Technique* (Portland, OR: Trial Guides, 2012).

concessions from opposing witnesses on cross-examination can become more straightforward in execution. As readers will see, the Rules of the Road method also helps us clarify our goals in cross-examining any witness. Even when this is a witness who will give up no agreements with our case, the Rules method can help guide the destructive cross-examination we must do.

A good way to see cross-examination, I've come to believe, is as a game of chess or tennis. You're playing to win, and your adversary is playing to win. No need to get agitated; it's better to try to anticipate the witness's next move and plan what you can do to forestall and frustrate that move, just like a good chess player tries to think ahead as many moves as she can crowd into her neural networks. And by the way, just as in a high-level chess match, we need to understand that this game of cross is a whole-body and whole-brain experience, not just an exercise in logic. Just as tennis is more than muscles at work, so too chess and cross-examination are more than brains at work. They involve the whole body too.

You will know this when you have just finished a successful cross-examination and, as your heart begins to slow, you realize you are bone-tired and will sleep well that night.

Here is how I've structured the book.

- ◆ Part 1, "You, the Cross-Examiner," is about you: the mental preparation needed to reach your full potential, the old ways that need to be thrown off and why, and an introduction to how to select and execute the type of cross-examination that fits each witness.
- ◆ Part 2, "Building the Case with Cross-Examination," is about building your case through cross-examination by winning witness agreement to important liability Rules of the Road that mean your client deserves to win. After exploring how we construct these case-building Rules, I will also focus on how to analyze the witness's self-interest and turn that to our advantage.
- ◆ Part 3, "Tearing Down the Witness," looks at the four ways we can tear down a witness's credibility, by showing lack of

fit for the case, ignorance and mistakes about key facts, bias, and contradictions. Each of these four strategies works well with a Rules of the Road approach.

- ◆ Part 4, “Problems and Solutions,” studies the common problems that derail cross-examination and the solutions to get our cross back on track: key evidence rules, bogus objections, the adverse party in our case-in-chief, runaway witnesses, and technique issues and their cures.
- ◆ Part 5, “Bringing It Home,” pulls together some overall lessons.

A side note about transcripts and names: Trial lawyering is an imperfect art, as I can see all too well when I look back over some of my own cross-examination transcripts, like some I have featured in this book. Too many books about trial practice make it seem all triumph and no trial, all glory and no stumbling. In some of these texts, transcripts are bleached of all blemishes and starched of all wrinkles. The cross-examiner slices up witnesses with effortless eloquence. We admire these practitioners and wonder why our own efforts seem so feeble and inarticulate in comparison. But do awe and discouragement really help anyone do better? I think not. So my antidote in this book is to present raw transcripts, edited only with an occasional ellipse of irrelevant material, sidebars at the bench and such.

I also try to always use real names except when there is a very good reason to protect someone’s identity. In those cases, I have indicated the name alteration. My fetish for real names probably stems from my days as a newspaper reporter, when editors would say mean things to us if we tried to slip anonymous people into our stories. For teaching lawyers, the reason I like real names is because it reassures us that these are real cases and real cross-examinations. In a few instances (and at my publisher’s insistence), I’ve omitted the names of the witness being cross-examined. Other than that, these are real, unedited transcripts from real cases.

Before we dive into the chapters, here is a blunt but fair question: Why listen to Malone? I’ve practiced this craft of trial

lawyering for thirty years, doing cross the old way and then the better way, and I know by painful experience what doesn't work and what does. For the last decade, I've taught the Rules of the Road method all over the country, and I've consulted with many trial lawyers building their cases. I have also reached out to some of the most successful trial lawyers I know to send me transcripts of cross-examinations that worked for them, and I've spent a lot of time studying their secrets of success. In this book, you will see many examples from these other lawyers of fine cross-examinations, with comments from me about how they work and why. The before-and-after difference for me boils down to two three-letter words:

- ◆ “Meh . . .” for the old-style cross that scores a few points but leaves the witness basically intact.
- ◆ “Wow!” for the new-style cross where the witness seems to mutate into a whole new person.

This book will give you the tools for more Wows and fewer Meh.

PART I

You, the Cross-Examiner

Let's begin by holding up a mirror to you, the reader. I said in the introduction, "Any smart, hardworking lawyer can become a good cross-examiner," but not without some introspection and honest self-study. This comes first because the rest of the book counts for little if I cannot help you tap into your core strengths and weed out the self-destructive habits and bad old learning that hold you back.

- ◆ So chapter 1, "Laying the Mental Foundation," starts with the person you must control in the courtroom before you can control any other: yourself. I show some effective techniques to manage stress and remain genuine in the heat of the battle. I look at the elements of a winning trial lawyer personality. And I harness the power of positive thinking and show how to set specific goals to help you get the most from this book.
- ◆ Chapter 2, "Freeing Yourself from the Ten Commandments of Cross," takes on all our deeply engrained but self-defeating

attitudes about cross, the ones we think we know, like “Never ask a question you don’t know the answer to,” or “Always ask leading questions,” but which I show to be wrong much of the time. We have to do “out with the old” before we’re ready for “in with the new.”

- ◆ Chapter 3, “Choosing the Weapons Right for You,” starts us down the path of building new methods of effective cross-examination. It shows how all of cross-examination falls into case-building or witness-destroying, how to choose the weapons to achieve each of these goals, and how to know when you’ve succeeded. This chapter will complete part 1 of the book and move us directly into case-building (part 2) and witness-destroying (part 3).

1

LAYING THE MENTAL FOUNDATION

If you know the enemy and know yourself, you need not fear the result of a hundred battles. If you know yourself but not the enemy, for every victory gained you will also suffer a defeat. If you know neither the enemy nor yourself, you will succumb in every battle.

—Sun Tzu, *The Art of War*

Since this is at heart a self-improvement book, we start with the “self,” as in yourself. Why does mastering self-control come before you can master control of the witness? And why can we see our own worst enemies only by looking without flinching into the mirror? Answering those questions with some practical mental housecleaning advice is my first goal in this book.

If you read only one thing in this book, please make it these next few pages. Because a big question looms now that you’ve invested in this book: Is this going to be yet another how-to-be-a-better-lawyer book that winds up on your bookshelf, half-read

and fully forgotten? Or will you invest the time and sweat equity needed to pull this book's lessons into your daily routine and take your practice to a higher level? We retreat from good advice just like we abandon New Year's resolutions, quietly and without really meaning to, but with the same self-destructive effect as if we'd set our hair on fire. Why do we give up, and what can we do to block the self-surrender and unlock our true potential?

It's not laziness and lack of resolve that defeat our efforts to improve cross-examinations (or any other aspect of lawyering). Probably the biggest obstacle is fear. Cross-examination is, after all, the one moment in trial when we face three opponents, each very vocal. We must fend off not only the opposing lawyer and the sometimes difficult judge, but a third adversary: a witness who wants to frustrate our efforts to make points out of his or her mouth. Facing three opponents at the same time can be pretty scary. Add to this the fact that cross-examination, even in the best of circumstances, is a high-risk, high-reward game, with ever-present opportunities for humiliation and triumph.

If you've thought about all this and still have never felt sheer terror when standing up to cross-examine a witness, you're a better human than I am, Gunga Din.

One way to respond to the fearful prospects is to retreat into a hyper-cautious style of cross-examination. This is the style that counsels, "never ask a question you don't know the answer to," and "save your point for closing," and other misplaced warnings that inhibit effective cross.

A better way to respond to Fear-of-Cross is to confront the fear and defeat it with emotional calisthenics and honest introspection. That may be even more important than exercises in the techniques of cross-examination, the technical aspects of which are not hard to learn. Oliver Wendell Holmes said, "The life of the law has not been logic: it has been experience," and we can now say that the life of the cross-examiner is not logic but the confronting of our own fears. Let's explore this idea in more depth by looking at stress and self-control. Then I will focus on stress-reduction techniques, a plan for motivating success, and some thoughts on positive thinking.

STRESS, SELF-CONTROL, AND CROSS-EXAMINATION

One way to look at cross-examination is through the lens of stress. Physiological stress—pounding heart, dry mouth, trembling hands—happens when we face a threat and need to figure out a response. Fight or flight? The answer depends on whether you are facing a threat you can control. Charging rhino bearing down on you? Unlikely you will control this threat, unless you're holding a high-powered rifle. Yapping witness whose own lawyer has just said, "No further questions," and now it's your turn? Maybe.

Cross-examination is at its core something much more profound than a clash of two brains, questioner versus witness. It's a stressful body-and-brain activity that we cannot understand until we know something about the biology of stress and risk-taking, and risk avoidance too.

All humans have a basic need to reduce stress. One effective way to do that is to take control whenever you can. It doesn't matter so much how demanding your job is; if you can control the situation, you do much better with stress. High-level corporate executives typically have less stress than mid-level managers, by objective biological markers, because they have more control.

As any cross-examination starts, one basic issue involves who will control the proceedings. It's a given that the lawyer wants control; that's an instinctive, self-preserving, stress-reducing reaction to the threat that any serious cross-examination situation poses.

Another important element of control in cross-examination is the judges' and jurors' *perception* of control. Judges and jurors generally like it when *you* stay in control, as long as you seem even-handed and fair. If you keep a loose hand on the reins, you'll do much better, by and large, than if you constantly jerk the bit tightly and fight the witness forever. That attorney, by the way, has lost the battle of perception even if he technically keeps the witness from straying too far from his tightly barked commands.

Jurors who are only paying half-attention to the *content* of the cross can see and instantly judge the *context* of the back-and-forth. Who shows calmer self-control? Jurors generally see that person

as the winner of the cross, as long as the answers don't blatantly contradict the perception. Who shows more stress? There shuffles the loser of the cross.

The lesson is that as hard as you work to control the witness, you must work even harder to control yourself.

One way to reduce stress as a cross-examiner is to just stop, or not even start: "No questions for this witness, Your Honor." But unless the witness hasn't hurt your case, you *must do something* to undermine the witness or the other side's case through this witness. When you stand up to do that, you are taking a risk that you will lose the match. And that thought is stressful. Your adrenal glands are squirting out cortisol, and this ancient fight-or-flight response is preparing your body to move, and fast, to either fight like hell or run as fast as your legs can carry you.

But right now your body is moving nowhere. You are in the middle of a courtroom, deciding what to do with a witness whom you now can ask any question you want. You want to venture forth in a way that takes some measured risk (otherwise you will just sit down), controls your own stress, and takes the witness where you want to go. Confronting your own internal demons is a first step to maximizing your returns by getting the right balance between risk and reward. Knowing what the witness will say is one way to stay in control and reduce stress, but that also minimizes your chances of obtaining a surprising, helpful concession from the witness. So one thing I teach in this book is plotting a cross-examination to deal with the unknown and surprising answer.

Stress plays a different, important role in cross-examination—enhancing the memory of the points you score in the brains of the jurors. They may not feel the same levels of stress that you and the witness feel in a hard-fought cross-examination. But bystanders engaged in watching verbal combat feel their own stress, and that's a good thing for us cross-examiners, because stress is the brain's memory drug. When our hearts begin to pound, our memory centers of the brain kick into work.¹ Bottom line: a cross

1. The studies on stress and memory (which at its extreme is the root cause of PTSD) are summarized neatly in James McGaugh's book *Memory & Emotion*,

that looks stressful, especially for the witness, is a physiologically memorable cross.

WALKING THE STRESS TIGHTROPE

How do we walk the stress tightrope, without making the cross such a low-stress event that we lose its memory-enhancing core? Here are some basic rules for modulating stress and achieving better self-control. These rules make sense when we understand the balancing act between risk, stress, and control that makes for the best cross-examination.

1. *Work hard to stay polite.* Yes, there are a few times that provocation is so bad that you have permission to drop the politeness and go bare-knuckled. But this happens less than you think. One big reason to stay polite is that it shows control and lack of stress. When you interrupt, yell, slam papers—you are showing that you've lost control over yourself. You get a big demerit, not because Miss Manners and Emily Post sit in the jury box, but because when you get mad, it looks like you're losing.
2. *Don't get mad.* See above. The general rule is this: whoever gets mad first in a cross-examination is the loser of the bout. You do have permission to get mad second, but only rarely.
3. *Keep your tone and volume even.* It's so easy to veer into sarcasm, or pump our volume up to eleven on our internal amplifier when we want to best a nonresponsive witness. Those methods don't work! When the witness grows louder, you grow softer. When the witness gets nasty, you stay even. This will help keep your stress down and show that you're the winner.

4. *Stay your genuine self.* Some lawyers like to cuddle up to an adverse witness at the start of the cross. “Good morning, Mrs. Cleaver, I hope you’re having a wonderful day,” oozes lawyer Eddie Haskell, with elaborate and phony sincerity. Polite is one thing; obsequious is something else. Jurors know you’re there to undermine the witness, so get on with it. You can do it in a courteous, businesslike way without the fake preamble.
5. *Listen, listen, listen.* You ask a carefully honed yes-or-no question, and the witness responds with a narrative. You go into a slow burn and don’t even hear the answer, you’re so mad. Finally, you bark: “That was a yes-or-no question!” The witness responds, “But I was agreeing with you, counsel.” Guess who just lost that exchange? The antidote: Listen to every answer, and build from the answer. Don’t so obsess with tight control that you lose track of when you are getting meaningful agreement.
6. *Embrace risk in measured doses.* Throughout this book, I will show you how to take prudent risks in your cross-examinations that will get you much better results than the overcautious, risk-avoidant style that baby lawyers learn. Some level of stress, in you and the witness and hence in your bystanders, is necessary.
7. *Don’t accuse the witness of lying.* Let jurors reach their own conclusions. If it’s obvious the witness is lying, your accusation will add nothing, except to ratchet up everyone’s stress level. If it’s not obvious, you will look bad.
8. *You can start nice and finish mean, but you can never start mean and finish nice.* I stole that line from San Francisco attorney Mike Kelly. When you start mean and finish nice, you expose yourself as a phony. Let the witness give you a reason to turn mean, and it has to be something pretty flagrant, approaching out-and-out perjury. When you start nice, you are calm and in control.
9. *Hit the reset button when you feel yourself losing control over your own emotions.* Ask for a recess, pour yourself a

glass of water, whisper a few words to co-counsel—a timeout of even a few seconds usually works.

10. *Be aware of your stress level and manage it.* Pay as much attention during trial to reducing your stress level as you do to deposition digests and proposed jury instructions. There are lots of reasons for this. For starters, chronic stress is bad for your health in an amazing variety of ways, from your heart to your digestive system to your sex life. But as a cross-examiner, stress modulation is simply an important element for victory, because it makes for calmer, more in-control examinations. Figure out what works for you: jogging, meditation, a few deep regular breaths, prayer, timeouts during trial—whatever it takes to blow off the steam and bring you to calm. And once you're in that quiet place of mindfulness, you may just discover a whole new level of insight into your work.

BUILDING A BETTER YOU, AND A BETTER CROSS-EXAMINER TOO

The place where I want you to come out, before we get to the law stuff, is being true to yourself and true to your mission at the same time. Think about it this way.

The successful cross-examiner is:

- ◆ **Self-confident.** But self-confidence without truth is just cockiness, and reckless too.
- ◆ **Persistent.** But persistence without a worthy goal is just bullying.
- ◆ **Humble.** Because self-knowledge keeps us tethered to the ground and connected to the jury.
- ◆ **Genuine.** The sum of all the above.

Getting there is a balancing test that takes a while to master and that you must revisit in every trial, and from moment to moment within the trial.

The Winning Trial Lawyer Personality through the Ages

In his 1903 classic, *The Art of Cross-Examination*, Francis Wellman said this about lawyer personality and demeanor in the courtroom:

The counsel who has a pleasant personality; who speaks with apparent frankness; who appears to be an earnest searcher after truth; who is courteous to those who testify against him; who avoids delaying constantly the progress of the trial by innumerable objections and exceptions to perhaps incompetent but harmless evidence; who seems to know what he is about and sits down when he has accomplished it, exhibiting a spirit of fair play on all occasions—he it is who creates an atmosphere in favor of the side which he represents, a powerful though subconscious influence with the jury in arriving at their verdict.

On the other hand, the lawyer who wearies the court and the jury with endless and pointless cross-examinations; who is constantly losing his temper and showing his teeth to the witnesses; who wears a sour, anxious expression; who possesses a monotonous, rasping, penetrating voice; who presents a slovenly, unkempt personal appearance; who is prone to take unfair advantage of witness or counsel, and seems determined to win at all hazards—soon prejudices a jury against himself and the client he represents, entirely irrespective of the sworn testimony in the case.²

Wellman paced some of the toughest courtrooms in New York City for many decades. He must have done something right in stress control, because he lived to age eighty-seven.

2. Francis L. Wellman, *The Art of Cross-Examination*, (1903; repr., New York: Touchstone, 1997), 34.

SUCCESS STARTS WITH GOALS

So how do we move past the failed New Year's resolutions and begin improving our lawyerly selves? Let's look way, way outside the law for some tips: to bodybuilders. Not that I find their overly muscled bodies all that attractive, but in a society like ours bloated with an obesity epidemic, when you find a group of people who have the self-discipline to diet and exercise their way to chiseled transformations, attention must be paid. Tom Venuto, a personal trainer, wrote a popular book, *Burn the Fat, Feed the Muscle*,³ with four steps: the second, third, and fourth of which are nutrition, cardio exercise, and weight training. No surprise there. But his first step, before all those, is mental training. I borrowed and adapted the following how-to-succeed list from Venuto and other sources:

1. Set specific, measurable goals.

In cross-examination, this means moving beyond the vague "I want to be a better lawyer." Your goals can vary depending on the strengths and weaknesses you start with, but could include, for example, "I will get one witness within the next ___ months to admit the truth of a major element of my case." The goals need to be specific enough that you can measure results.

2. Set big but attainable goals.

There's no sense being modest about what you want to achieve. Tiny, partial victories aren't enough. Look at some of the transcripts in this book that you want to emulate, and then do it. (And send me your own transcripts for the second edition!)

3. Set realistic deadlines, and break them down into short-term and long-term goals.

Ask yourself: What am I going to do today to start the journey of becoming a better cross-examiner? Every day, or at least every week, you should have some specific new habit or technique you're working on. Then there are longer-term goals: every three months, or six months, or at least in

3. Tom Venuto, *Burn the Fat, Feed the Muscle* (New York: Harmony Books, 2013).

a year—what is the goal at each interval? Set the goals and write them down.

Some of the chapters in this book are self-contained enough to lend themselves to short-term goals. For example, chapter 6, “Using Treatises to Get to Yes,” and chapter 15, “Evidence Rules Every Cross-Examiner Must Know,” each gives you the opportunity to cross some technical hurdles in the Rules of Evidence. These chapters will equip you with new, specific weapons for better cross, all in the time it takes to read the chapter and try it out once or twice in your own cases. It starts with a goal as simple as, “I will learn how to effectively use an adverse witness to put in front of the jury literature quotations that help my side.”

A more medium-term goal might be, “I will master the elements of ‘contradictions cross’ and how and when to deploy this type of cross.” This requires pulling together organizational skills (chapter 7), contradictions-cross techniques (chapter 9), witness analysis (chapter 5), and witness control methods (chapter 18), so it’s going to take a little longer than mastering a specific evidence rule for cross.

And a long-term goal could be, “When I stand up to cross-examine, I will feel less anxiety and more eagerness.” When that happens, you will know you have absorbed some of the major lessons of this book, but it won’t happen overnight.

4. Establish the emotional reasons why you want to achieve your goals.

We have both positive and negative reasons why we want to do better. A simple list for the trial lawyer could include:

- » I want to avoid being humiliated when I stand up to cross-examine.
- » I want to be admired.
- » I want to make more money.
- » I want to win more cases.
- » I want to do a better job for my client in my next trial.

This list is intended to be frank, and so I'm not censoring out the less admirable goals. If we cannot be honest with ourselves, it's hard to be honest with others.

5. Write out a list of goals. Make them positive affirmations. Read them to yourself regularly.

What's the point of reaffirming our goals repeatedly and sounding them out?

Now we wax a little woo-woo: the power of positive thinking. But it happens to work. So bear with me.

POSITIVE THINKING: IT WORKS FOR CROSS-EXAMINERS TOO

We all know, yet mightily resist, the truth that, to quote Pogo, "We have met the enemy and he is us." We defeat ourselves because secretly we don't think we deserve success. What other explanation is there for the choices we regularly make: to persist in bad habits, to put off to some rainy day the self-improvement that we know would make us happier than we are now? You don't have to be an apostle of Freud to know that our subconscious has a way of undermining our best intentions.

So what do we do about it? Simple:

- ◆ We change the soundtrack that loops through our brains by setting simple, concrete, positive goals.
- ◆ We put our goals in the present.
- ◆ We visualize them as having already occurred.
- ◆ We remind ourselves of them over and over.
- ◆ We let the body follow the mind.

There—I've just summarized a library's worth of self-improvement books, all of which preach the same basic message. Why? Because it's effective if you follow it. From Napoleon Hill's Depression-era

classic *Think and Grow Rich*⁴ to Norman Vincent Peale and motivational speakers like Tony Robbins and Zig Ziglar, all espouse the same basic secret: focusing on the positive will help you get there. We're not talking about giddy self-delusion, but making the most of what you know you have.

TAKEAWAYS

- ◆ Cross-examination is a skill that you can learn, just like judo or playing the guitar. It takes persistence, practice, and attention.
- ◆ Learning to keep your own emotions under control is even more important than learning to control the witness. The jurors' perception that you are under better self-control than the witness is key to the impression you want to create.
- ◆ The skilled cross-examiner is self-confident and persistent, yet humble. And genuine too.
- ◆ Set realistic, measurable goals concerning what you want to achieve as a cross-examiner. That applies to each witness you cross-examine, and to your growth as a better cross-examiner. Keep a positive attitude, practice, and watch yourself grow.

Exercise

Decide on a goal for improving your cross-examination in the next thirty days. Make it as specific as you can. (Suggestion: Look over the table of contents and pick a chapter that deals with something you know you're weak in. Stress and fear are a good place to start.) Stick this goal in your calendar and review it a month from now. Then set another goal.

4. Napoleon Hill, *Think and Grow Rich* (Cleveland: The Ralston Society, 1937).