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CROSS-EXAMINATION CONTENT AND THE “POWER OF NOT”

By Patrick C. Brayer



One of the challenges in constructing an impactful cross-examination (cross) is creating content. Many trial attorneys can effectively identify issues in the discovery process but fail to communicate to the fact finder the power of the facts as they relate to the case.¹ Depositions can be artfully conducted and interrogatories expertly administered, but if the presenter of the evidence is unable to translate basic facts into vivid images and stories, then once-dominant discovery revelations can often be reduced to tepid references.² After years of preparing one case, many trial attorneys are so hardened to the basic facts that they fail to emphasize in cross the importance of obvious, yet highly influential, pieces of evidence.³

While observing one recent high-profile (and widely publicized) cross-examination, one legal analyst commented, “in fact, the lack of theme right now is a big question that myself and a lot of other people are thinking about because there hasn’t been a specific overarching theme other than ‘let’s show everybody in America a bunch of embarrassing messages that are tasteless and wrong.’”⁴ Without the benefit of themes and thematic devices during cross-examination, perceived self-evident facts can become less powerful. The power of cross-examination comes less from a fact being spoken and more from a fact being contextualized, contrasted, and pictured. A fact that embarrasses can also humanize a witness if the cross-examiner fails to advance an organized narrative.⁵

For example, if a cross-examiner hopes to prove a witness was overusing alcohol, they can benefit by seeking more than admissions of alcohol abuse.⁶ The examiner can also paint a picture of sobriety and establish how the witness’s actions failed to create an image of substance moderation. The listing of a series of obvious facts becomes more impactful when reframed as part of a vivid narrative.

What Is the “Power of Not”?

A technique that reframes seemingly self-evident facts into potent consideration points is the use of negative phrased or contrasting themed leading questions⁷ to tell a story or paint a picture.⁸ I refer to this simple technique as the “Power of Not.”⁹ This practice is an easy way to build argument into cross without being argumentative or legally repetitive. For example, every traffic sign that says “STOP” is not only a stop sign but also *not* a yield sign, *not* a proceed with caution sign, and *not* a slowdown sign—it is a stop sign. Any other sign is something very different from a stop sign. Each time we consider this contrast, we linger on what a stop sign truly means, and we imprint a visual of the stop sign in our mind.¹⁰

Building small chapters¹¹ or stories¹² about what something or someone is *not* is a way to bring power to obvious facts, so they become consideration points for judges and talking points for jurors. If certain facts are not given power and contrasted in cross-examination, a self-evident winning case can easily be lost.

In some cases, cross-examinations can continue for hours, days, or weeks. Fact finders will often fail to detect the significance of a particular detail unless the trial attorney is successful



TIP: To emphasize a point on cross-examination, create a visual by asking a series of negative leading questions that describes the absence of a fact.

in signaling how that fact embodies power within the case.¹³ Jurors get bored and distracted; their minds wander, and they are not always completely engaged. The Power of Not is an easy way for the litigator to reengage the listener, call them to action, and provide them with an important visual to argue in a jury room or to consider in a judge's chambers.

A series of leading questions that articulates how an event did not happen, an object was not present, or a person did not act in a particular way is a means to empower an expression of one basic circumstance that normally could be uttered in one easy efficient question. In the context of cross-examination, efficiency can often become the enemy of conveying and emphasizing the important. That one fact that is conveyed by only one question may never linger on a judge's mind or never find action in a deliberation room as a talking point for a temporarily distracted yet allied juror who could advance the case.

To build value into a cross-examination, add a series of "did not," "was not," or "never" leading questions to that one "did" or "was" leading question when it is time to emphasize a point of power on cross. Additionally, try using positively phrased questions when that proposition proves opposing counsel's narrative is "not" accurate. Take these statements for example: "You did not always pay the rent on time." "You never paid the rent on time." "You paid the rent late each month." These are all equally powerful ways to subtract from opposing counsel's narrative of their client being a good roommate. Use any question structure that matches your style, your case, and the larger goal of the chapter—just be sure to build it around other leading questions that generally convey the same point.

A Real-World Example

On November 18, 2021, Linda Dunikoski, an experienced Georgia assistant district attorney and litigator, engaged in the cross of defendant Travis McMichael.¹⁴ Her stated goal was to convict McMichael for the murder of Ahmaud Arbery, an unarmed Black man who was gunned down while jogging in a predominantly white neighborhood just outside of Brunswick,

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Georgia.¹⁵ By many accounts, her cross of the defendant was highly effective and was streamed nationwide by media and online platforms.¹⁶ McMichael, along with two others, was convicted and received a sentence of life imprisonment without the possibility of parole.¹⁷

Relevant to this piece is how Dunikoski crafted her cross-examination questions to include a segment that demonstrated how McMichael "did not" see Arbery engage in any threatening acts. She could have taken an efficient path by simply asking what he was doing. One example would be, "When you first see him, he is just running?" Dunikoski did not allow the efficient to be the enemy of conveying the power of the fact. In a very work-like and measured approach, she advanced the following sequence of negative leading questions:

Linda Dunikoski: "And at this point in time, when you first see him on Burford, he's not reaching into his pockets."

Travis McMichael: "No, ma'am. Not—no, ma'am."

Linda Dunikoski: "And he never yelled at you guys?"

Travis McMichael: "No, ma'am."

Linda Dunikoski: "Never threatened you at all?"

Travis McMichael: "No, ma'am."

Linda Dunikoski: "Never brandished any weapons?"

Travis McMichael: "Yeah, he did not threaten me verbally, no ma'am."

Linda Dunikoski: "All right. Didn't pull out any guns?"

Travis McMichael: "No, ma'am."

Linda Dunikoski: "Didn't pull out any knife?"

Travis McMichael: "No, ma'am."

Linda Dunikoski: "Never reached for anything, did he?"

Travis McMichael: "No."

Linda Dunikoski: "He just ran?"

Travis McMichael: "Yes, he was just running."¹⁸

This simple yet impactful chapter of statement-type leading questions was able to focus the jury on what was important. Dunikoski drew a frame around the simple fact that McMichael saw Arbery running and *only* running. The mere image of a man running means much more when it is placed in the context of

what it is *not*. With each simple “not” and “never,” this seasoned prosecutor was able to convey micro-arguments in cross about McMichael’s flawed state of mind.¹⁹

What drew my attention to this segment of Dunikoski’s work was how multiple broadcasters played this specific segment numerous times on news platforms as an example of McMichael’s cross-examination. It appeared her use of negative-phrased leading questions had an impact on the media, which was seeking to give a brief flavor of how the accused withered on the stand. From hours of trial footage, Dunikoski’s use of the Power of Not appeared as the most effective way to display the story and paint a picture of how McMichael murdered Arbery without cause.

How to Build Power of Not Content

The purpose of utilizing a Power of Not technique is to build cross-examination content that will emphasize dominant points in your theory of the case. This approach frames cross-examination as a series of pictures painted by leading questions. The more dominant—and dominantly obvious—a cross-examination point helps the case, the more that chapter or sequence of questions could benefit from a visualization technique. The Power of Not is one imagery method that contrasts the perfect depiction your opposing counsel hopes to convey on direct examination with the more realistic picture you can frame through your cross.

In preparing a cross-examination, start with identifying several scenes you want to be visualized by the fact finder. These scenes should be durable mental pictures intended to last in the mind of the jury or judge. Then, construct the picture your opposing counsel intends to construct. Try to contemplate their perfect visual of the same set of factual scenes you want to be imagined. Ask yourself, “What image would opposing counsel create in the mind of the fact finder, regardless of the facts?” and “If opposing counsel were not constrained by reality or rules of evidence, what would they want the jury to visualize?” Work toward contemplating this opposing scene, and invest time in seeing it in detail. Once the opposing picture is created in your mind, list how the stated facts are *not* consistent with that picture, and incorporate the words “not” or “never” into every factual listing you make. Once you have exhausted the addition of all negating terms, force yourself to keep listing as you also consider positively phrased facts that establish the opposing narrative is not accurate.

For example, imagine that you want the jury to visualize how your client (accused of trespassing) acted appropriately when they entered a piece of property. First contemplate opposing counsel’s perfect image of your client’s actions; opposing counsel wants the jury to see an individual who violated the property in every way. In this opposing image, you see your client in every corner of this property entering every structure and trampling

every inch of ground. The next step is to list every way discovery proves how this image is not a true picture—your client did *not* go into the backyard, *not* into the side yard, *not* into the garage, *not* onto the deck, *not* into the house, and *not* onto the front grass. Instead, your client stayed on the walkway, went to the front door, and rang the doorbell. This would be a short example because your client did *not* enter any room in the house. Additionally, each room could be listed as part of this preparation exercise for cross.

To frame your visual on cross of a witness who saw your client on the property, create content from the most powerful entries on your list that convey the vivid imagery of your story. The fact that your client did *not* go into the backyard and did *not* go into the side yard may have significance and emphasize the point that your client stayed on the designated path to the front door. The fact that your client did *not* go into the kitchen

In preparing cross, contemplate the opposing scene, list how the stated facts are not consistent with that picture, and incorporate “not” or “never” into every factual listing.

or bathroom may be seen as excessive and unnecessary to create a powerful visual of your client on the walkway. This technique also visualizes to the fact finder what the actions of a real trespasser are in contrast to your client’s actions. This contrast serves as a micro-argument in cross that is not objectionably argumentative. Make sure to use this technique sparingly, remembering the purpose is to distinguish a few important areas of inquiry from the rest of the examination.

Ann MacDonald, an experienced trial attorney of high-profile cases and a partner at ArentFox Schiff in Chicago, explains that one of her “trial practice mentors always reinforced the importance of repetition for a jury, saying you should ‘Show, and Tell, and Show Again.’ The ‘Power of Not’ takes this to another level with a creative way to reinforce important things while keeping the jury interested.”²⁰

Law professor and University of Missouri–Kansas City (UMKC) trial advocacy scholar Michaelle Tobin finds value in this method as a teaching tool in addition to its use in cross-examination.²¹ Tobin believes that “contemplating what is absent in a case forces trial advocacy students to reframe how they look at the facts and prompts them to broaden their search for stronger

themes and theories.”²² Tobin also teaches law students to detect missing factual elements as a way to understand the law and better comprehend rules of evidence and procedure.²³

Some advocates have warned against the use of negative leading questions, arguing the responding answer can be confusing.²⁴ Despite this warning, I avoid asking witnesses “yes or no” questions, solely intending to make answering easier for the witnesses.²⁵ My style is consistent with Dunikoski’s example above; I prefer to state the answer to the witness in cross-examination, even if it contains a “didn’t.” I tell the witness in cross what they did or didn’t do and/or what they did or didn’t see. If the Power of Not is delivered with conviction, then the jury imprints the

Advancing a concept by framing what that concept is not is a powerful way of imprinting an idea into the mind of a fact finder.

visual of the story from the questions and is not easily confused by a “yes or no” answer. In the case of McMichael’s cross-examination, I suspect both the jury and the viewing public fully comprehended the deadly meaning of each leading question—styled as a statement—and the killer’s ensuing response.

The History of the Power of Not

Establishing a concept by emphasizing a “system of oppositions” is not a modern technique.²⁶ This connection between absence and presence, labeled as “negation” by some theorists,²⁷ is well established in the sciences of logic, linguistics, mathematics, and grammar. “Binary opposition,”²⁸ a form of negation that emphasizes extreme opposites, is considered a structural methodology used to organize everything from political thinking to literature.²⁹ An example of binary opposition is seen when philosophers explore the idea of “good” by analyzing what is “evil.”³⁰ Similarly, the binary of the hero in contrast to the villain is often used in cinema and television to create a narrative of the virtuous.³¹ The commonly seen depiction of the good sheriff protecting a vulnerable small western town becomes more vivid when a malicious gang of marauders is introduced into the story. In reality, a trial attorney can use this tool of proof by contradiction to bring narratives and visuals to cross.

The Power of Not also has roots in law and advocacy. The distinction between affirmative deeds and omissions has been a traditional area of inquiry in tort law.³² In trial work, some advocates have embraced the idea of using “negative cross-examination questions” to demonstrate what a witness should have

done or failed to do.³³ Experts on cross-examination, like Larry Pozner and Roger Dodd, utilize similar “factual variations” from the desired answer as a technique to control the uncooperative witness.³⁴ They call this method “Elimination” and propose its use when a witness refuses to give a responsive answer in depositions or at trial.³⁵ Interestingly, early iterations of the Power of Not in cross-examination can be found in the practice of American litigators dating back to 1875—questions like, “Did he make any threats?” “He did not.” “Did he exhibit any violence?” “He did not.”³⁶

Unfortunately, binary thinking is tragically tied to racism, implicit bias, and gender discrimination.³⁷ Early 20th-century litigators combated this form of racism by cross-examining what law enforcement “did not” do or failed to do to protect Black citizens.³⁸ Clarence Darrow exposed racist police binary thinking in the Detroit murder trial of Dr. Ossian Sweet by utilizing binary opposition (or the Power of Not) in cross-examination.³⁹ Darrow painted a vivid picture (on cross) of what a good police officer should have done in the situation, but used “no” answers to show how the officers failed in their duty because Dr. Sweet was Black. Famed cross-examiner and Chicago public defender Terry MacCarthy calls Darrow’s method putting the witness in the “no mode” and recommends “grouping negatively phrased questions together” to gain an advantage on cross.⁴⁰

As I reflect on how negative cross-examination questions have historically been used to combat hatred, I am reminded of the biblical phrase “bring to nought.” It is taken from a scripture describing evil as being rendered ineffective.⁴¹ Regarding Darrow, he certainly brought evil to “not” examining one of Sweet’s white neighbors at trial when asking, “I suppose you didn’t want Dr. Sweet as your neighbor?” “You didn’t want him in your neighborhood, did you—any colored man?” “You didn’t want him there?”⁴² After equivocating on the initial questions, the witness was finally forced to relent and admit to Darrow with an answer of “no,”⁴³ and his meaning was clear to all.

Establishing a proposition by exploring what that proposition is not emerges logically when questions are used to advance a narrative. For both advocate and layperson, this method can be self-evident when seeking to advance a powerful point through leading questions. For me, the use of the Power of Not came naturally as I conducted hundreds of cross-examinations throughout my public defender career. The quickest and most efficient way to convey a narrative on cross was to throw in a few “nots” or “nevers” and let the contradiction emphasize the imagery of the story. In addition, I used positive-phrased leading questions to emphasize what *did* happen when what happened was *not* consistent with opposing counsel’s story.

If you ponder the Power of Not in a more casual context, you will see that this technique is second nature to any layperson who has had or has been a bad roommate: “You say you are a great roommate? You don’t do the dishes, you don’t pay

the rent on time, you never clean your dirty clothes, you never turn off the television, you don't take out the garbage, and you leave old pizza and beer cans everywhere! You? A good roommate?" I suspect this method dates from the ancient evolution of language and when the earliest of humans started living together as friends and partners.

Conclusion/Practice Tip

What I refer to as the "Power of Not" is a method that has been incorporated into casual and professional settings for ages. More importantly, it is a technique that individually evolves from the unique interaction between cross-examiner and witness. When a litigator endeavors to emphasize a fact, paint a picture, or tell a story, they benefit by expanding beyond the efficiency of asking one comprehensive question to obtain one answer. Asking a series of leading questions to detail the absence of a thought, thing, action, or occurrence is a way to expand cross-examination content and make the facts more graphic. This process informs the overall approach to the case by prompting the litigator to delve deeper into the narrative, while considering the impact of what *did* and *did not* happen.

This technique can be put into action by envisioning opposing counsel's perfect picture of events, then listing how that picture fails to comply with the reality of the situation. This list is then translated into leading questions akin to statements and grouped into chapters, stories, or sequences on cross-examination. The examiner on cross posits a point by structuring the leading question in a negative by using words like "did not" and "never." This method should be used sparingly and utilized to communicate the most impactful and intense images.

Advancing a concept by framing what that concept is *not* is a powerful way of imprinting an idea into the mind of a fact finder. This method has evolved over time, but the original concept is found in the earliest teachings of "good and evil."⁴⁴ The power of "bringing to nought" is still used to this day as a cross-examination tool that promotes justice by exposing hate and revealing the truth. ◀

Notes

1. See Donald G. Kempf Jr., *The Language of Cross-Examination: Use K-Words*, in *YOUR WITNESS: LESSONS ON CROSS-EXAMINATION AND LIFE FROM GREAT CHICAGO TRIAL LAWYERS* 120, 121–23 (Steven F. Molo & James R. Figliuolo eds., 2008).
2. *Id.*; see also TERENCE F. MACCARTHY, *MACCARTHY ON CROSS-EXAMINATION* 4, 11 (A.B.A. 2007).
3. Michael D. Monico, *The Little Things Can Mean a Lot*, in *YOUR WITNESS*, *supra* note 1, at 231, 232.
4. Court TV, *Johnny Depp on Cross-Examination Pt. 1*, *YOUTUBE*, at 01:23 (Apr. 21, 2022), <https://www.youtube.com/watch?v=oaKtwWkiQZ8> (comments of criminal defense attorney Josh Schiffer).
5. *Id.*
6. See Law&Crime Network, *WATCH LIVE: Day 7—Johnny Depp Testifies under Cross Exam—Defamation Trial against Amber*

Heard, *YOUTUBE* (Apr. 21, 2022), <https://www.youtube.com/watch?v=1loamyPv9aA>, for an example of a cross-examination that seeks admissions of alcohol abuse without contrasting images of sobriety.

7. See LARRY POZNER & ROGER J. DODD, *CROSS-EXAMINATION: SCIENCE AND TECHNIQUES* 12 (3d ed. 2018), for an explanation of how to format a leading question.
8. MACCARTHY, *supra* note 2, at 92–93.
9. The "Power of Not" is a phrase I utilized (since the late 1990s) when teaching public defender interns in St. Louis County, Missouri, how to create content for cross-examination. I first used the phrase in a formal presentation to the Louisiana Public Defender Training Institute in 2012 titled "Cross-Examination: Art, Storytelling or Science?" (on file with author). See also KEVIN BOYLE, *ARC OF JUSTICE: A SAGA OF RACE, CIVIL RIGHTS, AND MURDER IN THE JAZZ AGE* 274–75 (2004), for an example of Clarence Darrow using a form of this technique in 1926.
10. See NICK LACEY, *NARRATIVE AND GENRE: KEY CONCEPTS IN MEDIA STUDIES* 64–66 (2000).
11. See POZNER & DODD, *supra* note 7, at 12 (defining "chapter").
12. See MACCARTHY, *supra* note 2, at 11, 90.
13. Kempf, *supra* note 1, at 121.
14. Tariro Mzezewa et al., *Prosecutor Challenges Assailant on Whether Arbery Posed a Threat*, *N.Y. TIMES* (Nov. 18, 2021), <https://www.nytimes.com/2021/11/18/us/ahmaud-arbery-travis-mcmichael-testimony.html>.
15. Richard Fausset, *How a Prosecutor Addressed a Mostly White Jury and Won a Conviction in the Arbery Case*, *N.Y. TIMES* (Nov. 25, 2021), <https://www.nytimes.com/2021/11/25/us/prosecutor-white-jury-conviction-ahmaud-arbery.html>.
16. See, e.g., Mzezewa et al., *supra* note 14.
17. Richard Fausset, *Three Men Sentenced to Life in Prison in Arbery Killing*, *N.Y. TIMES* (Jan. 7, 2022), <https://www.nytimes.com/2022/01/07/us/mcmichael-bryan-sentencing-ahmaud-arbery-killing.html>.
18. For a transcript of court proceedings, see Steve Fennessy & Jess Mador, *Georgia Today: Reporter Reflects on the Ahmaud Arbery Trial and Where Brunswick Goes from Here*, *GPB NEWS* (Dec. 3, 2021), <https://www.gpb.org/news/2021/12/03/georgia-today-reporter-reflects-on-the-ahmaud-arbery-trial-and-where-brunswick-goes>.
19. *Id.*
20. Email from Ann MacDonald, Partner, ArentFox Schiff LLP, to author (May 18, 2022) (on file with author).
21. Email from Michaelle Tobin, Clinical Professor, UMKC School of Law, to author (May 18, 2022) (on file with author).
22. *Id.*
23. *Id.*
24. Gerald A. Klein, *The Art of Cross-Examination*, *OCTLA GAVEL* (Fall 2010), <https://www.kleinandwilson.com/publications/the-art-of-cross-examination> ("When asking leading questions, avoid double negatives. For example, it is sufficient to ask the witness whether he signed the contract to get the answer of 'no.'").
25. See MACCARTHY, *supra* note 2, at 77–83.
26. LACEY, *supra* note 10, at 64–65.
27. *Negation*, *STAN. ENCYCLOPEDIA OF PHIL.*, <https://plato.stanford.edu/entries/negation> (last revised Feb. 20, 2020).
28. "Binary opposition" is defined as "[a] pair of mutually-exclusive

signifiers in a paradigm set representing categories which are logically opposed and which together define a complete universe of discourse: for example, alive or dead. In such oppositions each term necessarily implies its opposite and there is no middle ground.” *Binary Opposition*, OXFORD REFERENCE, <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095506296> (last visited Aug. 1, 2022).

29. LACEY, *supra* note 10, at 64–65; *see also* RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 67–74, 142 (2001).

30. Michael Sinding, *Against Opposition: Review of Nick Lacey, “Narrative & Genre”* (2002), https://www.academia.edu/39413529/Against_Opposition_Review_of_Nick_Lacey_Narrative_and_Genre._New_York_St._Martin_s_P_2000.

31. *Id.*

32. DAN B. DOBBS, *THE LAW OF TORTS* 62–63 (2000) (“[A] hospital is under a duty to protect patients from attack, and a knowing failure to do so might be thought of as a battery by inaction.”).

33. Jarrett Stone, *2 Best Types of Cross Examination Questions*, LAW VENTURE (Apr. 14, 2022), <https://lawventure.com/2-best-types-of-cross-examination-questions> (“Negative questions can be extremely powerful because they show that witness had the opportunity to make the right decision, however, the witness *chose* not to do so.”).

34. POZNER & DODD, *supra* note 7, at 387–89.

35. *Id.*

36. FRANCIS L. WELLMAN, *THE ART OF CROSS-EXAMINATION* 121–23, 158 (2d ed. 2008).

37. DELGADO & STEFANCIC, *supra* note 29, at 67–74; *see also* Patrick C. Brayer, *Gender Non-Conforming Expression and Binary Thinking: Understanding How Implicit Bias Becomes Explicit in the Legal System, Considering the Shooting Death of Philando Castile*, 55 GEO. AM. CRIM. L. REV. ONLINE (2018), <https://www.law.georgetown.edu/american-criminal-law-review/aclr-online/volume-55/gender-nonconforming-expression-and-binary-thinking-understanding-how-implicit-bias-becomes-explicit-in-the-legal-system-considering-the-shooting-death-of-philando-castile>.

38. Marcet Halderman-Julius, *Clarence Darrow’s Defense of a Negro*, in CLARENCE DARROW’S TWO GREAT TRIALS: REPORTS OF THE SCOPES ANTI-EVOLUTION CASE AND THE DR. SWEET NEGRO TRIAL 62 (1927).

39. *See* BOYLE, *supra* note 9, at 274–75; *see also* MACCARTHY, *supra* note 2, at 92–93.

40. MACCARTHY, *supra* note 2, at 92–93.

41. *Hebrews* 2:14 (American Standard Version) (“that through death he might bring to nought him that had the power of death, that is, the devil”).

42. *See* BOYLE, *supra* note 9, at 275–76.

43. *Id.*

44. *Hebrews* 2:14.