Paul-Erik Veel
416-865-2842
pveel@litigate.com

February 5, 2026

On Litigation

In a series of LinkedIn posts (compiled below), I am posting about litigation and legal practice under the banner “On Litigation”. The goal is to build a connected series of short reflections on what it means to be an effective litigator – one post at a time.

Part 1: Introduction

Those who know me know that, in addition to practicing law, I love to write. Over the years, I’ve written full-length journal articles, book chapters, and a steady stream of blog posts. But I’ve always wanted to write a book.

The topic I’ve long envisioned tackling in book form is broad: litigation. When I say “litigation,” I don’t just mean courtroom advocacy, although that’s certainly part of it. There are already excellent texts devoted to oral advocacy. What I have in mind is something broader: a synthesis of the insights, habits, approaches, and decision-making frameworks that great litigators rely on to navigate complex disputes. Put differently, what are the skills, strategies, and tactics that underpin success in complex litigation?

A great litigator, in my view, is someone who can shepherd a dispute from start to finish –maximizing the likelihood of achieving outcomes that matter to the client. I’ve had the privilege of working with and against some exceptional litigators in the course of my work. From observing them, I’ve come to believe that great litigators tend to combine many (if not all) of the following:

- Command of procedure and the rules of evidence
- Deep understanding of the relevant substantive law
- Strong courtroom presence
- Clear, persuasive writing
- The ability to tell a compelling story
- Leadership and team management skills
- Excellent judgment

If I ever do write that book, it won’t be about any one of those skills in isolation. Rather, it would try to weave them together, into a comprehensive picture of what makes a litigator truly effective in high-stakes, complex disputes.

But writing a book will have to wait. Between a busy practice

and three young kids, now is not the time for a long-form project.

What I can manage, for now, are LinkedIn posts.

Part 2: What Are We Doing When We Litigate?

Before diving into how we should litigate, it’s worth asking a more foundational question: what are we doing when we litigate?

“We try to win cases for our clients” is a common answer, but it's too narrow. Most of what we do happens outside court. "We solve problems for our clients” is broader, but not very useful. That describes every professional.

So, can we define our work in a way that is both accurate and illuminating? I think we can.

Before law school, I studied economics. I later completed a master’s degree in economics alongside my JD, and I’ve taught economics courses, including graduate-level classes on the economic analysis of law. I work closely with economists in my legal practice. So it won’t surprise anyone that I think economics offers a helpful lens for thinking about litigation.

From that perspective, here’s how I would define what we’re doing when we litigate: "We act strategically, under conditions of imperfect information, to optimally advance our client’s goals in relation to the expected scope of a dispute."

Let me unpack that. In brief for now, with longer posts to follow.

"Strategic action" means anticipating your opponent’s response. Litigation is a game. Not in the sense of being trivial or fun (though it sometimes is), but in the game-theoretic sense: the outcome for each party depends not just on their own actions, but on the actions of others. Your choices shape your opponent’s moves, and vice versa. Great litigators think in chains of action and reaction, several steps ahead.

"Imperfect information" is everywhere. Your opponents know things you don’t. But more importantly, no one knows exactly how a witness will testify or how a judge will decide. Litigation is human, and humans are unpredictable. Great litigators don’t fear uncertainty; they harness it.

"Client goals" can be broader than just winning the case. Sometimes the objective is minimizing cost, protecting reputation, avoiding precedent, or something else entirely. Often, these goals compete. Great litigators know how to weigh those trade-offs.

The "expected scope of the dispute" matters. We’re not optimizing for today’s motion; we’re optimizing for the entire

trajectory of the case (or a portfolio of cases). Sometimes that means fighting hard. Sometimes it means retreating. But always with an eye on the bigger picture.

So why does this definition matter?

Because it shows why litigation can be challenging: not because the law is complex (though it can be), but because the decisions are. You're making judgment calls with limited information, against smart opponents, trying to chart the best path for your client not just now, but years down the road.

That's why judgment is so central to great litigation. And while experience builds judgment, so does thoughtful preparation and careful reflection.

Part 3: Strategic Thinking in Litigation

Thinking and acting "strategically" isn't about being clever or theatrical. It's about anticipating your opponent's likely responses to your moves, and shaping your own actions with those responses in mind.

In game theory terms, litigation is an extensive-form game: a branching decision tree where each side's optimal choice depends on how they expect the other side to act later. But an extremely complicated one. Game theory students work with neat diagrams of four or five decision points, a handful of options, and tidy probabilities. Litigation is a different beast. A single case can involve hundreds, sometimes thousands, of decisions, with multiple options at each turn and shifting probabilities as the facts and law evolve.

The clearest example is cross-examination. A skilled cross-examiner (almost) never asks questions blindly. Entire lines of questioning are built around a reasonable expectation of the witness's answers. Every question is informed by the likely range of responses from the witness. That makes cross-examination one of the purest exercises in strategic decision-making in our craft.

But strategy doesn't stop at cross-examination.

Every meaningful decision in litigation – from pleading choices to motions, from discovery requests to trial tactics – will provoke a reaction. The quality of your decisions often depends less on their standalone merits and more on how they will influence what your opponent does next.

Take this example. A plaintiff has a strong $1 million breach of contract claim, but counsel can make a good-faith case for $10 million. The larger claim might pressure the defendant toward a faster settlement and make $1 million seem “reasonable” by comparison.

Or it might backfire.

The defendant could respond by escalating: engaging in a no-stone-unturned approach that uncovers new defences, demanding broader discovery, and pushing the matter into a slower, more expensive litigation track. The defendant may refuse mediation, seeing the plaintiff as unreasonable. And at trial, a judge may be more skeptical of the entire case if the bulk of the damages claim doesn’t hold up.

The lesson isn’t that bigger claims are always good or bad. It’s that there are no universal rules. The right move depends on the context: the parties, the lawyers, the tribunal, and the personalities in play. The best litigators take the time to understand their opponents, their opposing counsel, the decision-maker, and even the key witnesses. The more they understand those actors, the better they can predict reactions and craft actions accordingly.

We can’t know with certainty how an opponent will respond. But uncertainty doesn’t mean ignorance. It means we think in probabilities, not absolutes.

Part 4: Thinking About Probability

I described how strategic thinking in litigation means looking ahead: if we take this step, what will our opponent do next? The challenge is that we never know with certainty how an opponent will respond. What we’re really doing is estimating probabilities of the different things that might happen. So strategic thinking depends on thinking about probability correctly.

But people aren’t always good at thinking about probability. Behavioural economics has catalogued a lot of ways in which our thinking about probability can be skewed. There’s too many to go over here, but here’s a handful that apply in the litigation context:

- The Availability Heuristic. We overestimate the likelihood of outcomes that are vivid or fresh in our minds. A lawyer who just won a trial of a certain type may treat that experience as highly predictive of the next case, even though the facts differ materially.
- Anchoring. Initial numbers or positions exert undue

influence. A plaintiff's inflated damages claim or an aggressive scheduling proposal can shape settlement ranges or procedural timelines, even if the starting point is unrealistic.

- Overconfidence Bias. Lawyers, like professionals in many fields, tend to overstate the accuracy of their judgments. Predicting a "strong" chance of success on a motion may feel justified, but the reality may be closer to a 50-50 case than counsel's confidence suggests.

Each of these heuristics distorts how we perceive probability. And when we misperceive probability, we risk misjudging our opponent's likely moves, a judge's reaction, or the strength of our own position.

The solution is to recognize our biases and think carefully and systematically about probability. With experience, one's heuristics may improve, but even experts' intuitions can be biased. So think carefully and systematically whenever possible.

How do you do that? There's no substitute for spending the time thinking through the likely outcomes, based on as much information as you can have about the facts, the law, and your opponent.

Speaking for me personally, I find it useful to make explicit probability estimates for critical decision-points, expressing the likelihood of outcomes in percentages rather than vague adjectives. I often model different scenarios with different probability assessments to stress-test how my own assessment impacts the best course of action. Not because the numbers or the scenarios are necessarily "right", but because it keeps me honest as to how I'm evaluating the best course of action rather than relying purely on gut or heuristics.

However you approach the problem, strategic litigation demands disciplined thinking about probability. Only by confronting risk explicitly can litigators make decisions that reflect both where we want to go and identify the highest likelihood path of getting there.

Part 5: Signaling

Great litigators are strategic thinkers: in deciding what the right move is in any case, they anticipate how their opponent might respond. But strategic thinking goes beyond anticipating an opponent's response. It also requires thinking about what information your actions convey and, in turn, what that reveals about your strategy.

That implicates the concept of signaling. In economics, signaling describes how actions convey information beyond

their immediate effect. Michael Spence, who won the Nobel Prize for his work on signaling in markets, illustrated this through education: a degree is not just about gaining knowledge, but a “signal” of ability or perseverance to employers.

Litigation is no different. Every move we make signals something to our opponent, and every move they make signals something back. For example:

- Proposing mediation early. This might be read as eagerness to settle, leading the other side to infer you will accept less (or pay more).
- Broad discovery demands. These can signal an intent to pursue no-stone-unturned litigation, indicating a desire to make the process time-consuming and expensive.
- Trial scheduling. Pushing hard for an early trial date can signal eagerness to have the matter decided, suggesting high confidence in the case.

The key is that signaling cuts both ways. We must be alert to what our own actions communicate, since a sound step might inadvertently send our opponent information we’d rather they not have. At the same time, we should read the signals embedded in our opponent’s conduct: their procedural choices, timing, and posture often contain valuable clues about how they assess the case, their client’s risk tolerance, or their appetite for settlement.

Failing to account for signaling can cause missteps. Consider a party that proposes early mediation as a good-faith effort to resolve matters efficiently. If they overlook that it also signals eagerness to avoid trial, they may enter mediation unprepared for the other side to demand more movement than expected. That doesn’t mean you shouldn’t pursue early mediation to settle efficiently; it means you must be attuned to the signals your actions convey and take steps without inadvertently communicating what you don’t intend.

Litigation is a dialogue. Our actions are part of an ongoing exchange of information, sometimes explicit, sometimes subtle. To be a great litigator, you need to learn to read and convey signals in ways that make that dialogue favourable to your client’s position.

Part 6: The Four Things Every Litigator Needs to Know

Cases aren’t solved in the abstract. They’re litigated in reality, by real people.

Which brings me to the four things every effective litigator

should know to win a case:

1. Know the law.
2. Know the facts.
3. Know their opponent.
4. Know their adjudicator.

The first two are obvious to any litigator, so I won't spend more time on those. But many litigators stop at the first two. In fact, the last two are critical to thinking through and executing an effective litigation strategy, because opposing counsel and the adjudicator are the human players through which abstract law and facts are litigated. (Witnesses too, but that's even more complex, and I'll deal with that later.) So let's talk about those last two points a bit more.

Know your judge: You don’t always know in advance who your adjudicator will be, but often you do. And when you do, it would be a mistake not to account for that judge’s background knowledge, their preferences in courtroom style, their history on related issues, and the way they like to process information. The same legal argument can land very differently depending on who is hearing it; points of reference or resonance for one judge may fall flat with another.

Know your opponent: Cases don’t unfold against a blank wall. They unfold against another human being who is making their own strategic calculations. As I've described before, litigation is a strategic interaction: the law and facts may be like an LSAT logic game, but litigation is game theory. If you ignore how your opponent is likely to react, you can build a beautiful legal strategy that collapses the moment it encounters resistance.

Litigation strategy lives in the interplay between these four forms of knowledge. The law and facts are the raw materials. But the judge and the opponent are what determine how those materials can be used, and whether they’ll stand up when tested.

If we stop at the first two, we risk treating litigation like a seminar room debate. But in the courtroom, it’s always real: a real human opponent, and a real human decision-maker. How much time should we, as litigators, really spend preparing for those human dynamics? The best litigators know the answer: more than you think.

Part 7: Balancing Action and Reflection in Litigation

We’ve looked at litigation as a strategic interaction under conditions of uncertainty, explored how probability and signaling shape decision-making, and emphasized the importance of knowing not just the law and facts, but also your opponent and adjudicator. All of this with a view to "act

strategically, under conditions of imperfect information, to optimally advance our client's goals in relation to the expected scope of a dispute".

Together, these posts map out the architecture of litigation strategy. Useful as that framework is, it's also high-level and information-intensive. It helps us understand how to think, but it doesn't always tell us what to do next.

That's where I want to take this series. Going forward, I'll focus less on conceptual structure and more on practical tools, approaches, and strategies for day-to-day litigation.

Before making that shift, one last framework point: there are no universal "rules" in litigation. Every case depends on its circumstances. What works brilliantly in one may be disastrous in another. That's why whatever best practices you adopt, it's essential to build in moments of reflection: times to step back, assess, and recalibrate. The danger is being either too reactive or too relentlessly action-oriented. Good strategy requires deliberately making space to think.

So how do you build that into your practice? A few thoughts:

- Set aside milestone strategy sessions: Go beyond routine check-ins by creating space for broader, big-picture thinking.
- Empower every voice: Junior colleagues may lack experience but often see things fresh. Those perspectives can be invaluable.
- Seek input from people outside of your team: Mentors and colleagues can surface blind spots and sharpen judgment.
- Beware tunnel vision: Don't fall in love with your strategy. Be prepared to pivot.
- Pause under pressure: Some of the best insights emerge in the quiet moments, not the rush.

The best litigators act decisively when needed. But they also carve out time for reflection. Balancing the two is what makes litigators effective.

Part 8: Perfect First Drafts vs. Iterative Work

Litigation is a team sport. No matter how talented the lead counsel, complex disputes are won by teams working in concert. How you run that team is as critical as the courtroom skills you bring to the case. One of the most consequential decisions is how you delegate tasks.

I see two main models.

The first is the perfect first draft: you ask an associate to draft a substantive work product (say, a factum) and expect something "court-ready." (I focus here on legal writing, but the same principles apply to any delegated work product.) The "perfect first draft" approach demands high effort from the drafter and gives the senior lawyer a nearly finished product. My impression is that this is the dominant model on most litigation teams.

The second is the iterative draft: you ask for an earlier, rough version. It may be skeletal or imperfect, but it arrives sooner and provides a platform to think, react, and workshop together.

Both can work. But I've come to believe the "iterative draft" model often produces better outcomes, and economics helps explain why.

The 80/20 rule teaches that 80% of the value often comes from the first 20% of the effort. A rough draft captures most of the conceptual value – framing issues, surfacing questions – while avoiding the low-return hours spent polishing prose too early. Economists studying innovation likewise show that early, even flawed, prototypes accelerate learning by revealing information you can't predict in advance. Litigation writing is no different: each iteration is a new data point that improves the final product and leaves more time to pivot if strategy needs to change.

There are training benefits, too. An associate asked for a polished draft learns craftsmanship; an associate involved in iterative work also learns judgment: how arguments evolve and trade-offs are weighed.

None of this means the perfect-first-draft model is wrong. Sometimes deadlines or routine work make it the efficient choice. But the key is clarity. These models require different workflows and mindsets. Whether you want perfection up front or iteration over time, be explicit about your expectations. Your team, and your client, will thank you.

Part 9: What Is "Good" Legal Writing, Anyways?

Ask ten litigators what good legal writing is, and you'll get fifteen different answers.

Part of the reason is that people may have different things in mind when they think about good legal writing. It's a mistake to think that there is a single form of good legal writing. There isn't. What counts as good writing depends on both the purpose of the writing and the audience you're writing for.

A pleading or an agreement calls for precision. Every word

matters. Definitions are necessary, repetition is to some extent unavoidable, and clarity sometimes requires rigidity. Good writing in that context may be relatively dense and technical.

But don’t write your factum like it’s a contract. It will fall flat. Factums, or any writing with an advocacy function, require a different kind of clarity: clear structure, persuasive framing, and simplicity over technicality.

Audience matters too. A reporting letter to an insurer should read differently than a quick update email to a busy general counsel. A factum written for an Ontario judge may look different from one for a BC judge, because the norms and expectations differ. Writing well means meeting your reader where they are.

So if there’s no single formula, are there any general rules for good legal writing? I’d say yes, at least for advocacy. Here are four key points to keep in mind:

1. Clarity first. If your reader doesn’t understand your point, they won’t be persuaded by it. Write as simply as the argument allows.

2. Orient your reader. Use structure, headings, and signposts liberally. Make sure the reader always knows where they are in your argument.

3. Fit the forum. Know the norms and expectations of your audience. A judge distracted by your style won’t be focused on your substance.

4. Write to persuade, not to be right in the abstract. Legal writing isn’t an academic exercise; it’s a practical one. The measure of good writing is whether it moves your audience.

Good legal writing isn’t one thing. It’s the right thing, for the right reader, at the right time.

Part 10: Treat Every Case Like It's Going to Trial

Most cases settle. Everyone knows that. But the best litigators treat every case as though it’s going to trial anyway.

At first glance, that may seem inefficient. Why invest in working up a case like it's going to trial when the overwhelming probability is that it will settle? Economics helps explain why, in most cases, this is the optimal approach to achieving your client's goals.

As I've described in previous posts, litigation involves strategic interaction under uncertainty. Each party acts based on expectations about how the other will behave. Those expectations depend on what each side believes about the other's preparedness and resolve. If you approach a case as

though it's destined to settle, you'll signal that in subtle but perceptible ways: limited document work, tentative discovery, half-formed theories. The other side will sense it. And they'll price that into settlement.

The reverse is also true. Litigators who prepare as though they're heading for trial change the negotiation game. They increase the credibility of their threat to proceed, effectively a commitment device in economic language. In game-theoretic terms, they shift the equilibrium. A lawyer who is truly ready for trial is more likely to achieve a favourable settlement, precisely because they don't need one.

That's not bravado; it's expected value. Settlement decisions, like all litigation decisions, turn on probabilities multiplied by payoffs. If you're ready for trial, your expected trial payoff increases (since readiness improves your likelihood of success), and your opponent's expected payoff decreases (since they face a more formidable case). Even if the trial never happens, those revised expectations shape the bargaining range and push resolution closer to your client's optimal outcome.

There's another reason to treat every case like it's going to trial: it disciplines your judgment. Preparing for trial forces clarity. You must decide which facts matter, which legal theories survive scrutiny, and which witnesses you trust. Even in cases that settle early, that trial-focused discipline ensures that every motion, discovery, and negotiation aligns with a coherent endgame.

Treating a case like it will go to trial doesn't mean acting as if settlement is failure. It means litigating with integrity to the process: developing the record, refining the theory, and making choices that would withstand the light of a courtroom. Ironically, that's also what makes settlement possible on the best possible terms.

So yes, most cases settle. But the best settlements, and the best advocates, come from those who prepare as though they won't.

Part 11: Litigating from the Moral High Ground

Every litigator knows that to win, it helps to have the law on your side. But the best litigators know that isn't enough.

Judges don't just decide who's right on the law. They decide who deserves to win.

From the very beginning of a case, great advocates think about both: the legal argument and the moral one. They frame the case so that, by the time the law is applied, the judge wants to

apply it in their client's favour. That doesn't mean appealing to emotion or abandoning logic. It means showing why the just outcome, morally and institutionally, aligns with your position in law.

Economics helps explain why this matters. Decision-makers, including judges, aren't neutral processors of information. Behavioural economics teaches that how information is framed affects how it's perceived. People naturally search for coherence between what feels fair and what seems correct. When the moral and legal narratives point in the same direction, the decision feels not just permissible, but compelled.

Consider a complex breach of contract case between two sophisticated parties. On paper, it might be a technical dispute over a clause or timing provision. But technical disputes can and should have moral narratives. The plaintiff's narrative might be about reliance and good faith: a party that invested, performed, and trusted, only to be left exposed when the counterparty chose opportunism over obligation. The defendant might instead be about efficiency and certainty: a party who priced risk, complied with the bargain as written, and now faces a claim that would undermine contractual predictability.

Both stories have legal merit. But decision-makers tend to prefer outcomes that feel fair in light of effort, reciprocity, and good faith: all deeply ingrained social heuristics. The side that aligns the formal law with that intuitive sense of justice gives the court psychological permission to decide in their favour.

That's why, when building your case theory, you should think beyond whether you meet the legal test. Ask instead: why should we win?

Because persuasion isn't just about being right in law. It's about making the judge want your side to win, because it feels right, not just reads right. If you can hold both the law and the moral high ground, you don't just argue persuasively. You align incentives, logic, and justice: the conditions under which good judges make confident decisions.

Part 12: The Trial Recipe

Most posts in this series draw on economics or decision theory. This one (mostly) doesn't. Instead, it's something I said to a more junior colleague while we were preparing for trial.

I don't recall what prompted it, but my description of a trial was this: a trial is 25% law, 25% emotional intelligence, 25% poker, 25% theatre, and 50% photocopying.

The law part is obvious. Trials involve proving or rebutting elements of causes of action and defences, within the rules of

procedure and evidence. It’s foundational. But it’s also the part we tend to overemphasize.

Emotional intelligence matters because trials involve real people. And beyond that, trials are stressful – for clients, for witnesses, for opposing counsel, and for your own team. Managing that stress, especially with witnesses, is often the difference between evidence that lands cleanly and evidence that doesn’t.

Poker reflects the fact that trials are optimization problems under uncertainty. Every day brings a steady stream of judgment calls: witnesses to call or not, objections to take or let go, points to press or abandon, risks to assume or avoid. Some are planned. Many aren’t. You need to exercise judgment under uncertainty – by taking calculated risks – many times a day.

Theatre matters because decision-makers are human. When I say theater, I don’t mean acting. I just mean that presentation matters. Trial is about presenting a narrative that is clear, credible, and engaging enough to persuade.

And then there’s photocopying. Or, more accurately these days, hyperlinking. The logistics, preparation, and legwork that make everything else possible. Trials always take more work than you expect, particularly on the operational side. Start earlier than you think you need to.

You may have noticed that the math doesn’t add up; that’s intentional. Trials are intense and always require more than 100%. And that's what makes them both challenging and exhilarating!

Part 13: Why Do Cases Get Tried?

Most cases settle before trial. From an economic perspective, that’s exactly what we’d expect.

Settlement avoids legal costs, creating a larger “pie” to split between the parties. It also replaces uncertainty with a known outcome. Economic analysis suggests that if both sides are well-advised and can reasonably assess their chances, almost every case should settle.

And yet, trials still happen. Why? I think the reasons cases don’t settle generally fall into five categories.

1. Divergent expectations
The parties genuinely disagree about what will happen at trial. Each side thinks it's more likely to win: sometimes because information gaps persist despite discovery, sometimes because of bad legal advice, and sometimes for reasons that are never clear.

2. Strategic brinkmanship
The parties assess the case similarly, but each believes the other will blink first. Everyone is trying to capture more of the surplus, and no one yields.

3. Extreme outcomes and binding constraints
The structure of the payoffs makes trial rational. A settlement and a loss at trial may be equally bad for a defendant, while only a win is acceptable. Litigation funding can, depending on the structure, create similar dynamics for plaintiffs.

4. External incentives
The case matters beyond its dollar value: establishing precedent, deterring other claims, or avoiding the signal that settlement might send.

5. Principal – agent problems
The parties may be best off settling, but the decision-maker for one of them may not be. Managers, insurers, or even counsel can face incentives that diverge from the client's interests.

Why does this matter?

Because our system has tools to encourage settlement, but those tools don't work equally well at addressing all impediments. Discovery, mediation, and pre-trials help where the problem is information or bargaining. They are far less effective where the obstacle is constraints, incentives, or agency problems.

The practical takeaway is simple: if the other side won't settle, it's critical to understand why. Sometimes more mediation helps. Sometimes only time changes the calculus. And sometimes cases just have to be tried.

Knowing which situation you're in is a core part of good litigation judgment.

Part 14: Disciplined Cross-Examinations

Since most cases never make it to trial, most cases aren't determined directly by cross-examinations. But that doesn't mean that cross-examination isn't a critical part of a trial lawyer's toolkit. Cases can be won and lost through effective or poor cross-examinations. Being known to be a formidable cross-examiner can sometimes dissuade your opponents from taking a chance on going to trial. And, most importantly, cross-

examinations, if they go well, are one of the most exciting and enjoyable parts of our job.

So let’s talk about them!

Let me start today with this point: cross-examination tempts excess that you must resist in favour of disciplined restraint.

Consider: you’re cross-examining a witness. You hear answers you don’t like. Questions come to mind: some pointed, some clever, some mildly damaging. The instinct is to ask them. That instinct often needs to be resisted.

Cross-examination is not a brainstorming exercise. It is an optimization problem under severe constraints: limited time, limited attention from the trier of fact, and asymmetric risk. Every question has a cost. But not every question has a meaningful expected upside. If a question is not calculated to produce evidence you might actually rely on, don’t ask it.

I see this principle violated most often when it comes to credibility questions. At a very high level, cross-examination does only two things. It can be destructive, aimed at undermining the credibility or reliability of a witness’s evidence. Or it can be constructive, aimed at extracting admissions that advance your own theory of the case. These are distinct objectives, and many cross-examinations are weakened by blurring them.

If you are not going to argue at the end of the trial that a witness is unreliable or not credible, destructive questions are largely wasted effort. The occasional “drive-by” credibility shot rarely moves the needle. Judges discount noise. Unless you are prepared to argue that the witness’s evidence should not be accepted, nibbling at credibility just dissipates attention that could have been spent building something useful. In that situation, discipline means committing to a purely constructive cross.

The reverse is also true. If credibility is the target, half-measures are worse than restraint. Destructive cross-examination only works when it is sustained, coherent, and unavoidable: that is, when the cumulative effect forces the trier of fact to confront whether the evidence can safely be relied upon at all.

Seen this way, cross-examination is less about clever questions and more about strategic commitment. Good cross-examination isn't just about knowing how to execute on goals. It is also knowing what the goal is, and having the discipline to ask nothing else.

Part 15: The Key Inputs to an Effective Cross-Examination

Cross-examination is often treated as something mystical. Some lawyers are said to “have it.” Others don’t. The great cross-examiner is imagined as part actor, part instinctive predator: quick on their feet, fearless, impossible to wrong-foot.

That story is mostly wrong.

What looks like instinct is usually preparation. What looks like talent is usually structure. And what looks like improvisation is usually someone executing a plan they built long before the witness ever took the stand.

Effective cross-examination rests on three inputs.

First: a theory.

You must know what you are trying to prove when the case is over. That means knowing the legal test and having a coherent factual story that fits it. Every meaningful cross-examination is backward-looking: it is designed from the closing argument outward. If you don’t know what you need to be able to say at the end of the case, you will ask questions in the abstract. And abstract cross-examinations rarely help at the end of the day.

Second: a method.

This is the part of cross-examination that most people are taught, and what most people focus on when they think about how to cross-examine. Tight questions. One fact per question. No room to wander. These rules are not sacred, but they exist for a reason: they let you control the narrative and accumulate facts that advance your theory. Good cross-examination is not about cleverness. It is about building something, brick by brick, in a way the judge cannot unsee.

Third: contingency.

Witnesses do not always behave. Answers wander. Defences appear. Evasions creep in. This is where cross-examination is said to become “art.”

But this too can and should be prepared.

A strong cross is not a script. It is a decision tree. For every important question, you should know the range of likely answers, and what you will do if you get each of them. When the witness surprises you, you are not improvising from nothing; you are choosing between branches you already mapped out. The best cross-examiners are not fearless. They are, however, rarely surprised.

And that is why preparation, more than temperament or experience, is the true source of what we might label courtroom

“instinct.”

Part 16: Tweaking the Conventional “Rules” of Cross-Examination

There are well-known maxims that generally make sense to follow, but in my view some of them are misunderstood or applied too rigidly. So I want to propose some tweaks to those “rules”.

Rule #1: “Don’t ask a question you don’t know the answer to.”

This advice is frequently given, and it is certainly preferable to know the answer before you ask. But it is not always realistic. A better formulation is that you should never ask a question unless you are prepared to deal with whatever answer you might receive. If you do not know the precise answer, but the range of plausible answers is limited and each would be acceptable for your position, asking the question may still make sense. What matters is preparation, not omniscience.

Rule #2: “Only ask closed questions.”

This is good advice the vast majority of the time. Closed-ended questions should be the default in cross-examination, particularly for less experienced advocates. They are critical for controlling the witness and securing the admissions you need. Even experienced cross-examiners should rely on them most of the time.

That said, they are not always the optimal tactic. Sometimes you need to understand how a witness tells their story before you can challenge it effectively. In those situations, a carefully chosen open-ended question may be stronger than a closed proposition that the witness simply rejects. Used sparingly and deliberately, a witness’s own words can be powerful evidence.

The key is that open-ended questions should only be asked with a plan for addressing the range of possible answers.

Rule #3: “Don’t ask one question too many.”

This rule is often summarized as “stop at the win.” The concern is that once you have the admission you need, further questions invite the witness to undermine it. That risk is real, and it should always be in the cross-examiner’s mind.

But stopping too early can also be a mistake. An initial admission may be ambiguous, easily undone on re-examination, or unlikely to land with the judge as clearly as it should. In those cases, pushing carefully for a clearer or more durable admission may be justified. What matters is weighing the risks and benefits of the next question in light of the witness, their performance to that point, and your overall objectives.

For each line of cross-examination, it helps to know your limited goal, your reasonable goal, and your stretch goal. With a sophisticated or combative witness, achieving only the limited goal may be prudent. With a more cooperative witness, calculated risks may pay off.

The conventional rules of cross-examination are important. They reflect accumulated experience about what usually works. But they are not immutable laws. The best cross-examiners understand not only the rules themselves, but when thoughtful deviation from them makes sense.

Part 17: Listening to the Witness

I want to widen the lens beyond cross-examination and talk about a rule that applies to every kind of examination. It is a simple rule: pay attention to the witness and the answer they are giving, rather than rigidly following your script.

At a surface level, this sounds obvious. Of course you should listen to the answer before asking the next question. And yet, in practice, many lawyer do not do this nearly as well as we think.

There are a few predictable reasons that lawyers break this rule.

First, good examinations require preparation. Serious preparation. For most lawyers, that means detailed notes. Sometimes it means something very close to a script, complete with contingencies depending on how the witness answers. After investing that much effort, it is tempting to treat an examination as something fixed, something to be executed rather than adapted.

Second, there is a fear of losing control. Lawyers worry that deviating from the script will cause the examination to unravel, that the careful architecture they built in advance will collapse if they go off plan.

Third, examinations can be nerve-wracking, particularly early in one’s career. Notes can feel like a safety blanket. When things feel uncertain, the instinct is often to retreat into the comfort of the page.

All of that is understandable. But it does not change the basic reality: effective examinations engage with the evidence the

witness actually gives, not the evidence you hoped they would give.

That means listening and being prepared to pivot. If a line of questions no longer makes sense, abandon it. If the sequence needs to change, change it. If a new question becomes obvious, ask it.

Sometimes a witness will give an unexpectedly helpful answer. Sometimes they will volunteer a fact you did not anticipate. If you are mechanically following your script, you will miss those moments. Other times, the witness will fail to provide the foundation you need for a later point. If you press on regardless, the point simply will not land.

So how do you actually implement this advice? The simplest technique is visual: keep your eyes on the witness, not your notes.

That does not mean you should not prepare. Quite the opposite. I still script every question I plan to ask. Every one. But when I am actually examining a witness, I look at those notes sparingly, and I almost never follow them verbatim.

The preparation shapes my thinking. It helps me understand where I want to go and why. But it is an input, not a set of marching orders.

Preparation is essential. But preparation won’t tell you how the witness will actually answer every question. Only listening can.