Mentor as…Coach and Cheerleader

By Bob Gerber, Master

I was about a third year lawyer when I had the opportunity to second-chair my first significant Superior Court trial. It was the defense of a legal malpractice case arising from an underlying divorce case. I had deposed the plaintiff's damages expert, and gotten him to admit that out of eight factors he was supposed to consider in valuing certain community property, he had only considered four. I had drafted a motion in limine precluding the testimony of the expert which was conditionally granted, but the judge gave the plaintiff the opportunity to conduct a Cal. Evid. Code Section 402 hearing to "clarify" that in fact Mr. Expert had considered all eight of the factors and that he just hadn't done a very good job of explaining that at his deposition. (!)

We broke for lunch and my mentor, Mike Weaver and I, went back to our office to discuss who was going to cross-examine the expert in the 402 hearing, and how. I had taken Mr. Expert's deposition and knew the case law requirements better, but of course Mike was the more skilled ABOTA trial lawyer that could probably dismantle the expert with the greatest ease. In addition, practically the entire case was at stake – without a damages expert, the plaintiff's case would be in shambles and we would likely win either a nonsuit or verdict.

Mike decided early on that he would coach me through the cross and let me do it myself (with client consent of course). The client was on board because I had already set up Mr. Expert for the final blow and he thought I could carry the ball to the finish line. We reconvened at the courthouse and Mr. Expert took the stand. After 30 minutes of dancing around about how he had really considered all eight of the factors, I took the clean and simple route. I simply took the deposition transcript and meticulously asked the questions one by one, echoing the exact same language as that in the deposition: Q. Mr. Expert, did you consider factor X? Answer: Yes, I did. Me: Your Honor, I'd like to read from page ___, line __ of Mr. Expert's deposition: Q: Did you consider factor X? Answer: No, I did not." Q. Mr. Expert, did you consider factor Y? Answer, Yes I did. Me: Your Honor, I'd like to read from page ___, line __ of Mr. Expert's deposition: Q: Did you consider factor Y? Answer: No, I did not." After a couple more of these incompatible responses, the judge put down his pen and stared angrily at Mr. Expert. At the end of my short cross, and an even shorter attempt to rehabilitate Mr. Expert, the judge asked whether I would prefer to have Mr. Expert's opinion disregarded as not being in compliance with the law or, instead, have his opinion come in and be disregarded as being completely lacking in credibility. Indeed, in posing that question, he said: Wouldn't the latter give you a better defense on appeal? We chose the latter! The expert's opinion was admitted but found completely lacking in credibility. As a result, we successfully moved for a nonsuit. We later entered into a confidential and very favorable settlement.

Following the entry of judgment, Mike wrote up this experience briefly as I have here and circulated it to all of the litigators in our law firm (back then, there was no e-mail – a firm wide written memo was a big deal), trumpeting my success both on the conception of setting up the expert in deposition, and on conducting the cross. He also stated in the memo that the trial judge had complimented me outside my presence to Mike in the hallway when I wasn't present, indicating that he felt I showed a lot of experience for my "years." Of course, that came from Mike's mentoring and instruction. But rather than taking credit for it, Mike gave credit to me. He never mentioned that he had coached me through the whole cross before I ever conducted it.