— CHAPTER FIVE —
Cross Examination

I. THE ROLE OF CROSS EXAMINATION

Cross examination is hard. It is frequently dramatic, often exciting, and in many ways it defines our adversarial system of justice. At bottom, however, cross examination is the ultimate challenge for the trial lawyer. Can you add to your case or detract from the opposition's case by extracting information from the other side's witnesses?

If direct examination is your best opportunity to win your case, cross examination may provide you with a chance to lose it. A poor direct can be aimless and boring, but the witnesses are generally helpful. Your worst fear on direct examination is usually that you have left something out. A poor cross examination, on the other hand, can be truly disastrous. The witnesses can range from uncooperative to hostile, and you constantly run the risk of actually adding weight or sympathy to the other side's case. Moreover, most cross examinations will inevitably be perceived by the trier of fact as a contest between the lawyer and witness. You can seldom afford to appear to lose.

In other words, cross examination is inherently risky. The witness may argue with you. The witness may fill in gaps that were left in the direct testimony. The witness may make you look bad. You may make yourself look bad. And whatever good you accomplish may be subject to immediate cure on redirect examination.

None of these problems can be avoided entirely, but they can be minimized. Although some cross examination is usually expected of every witness, and the temptation is difficult to resist, as a general rule you should cross examine carefully. You must always set realistic goals.

Brevity is an excellent discipline. Many trial lawyers suggest that cross examinations be limited to a maximum of three points. While there may often be reasons to depart from such a hard and fast rule, there is no doubt that short cross examinations have much to commend themselves. In terms of your own preparation, setting a

mental limit for the length of the cross will help you to concentrate and to organize your thinking. Actually conducting a short examination will minimize risk, add panache, and usually make the result more memorable.

This chapter discusses the general law, content, organization, and basic technique of cross examination. Several more advanced aspects of cross examination—such as impeachment and the use of character evidence—are treated separately in later chapters.

II. THE LAW OF CROSS EXAMINATION

Cross examination is the hallmark of the Anglo-American system of adversary justice. Protected as a constitutional right in criminal cases, it is also understood as an aspect of due process in civil cases. The law of cross examination varies somewhat from jurisdiction to jurisdiction, but the following rules are nearly universal.

A. Leading Questions Permitted

The most obvious distinction between direct and cross examination is the permissible use of leading questions. It is assumed that your adversary's witnesses will have little incentive to cooperate with you, and that you may not have been able to interview them in advance. Consequently, virtually all courts allow the cross examiner to ask questions that contain their own answers. Moreover, the right to ask leading questions is usually understood to include the right to insist on a responsive answer.

As we will see below, the ability to use leading questions has enormous implications for the conduct of cross examination.

B. Limitations on Scope

The general rule in the United States is that cross examination is limited to the scope of the direct. Since the purpose of cross examination is to allow you to inquire of your adversary's witnesses, the scope of the inquiry is restricted to those subjects that were raised during the direct examination.

Note that the definition of scope will vary from jurisdiction to jurisdiction, and even from courtroom to courtroom. A narrow application of this rule can limit the cross examiner to the precise events and occurrences that the witness discussed on direct. A broader approach would allow questioning on related and similar events. For example, assume that the defendant in our collision case testified that his

brakes had been inspected just a week before the accident. A strict approach to the "scope of direct" rule might limit the cross examination to questioning on that particular inspection. A broader interpretation would allow inquiries into earlier brake inspections and other aspects of automobile maintenance.

A more generous approach to the scope of cross examination is definitely the modern trend. Undue restriction of cross examination can result in reversal on appeal. Nonetheless, there is no way to predict how an individual judge will apply the scope limitation in any given case; much will depend on the nature of the evidence and the manner in which the lawyers have been conducting themselves.

A few American jurisdictions have adopted the "English rule," which allows wide-open cross examination concerning any issue relevant to the case. In the federal jurisdiction, and some others, the trial judge has discretion to allow inquiry beyond the scope of the direct examination, but the cross examiner is then limited to non-leading questions. Also, in most states a criminal defendant who takes the stand and waives the Fifth Amendment is thereafter subject to cross examination regarding all aspects of the alleged crime.

There are two general exceptions to the "scope of direct" rule. First, the credibility of the witness is always in issue. You may therefore always attempt to establish the bias, motive, interest, untruthfulness, or material prior inconsistency of a witness without regard to the matters that were covered on direct examination. Second, you may cross examine beyond the scope of the direct once the witness herself has "opened the door" to additional matters. In other words, a witness who voluntarily injects a subject into an answer on cross examination may thereafter be questioned as though the subject had been included in the direct.

C. Other Restrictions

Cross examination is also limited by a variety of other rules, most of which involve the manner or nature of questioning.

Argumentative questions. You may ask a witness questions. You may suggest answers. You may assert propositions. But you may not argue with the witness. As you may have guessed, the definition of an argumentative question is elusive. Much will depend on your demeanor; perhaps an argumentative question is one that is asked in an argumentative tone. The following is a reasonable working definition: An argumentative question insists that the witness agree with an opinion or characterization, as opposed to a statement of fact.

Intimidating behavior. You are entitled to elicit information on cross examination by asking questions of the witness and insisting upon answers. You are not allowed to loom over the witness, to shout, to make threatening gestures, or otherwise to intimidate, bully, or (yes, here it comes) badger the witness.

Unfair characterizations. Your right to lead the witness does not include a right to mislead the witness. It is objectionable to attempt to mischaracterize a witness's testimony or to ask "trick" questions. If a witness has testified that it was dark outside, it would mischaracterize the testimony to begin a question, "So you admit that it was too dark to see anything ...." Trick questions cannot be answered accurately. The most famous trick question is known as the "negative pregnant," as in Senator McCarthy's inquisitional, "Have you resigned from the Communist Party?"

Assuming facts. A frequently heard objection is that "Counsel has assumed facts not in evidence." Of course, a cross examiner is frequently allowed to inquire as to facts that are not yet in evidence. This objection should only be sustained when the question uses the non-record fact as a premise rather than as a separate subject of inquiry, thus denying the witness the opportunity to deny its validity. Imagine a witness in the fire truck case who was standing on the sidewalk at the time of the accident. Assume that the witness testified on direct that the defendant never even slowed down before the impact, and that the witness said absolutely nothing about having been drinking that morning. At the outset of the cross examination, then, there would be no "facts in evidence" concerning use of alcohol. The cross examiner is certainly entitled to ask questions such as, "Hadn't you been drinking that morning?" The cross examiner should not be allowed, however, to use an assumption about drinking to serve as the predicate for a different question: "Since you had been drinking, you were on foot instead of in your car that morning?" The problem with this sort of bootstrapping is that it doesn't allow the witness a fair opportunity to deny having been drinking in the first place.

Compound and other defective questions. Compound questions contain more than a single inquiry: "Are you related to the plaintiff, and were you wearing your glasses at the time of the accident?" The question is objectionable since any answer will necessarily be ambiguous. Cumulative or "Asked and Answered" questions are objectionable because they cover the same ground twice (or more). Vague questions are objectionable because they tend to elicit vague answers.

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III. THE CONTENT OF CROSS EXAMINATION

The first question concerning any cross examination is whether it should be brief or extensive. Although it is standard advice in many quarters that you should refrain from cross examining a witness who hasn't hurt you, in practice almost every witness is subjected to at least a short cross examination. You will seldom wish to leave the testimony of an adverse witness appear to go entirely unchallenged. Moreover, as we will see below, there will often be opportunities to use cross examination to establish positive, constructive evidence. The most realistic decision, then, is not whether to cross examine, but how much. This evaluation must be made at least twice: once in your pretrial preparation and again at the end of the direct examination.

In preparation, you must consider the potential direct examination. What do you expect the witness to say, and how, if at all, will you need to challenge or add to the direct? At trial you must make a further determination. Did the actual direct examination proceed as you expected? Was it more or less damaging than you anticipated? You must always reevaluate your cross examination strategy in light of the direct testimony that was eventually produced. This process will often lead you to omit portions of your prepared cross because they have become unnecessary. It is considerably more dangerous to elaborate on or add to your plan, although this is occasionally unavoidable. In either situation always remember the risk inherent in cross examination and ask yourself, "Is this cross examination necessary?"

A. Consider the Purposes of Cross Examination

Though often an invigorating exercise, cross examination should be undertaken only to serve some greater purpose within your theory of the case. A useful cross examination should promise to fulfill at least one of the following objectives:

Repair or minimize damage. Did the direct examination hurt your case? If so, can the harm be rectified or minimized? Can the witness be made to retract or back away from certain testimony? Can additional facts be elicited that will minimize the witness's impact?

Enhance your case. Can the cross examination be used to further one of your claims or defenses? Are there positive facts that can be brought out that will support or contribute to your version of events?

Detract from their case. Conversely, can the cross examination be used to establish facts that are detrimental to your opponent's case? Can it be used to create inconsistencies among the other side's witnesses?

Establish foundation. Is the witness necessary to the proper foundation for the introduction of a document or other exhibit, or for the offer of evidence by another witness?

Discredit direct testimony. Is it possible to discredit the witness's direct testimony through means such as highlighting internal inconsistencies, demonstrating the witness's own lack of certainty or confidence, underscoring lack of opportunity to observe, illustrating the inherent implausibility of the testimony, or showing that it conflicts with the testimony of other, more credible witnesses?

Discredit the witness. Can the witness be shown to be biased or interested in the outcome of the case? Does the witness have a reason to stretch, misrepresent, or fabricate the testimony? Has the witness been untruthful in the past? Can it be shown that the witness is otherwise unworthy of belief?

Reflect on the credibility of another. Can the cross examination be used to reflect, favorably or unfavorably, on the credibility of a different witness?

The length of your cross examination will generally depend upon how many of the above goals you expect to be able to fulfill. It is not necessary, and it may not be possible, to attempt to achieve them all. You will often stand to lose more by over-reaching than you can possibly gain by seeking to cover all of the bases in cross examination. Be selective.

B. Arrive at the "Usable Universe" of Cross Examination

1. The Entire Universe

In preparing to cross examine any witness you must first determine the broadest possible scope, or universe, for the potential cross examination. From a review of all of the available materials and documents, construct a comprehensive list of the information available from the witness. In keeping with the purposes of cross examination, place each potential fact in one of the following categories:

- Does it make my case more likely?
- Does it make their case less likely?
- Is it a predicate to the admissibility of other evidence?
- Does it make some witness more believable?
- Does it make some witness less believable?

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1. *See* Rule 406,

This process will give you the full universe of theoretically desirable information from which you will structure your cross examination.

2. The Usable Universe

You must now evaluate all of the potential facts in order to arrive at your "usable universe." Ask yourself the following questions:

Is a friendly witness available to present the same facts? There may be no point in attempting to extract answers from an unwilling source if a friendly witness can provide you with the same information. On cross examination you always run the risk that the witness will argue or hedge, or that the information will not be developed as clearly as you would like. Unless you stand to benefit specifically from repetition of the testimony, you may prefer to bypass cross examination that will be merely cumulative of your own evidence.

Can the information be obtained only on cross examination? You have no choice but to cross examine on important facts that are solely within the knowledge or control of the adverse witness. Such information will range from the foundation for the admission of a document to evidence of the witness's own prior actions.

Will the facts be uniquely persuasive on cross examination? Some information, though available from a variety of sources, will be particularly valuable when elicited on cross examination. For example, evidence of past wrongdoing may be more credible if it is presented as an admission by the witness herself rather than as an accusation coming from another. In the automobile accident case, consider the different ways in which evidence of the defendant's driving habits could be admitted. You could produce your own witness to testify that the defendant was a constant speeder. You would have to lay a foundation for this testimony, establishing both the witness's personal knowledge and the consistency of the defendant's "habit."[1] Additionally, your witness would then be subject to cross examination not only on the foundation for the testimony but also regarding issues such as bias, accuracy, and opportunity to observe. On the other hand, the defendant's own testimony that he loved driving fast cars would be virtually uncontrovertible. It would also bolster the testimony of your own witnesses to the same effect. When possible, it is generally desirable to obtain negative or contested evidence from the mouths of the opposition witnesses.

1. *See* Rule 406, Federal Rules of Evidence.

How certain is it that the witness will agree with you? Certain information may be completely within the control of a witness for the other side, and it may be uniquely persuasive if elicited during the cross examination of that witness. You must nonetheless consider the contingency that the witness will deny you the answer that you want. You may need to abandon or modify a promising line of cross examination if you do not believe that you will be able to compel the answers that you anticipate. Can the information be confirmed by the witness's own prior statements? Can it be documented through the use of reports, photographs, tests, or other evidence? These and other devices for controlling a witness's testimony on cross examination are discussed in later sections.

The construction of your usable universe depends almost entirely on your mastery of the case as a whole. To prepare for cross examination you must know not only everything that the particular witness is liable to say but also every other fact that might be obtained from any other witness, document, or exhibit. Your effective choice of cross examination topics will be determined by your ability to choose those areas that will do you the most good, while risking the least harm.

C. Risk Averse Preparation

There are many ways to prepare for cross examination. The following is a "risk averse" method designed to result in a solid, if generally unflashy, cross that minimizes the potential for damage to your case.

Risk averse preparation for cross examination begins with consideration of your anticipated final argument. What do you want to be able to say about this particular witness when you address the jury at the end of the case? How much of that information do you expect to be included in the direct examination? The balance is what you will need to cover on cross.

Next, write out the portion of a final argument that you would devote to discussing the facts presented by this particular witness. This will at most serve as a draft for your actual closing,[2] and you should limit this text to the facts contained in the witness's testimony. You need not include the characterizations, inferences, arguments, comments, and thematic references that will also be part of your real final argument. Depending upon the importance of the witness, the length

2. Final argument is treated in Chapter Thirteen. At this point it is sufficient to note that, while it may be a useful exercise to write out a draft, it is a mistake to read your closing argument from a prepared text.

of this argument segment can range from a short paragraph to a full page or more.

It is important that you write your text using short, single-thought, strictly factual sentences. You are not attempting to create literature. Do not worry about continuity, style, or transition. Simply arrange the declarative sentences one after another in the order that you believe will be the most persuasive, referring to the witness in the third person. For example, your argument concerning the defendant in the fire truck case might, assuming that all of these facts were readily available, include the following:

> The defendant awoke on the morning of the accident at 7:00 a.m. He had to be downtown later that morning. He was meeting an important new client. He wanted to get that client's business. He stood to make a lot of money. The meeting was scheduled for 8:30 a.m. The defendant lived 16 miles from his office. He rented a monthly parking spot. That spot was in a garage located two blocks from his office. He left his home at 7:55 a.m. There was a lot of traffic that morning. The accident occurred at an intersection seven miles from downtown. It happened at 8:20 a.m.

An effective paragraph will include the facts that underlie your theory of the case. It should now be a simple matter to convert the text into a cross examination plan. You merely need to take each sentence and rephrase it into a second-person question. In fact, it is often best to leave the sentence in the form of a declaration, technically making it a question through voice inflection or by adding an interrogative phrase at the end. The above paragraph then becomes the following cross examination of the defendant:

QUESTION: You awoke at 7:00 a.m. on the morning of the accident, isn't that right?

QUESTION: You had to be downtown later that morning, correct?

QUESTION: You were meeting an important new client?

QUESTION: You wanted to get that client's business?

QUESTION: You stood to make a lot of money?

QUESTION: The meeting was scheduled for 8:30 a.m., correct?

QUESTION: You lived 16 miles from your office?

QUESTION: You rented a monthly parking spot?

QUESTION: That spot was in a garage located two blocks from your office?

QUESTION: You left your home at 7:55 a.m., right?

QUESTION: There was a lot of traffic that morning?

QUESTION: The accident occurred at an intersection seven miles from downtown?

QUESTION: It happened at 8:20 a.m., isn't that right?

Note that the above questions also fit neatly into the "usable universe." Many of the facts are not likely to be available from friendly witnesses. Most others are of the sort that will be most valuable if conceded by the defendant himself. Finally, the facts are nearly all of the sort that can be independently documented or that the defendant is unlikely to deny.

This technique is useful for developing the content of your cross examination. The organization of the examination and the structure of your individual questions will depend upon additional analysis.

IV. THE ORGANIZATION OF CROSS EXAMINATION

A. Organizing Principles

As with direct examination, the organization of a cross examination can be based on the four principles of primacy and recency, apposition, repetition, and duration. Unlike direct examination, however, on cross examination you will often have to deal with a recalcitrant witness. You may therefore have to temper your plan in recognition of this reality, occasionally sacrificing maximum clarity and persuasion in order to avoid "telegraphing" your strategy to the uncooperative witness. Thus, we must include the additional organizing principles of indirection and misdirection when planning cross examinations.

Three further concepts are basic to the organization, presentation, and technique of virtually every cross examination.

First, cross examination is your opportunity to tell part of your client's story in the middle of the other side's case. Your object is to focus attention away from the witness's direct testimony and onto matters that you believe are helpful. On cross examination, *you* want to tell the story. To do so, you must always be in control of the testimony and the witness.

Second, cross examination is never the time to attempt to gather new information. Never ask a witness a question simply because you

want to find out the answer. Rather, cross examination must be used to establish or enhance the facts that you have already discovered.

Finally, an effective cross examination often succeeds through the use of implication and innuendo. It is not necessary, and it is often harmful, to ask a witness the "ultimate question." Final argument is your opportunity to point out the relationship between facts, make characterizations, and draw conclusions based upon the accumulation of details. Do not expect an opposing witness to do this for you.

Lay the groundwork for your eventual argument, then stop. This technique is premised on the assumption that many witnesses will be reluctant to concede facts that will later prove to be damaging or embarrassing. Thus, it may be necessary to avoid informing the witness of the ultimate import of the particular inquiry. This can be accomplished through indirect questioning, which seeks first to establish small and uncontrovertible factual components of a theory and only later addresses the theory itself.

For example, a witness may be loath to admit having read a certain document before signing it; perhaps the written statement contains damaging admissions that the witness would prefer to disclaim. Direct questioning, therefore, would be unlikely to produce the desired result. The witness, if asked, will deny having read the item in question. Indirect questioning, however, may be able to establish the point:

QUESTION: You are a businessman?

QUESTION: Many documents cross your desk each day?

QUESTION: It is your job to read and respond to them?

QUESTION: Your company relies upon you to be accurate?

QUESTION: You often must send written replies?

QUESTION: Large amounts of money can change hands on the basis of the replies that you send?

QUESTION: You have an obligation to your company to be careful about its money?

QUESTION: So you must be careful about what you write?

QUESTION: Of course, that includes your signature?

By this point you should have obtained through indirection that which the witness would not have conceded directly. The final question should be superfluous.

Misdirection is an arch-relative of indirection, used when the witness is thought to be particularly deceptive or untruthful. Here the cross examiner not only conceals the object of the examination, but actually attempts to take advantage of the witness's own inclination to be uncooperative. Knowing that the witness will tend to fight the examination, the lawyer creates, and then exploits, a "misdirected" image. In our fire truck case, for example, the defendant is extremely unlikely to admit that he should have seen the fire engine; perhaps he would go so far as to deny the obvious. The lawyer may therefore misdirect the defendant's attention, as follows:

QUESTION: Isn't it true that you expected to see a fire truck at that corner?

ANSWER: Certainly not, I never expected a fire truck.

QUESTION: You weren't looking for a fire truck?

ANSWER: No.

QUESTION: You didn't keep your eye out for one?

ANSWER: No.

QUESTION: And you never saw one?

ANSWER: No.

QUESTION: Until, of course, after it was too late?

To be effective in the use of this technique, the cross examination must be organized first to obtain the "misdirected" denial. Note that the above example would not work at all if the questions were asked in the opposite order. In other words, the principle of misdirection works best with an intentionally elusive witness who needs only to be given sufficient initial rope with which to hoist himself.

B. Guidelines for Organization

There are many ways in which you can employ the principles discussed above.

1. Do Not Worry About Starting Strong

It would be desirable to be able to begin every cross examination with a strong, memorable point that absolutely drives home your theory and theme. Unfortunately, this will not always be possible. Many cross examinations will have to begin with a shake-down period during which you acclimate yourself to the tenor of the witness's responses, and when you also attempt to put the witness in a

cooperative frame of mind. Unless you are able to start off with a true bombshell, it will usually be preferable to take the time necessary to establish predicate facts through indirection.

2. Use Topical Organization

Topical organization is essential in cross examination. Your goal on cross examination is not to retell the witness's story, but rather to establish a small number of additional or discrediting points. A topical format will be the most effective in allowing you to move from area to area. Moreover, topical organization also allows you to take maximum advantage of apposition, indirection, and misdirection. You can use it to cluster facts in the same manner that you would on direct examination or to separate facts in order to avoid showing your hand to the witness.

Assume that you want to use the cross examination of the defendant in the automobile accident to show how busy he was on the day of the collision. You know that he had an important meeting to attend that morning, but he will be unlikely to admit that he might lose the client (and a lot of money) if he arrived late. You can solve this problem by using topical organization to separate your cross examination into two distinct segments: one dealing with the nature of the defendant's business and the other covering his appointment on the fateful morning.

In the first topical segment you will show that the defendant is an independent management consultant. It is a very competitive business in which client relations are extremely important. Part of his work involves seeking out potential new clients, whom he is always anxious to please. Since he is a sole proprietor, every client means more money. As a consultant, he must pride himself on professionalism, timeliness, and efficiency. He bills his clients by the hour. Time is money. In short, examine the witness on his business background without ever bringing up the subject of the accident. (The defendant's own lawyer almost certainly will have introduced his stable, business-like background; your examination on the same issue would then be within the scope of the direct.)

Later in the examination, after covering several other areas, you will shift topics to the defendant's agenda on the day of the accident. Now it is time to establish the details of his planned meeting and the fact that he was still miles from downtown shortly before it was scheduled to begin. You do not need to obtain an admission that he was running late or that he was preoccupied. Topical organization

has allowed you to develop the predicate facts for that argument before the witness was aware of their implications.

There is another advantage to topical organization on cross examination. Assume, in the example above, that the witness was well-prepared and that he immediately recognized your reasons for inquiring into his business practices. Because your examination was segmented, however, he could scarcely deny the facts that you suggested. In a portion of the examination limited to the operation of his business it would be implausible for him to deny that his clients value "professionalism, efficiency, and timeliness." Denying your perfectly reasonable propositions would make him look either untrustworthy or defensive. Note that you would not obtain the same result without topical organization. In the middle of the discussion of the morning of the accident it would be quite plausible for the defendant to testify that this particular new client was not dominating his thoughts.

3. Give the Details First

Details are, if anything, more important on cross examination than they are on direct. On direct examination a witness will always be able to tell the gist of the story; details are used in a secondary manner to add strength and veracity to the basic testimony. On cross examination, however, the witness will frequently disagree with the gist of the story that you want to tell, and use of details therefore becomes the primary method of making your points. You may elicit details to lay the groundwork for future argument, to draw out internal inconsistencies in the witness's testimony, to point out inconsistencies between witnesses, to lead the witness into implausible assertions, or to create implications that the witness will be unable to deny later.

Within each segment of your cross examination it will usually be preferable to give the details first. No matter what your goal, the witness will be far more likely to agree with a series of small, incremental facts before the thrust of the examination has been made apparent. Once you have challenged, confronted, or closely questioned a witness it will be extremely difficult to go back and fill in the details necessary to make the challenge stick.

Assume that the weather conditions turn out to be of some value to you in the automobile accident case. If you begin your examination of the defendant with questions about the weather you will be likely to obtain cooperative answers. As a preliminary matter you may have no difficulty establishing that it was clear and sunny that day. Perhaps you will have additional details available—the defendant left

home without an umbrella, he wasn't wearing overshoes, he didn't turn on his headlights. Conversely, imagine a first question such as, "Isn't it true that you never even tried to stop before the collision?" Now what is the witness likely to say when you ask whether the pavement was dry? Suddenly, the witness may remember all manner of fog and puddles; of course he tried to stop, but the street was just too wet.

There is an additional advantage to beginning a cross examination with details. It allows you to learn about the witness with a minimum of risk. We know that cross examination is not the time to try to gather new information about the case. You should only ask questions to which you know the answer, or where you at least have a good reason to expect a favorable answer. On the other hand, you frequently will not know how a particular witness will react to your questions. Will the witness be cooperative or compliant, or can you expect a struggle every inch of the way? Worse, is the witness slippery and evasive? Even worse, is the witness inclined to mislead and prevaricate? Worst of all, have you misinterpreted the information or made some other blunder in your own preparation? You must learn the answers to these questions before you proceed to the heart of your cross examination. While it may be mildly uncomfortable to receive an unexpectedly evasive answer to a question about a preliminary detail, it can be positively devastating to discover that you are unable to pin down a witness on a central issue. Beginning with details will allow you to take the witness's measure (and to evaluate your own preparation) at a time of minimum impact and risk.

4. Scatter the Circumstantial Evidence

Inferential or circumstantial evidence[3] is most persuasive when a series of facts or events can be combined in such a way as to create a logical path to the desired conclusion. Unfortunately, facts arranged in this manner on cross examination will also be highly transparent to the witness. As you stack inference upon inference your direction will become increasingly clear. A hostile or unfriendly witness will then become increasingly uncooperative, perhaps to the point of thwarting your examination. A far safer approach is to scatter the circumstantial evidence throughout the examination, drawing it together only during final argument.

3. Circumstantial evidence is defined and described in Chapter Four, Section III B (6), *supra* at p. 62.

5. Save a Zinger for the End

The final moment of cross examination may well be the most important. No matter how low-key or friendly your style, almost every cross examination will in some sense be viewed as a contest between you and the witness. Were you able to shake the adverse testimony? Were you able to help your client? In short, did you do what you set out to do? In this regard the final impression that you leave is likely to be the most lasting. Were you able to finish on a high note, or did you simply give up?

It is therefore imperative that you plan carefully the very last point that you intend to make on cross examination. It must be a guaranteed winner, the point on which you are willing to make your exit. Indeed, you should write this point down at the very bottom of your note pad, underlined and in bold letters. It should stand alone with nothing to obscure it or distract you from it. Then if your entire examination seems to fail, if the witness denies every proposition, if the judge sustains every objection, if the heavens fall and doom impends, you can always skip to the bottom of the page and finish with a flourish. Satisfied that you have made this single, telling, case-sealing point, you may proudly announce, "No further questions of this witness," and sit down.

How do you identify your fail-safe zinger? The following guidelines should help:

a. It must be absolutely admissible

There can be no doubt about the admissibility of your intended final point. Nothing smacks more of defeat than ending a cross examination on a sustained objection. If you suspect even for a moment that your zinger might not be allowed, abandon it and choose another. In fact, you should make an entry in the margin of your notes that reminds you of your theory of admissibility. Why is the point relevant? Why isn't it hearsay? How has the foundation been established? Why isn't it speculation?

b. It should be central to your theory

Since your closing point is likely to be the most memorable, you would be best served to make it one of the cornerstones of your theory. If there are eight facts that you must establish in order to prevail, you would like to end each cross examination on one of them. This may not always be possible. Not every opposing witness will testify about an essential matter, and it is important to insure admissibility by keeping your zinger well within the scope of the direct. Or it may be

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possible to undermine the witness's credibility by ending on a point that is collateral to your basic theory.

c. It should evoke your theme

The very purpose of a trial theme is to create a memorable phrase or invocation that captures the moral basis of your case. The closing moments of cross examination, therefore, constitute the perfect time to evoke your theme. Attention will never be more focused and memorability will never be higher. Imagine that the plaintiff in the fire truck case was taken directly to a hospital but that the unhurt defendant went on to his office after filling out a police report. If your theme is "Too busy to be careful," you can close your cross examination with these two questions: "You made it to your office later that morning, didn't you? Taking care of business, I suppose?" You know that the answer to the first question will be "Yes." You don't care about the answer to the second one.

d. It must be undeniable

It should be obvious by now that your final question must be undeniable. The end of your cross is not the time to argue or quibble with the witness. There are two good ways to insure undeniability.[4]

First, choose a fact that you can document. Look for something that can be proven from a prior statement of the witness or some other tangible exhibit or writing. If evidence of that sort is unavailable, select a point that has already been made in the testimony of other opposition witnesses, thereby making a denial either implausible or inconsistent with the balance of the other side's case.

Second, phrase your question in terms of bedrock fact, making sure that it contains nothing that approaches a characterization. The more "factual" your question the less possible it is for the witness to deny you a simple answer. In the automobile accident case, for example, a purely factual closing question would be, "You arrived at your office later that morning?" The same point, but made with a characterization, would be, "You were so busy that you went straight to your office?" The witness can argue with you about the interpretation of the word "busy," but arrival at his office is a fact.

Remember that cross examination may be followed immediately by redirect examination. Your closing question on cross may provide the opening subject for redirect. Thus, another aspect of undeniability is that the point must not be capable of immediate

4. The subject of controlling the witness and insuring favorable answers is discussed at greater length in Section V, *infra* at p. 102.

explanation. For example, the fire truck defendant may have gone straight to his office, but only to retrieve medicine for his heart condition. After that he might not have worked for the next three days. You can omit those facts on cross examination, but you can be sure that they will be developed on redirect. Since that point can be explained, it is not sufficiently "undeniable" for use as a closing question.

e. It must be stated with conviction

No matter what your closing question, you must be able to deliver it with an attitude of satisfied completion. If the subject makes you nervous, worried, or embarrassed, then you must choose another. It is neither necessary nor desirable to smirk, but you must exhibit confidence that your parting inquiry has done its work.

C. A Classic Format for Cross Examination

Because almost all cross examinations will be topical, there can be no standard or prescribed form of organization. The following "classic format" is designed to maximize witness cooperation. Of course, you may have a goal in mind for your cross examination other than witness cooperation; in that case, feel free to ignore or alter this approach. As a rule of thumb, however, you can best employ principles such as indirection and "detail scattering" by seeking information in this order.

1. Friendly Information

Be friendly first. Begin by asking all questions that the witness will regard as nonthreatening. These will often be background questions. For example, medical malpractice cases are often based upon errors of omission, and you may intend to argue in closing that the defendant physician, by virtue of her extraordinary training, should have known about certain available tests. You can start your cross examination, then, by asking friendly questions about the defendant's medical education, residency, fellowships, and awards. Most people, even defendants on trial, like to talk about their achievements. There is little doubt that a witness will be the most forthcoming when asked about aggrandizing information at the very outset of the cross examination.

2. Affirmative Information

After exhausting the friendly information, ask questions that build up the value of your case rather than tear down the opposition's. Much of this information will fill in gaps in the direct testimony. In fact, a good way to plan this portion of the cross is to list the

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information that you reasonably hope will be included in the direct. Whatever is omitted from the witness's actual testimony will form the core of your affirmative information section. Although adverse witnesses may not be enthusiastic about supplying you with helpful information, they will be unlikely to fight you over answers that might logically have been included in their own direct.

3. Uncontrovertible Information

You can now proceed to inquire about facts that damage the opposition's case or detract from the witness's testimony, so long as they are well-settled or documentable. On these questions a witness may be inclined to hedge or quibble, but you can minimize this possibility by sticking to the sort of information that ultimately must be conceded.

4. Challenging Information

It is unlikely that a witness will cooperate with you once you begin challenging her memory, perception, accuracy, conduct, or other aspects of her testimony. Therefore, it is usually desirable to proceed through friendly, affirmative, and uncontroverted information before you begin to take sharper issue with the witness. At some point, of course, you will have to ask most witnesses questions that they will recognize as challenges: "Mr. Defendant, the fact is that the first thing you did after the collision was to telephone your office?" Such questions are necessary. When used in their proper place they will not prevent you from first exploiting the other, more cooperative testimony from the witness.

5. Hostile Information

Hostile information involves confronting the witness directly. You may be able to extract the necessary answers to hostile questions, but certainly you can eliminate all hope of cooperation both then and thereafter. Hostile questions involve assaults on the witness's honesty, probity, peacefulness, character, or background. "Didn't you spend time in prison?" "You never intended to live up to the contract?" "That was a lie, wasn't it?"

6. Zinger

Always end with a zinger. You know why.

V. QUESTIONING TECHNIQUE

You know what you want to cover on cross examination and you know the order in which you want to cover it. How do you ask questions that will insure your success?

The essential goal of cross examination technique is witness control. As we noted above, your object on cross examination is to tell your client's story. This requires that you set the agenda for the examination, that you determine the flow of information, and that you require answers to your questions. In short, you must always be in control of the witness and the testimony. This does not, by the way, mean that you must appear to be in control, and it certainly does not mean that you must be domineering, rude, or overbearing toward the witness. In this context, control means only that the examination follow the course that you have selected and that the information produced be only that which you have determined helpful.

Control, therefore, can be either nonassertive or assertive. With a cooperative or tractable witness, control may mean nothing more than asking the right questions and getting the right answers. A hostile, evasive, or argumentative witness may require that you employ more assertive means.

There are numerous questioning techniques, to be discussed below, that you can employ to ensure witness control. At a minimum, however, every question on cross examination should have all of the following bedrock characteristics:

Short. Questions on cross examination must be short in both execution and concept. If a question is more than ten words long, it is not short in execution. Try to shorten it. If a question contains more than a single fact or implication, it is not short in concept. Divide it.

Leading. Every question on cross examination should be leading. Include the answers in the questions. Tell the witness exactly what to say. Cross examination is no time to seek the witness's interpretation of the facts. It is the time for you to tell a story by obtaining the witness's assent. A non-leading question invites the witness to wander away from your story.[5]

5. There are a few situations in which you may want to ask a non-leading question on cross examination. This chiefly occurs when you are absolutely certain that the witness must answer in a certain way and you believe that the dramatic value of the answer will be enhanced by having it produced in the witness's own words. If, for example, you are cross examining a witness with a prior felony conviction, you might ask the non-leading question, "How many years did you spend in prison after you were convicted of perjury?" Even in low-risk situations such as this, however, the technique has been known to backfire. Use it sparingly, if at all.

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Propositional. The best questions on cross examination are not questions at all. Rather, they are propositions of fact that you put to the witness in interrogative form. You already know the answer—you simply need to produce it from the witness's mouth. Every question on cross examination should contain a proposition that falls into one of these three categories: (1) you already know the answer; (2) you can otherwise document or prove the answer; or (3) any answer will be helpful. An example of the last sort of question would be the classic inquiry to a witness who must admit having previously given a false statement: "Were you lying then, or are you lying now?"

A. Planning for Control

Control of a witness on cross examination begins with your plan and is achieved, in large measure, on your notepad. In other words, a cross examination is only as good as your outline.

1. Avoid Written Questions

Many beginning lawyers like to write out all of the questions that they intend to ask on cross examination. This can be an excellent drill since it will concentrate your thinking and sharpen your specific questions. As we will see below, much of the art of cross examination involves asking short, incremental, closely sequenced questions. Since this is an unnatural style for many lawyers, it can be useful indeed to write out the questions first in order to make sure that they conform to this ideal.

When it comes to the actual examination, however, it is usually a mistake to read from a prepared list of questions. The great majority of lawyers use notes, of course, but not in the form of written questions. Reading your questions will deprive your examination of the appearance of spontaneity. For all but the most accomplished thespians, reading from a script will sound just like reading from a script, or worse, a laundry list. It will be almost impossible to develop any rhythm with the witness.

Reading from a set of questions will also deprive you of the control that comes from eye contact with the witness. The witness will be less likely to follow your lead, and you will be less able to observe the witness's demeanor of telltale signs of nervousness or retraction. Witnesses often betray themselves or open doors during cross examination, and you must constantly be ready to exploit such an unplanned opportunity. Needless to say, that will not happen if you are tied to a set of written questions.

There are even drawbacks simply to keeping your notes in the form of a set of written questions. First, this format encourages bobbing your head up and down from pad to witness. Even if you do not read the questions, you will spend an inordinate amount of time looking away from the witness. A more serious difficulty is the increased likelihood of losing your place. This is not a small problem. Notes based on written questions will be much longer than an outline, and the questions will all tend to look alike. The possibility of losing your place on a page, or being unable to find the page that you need, is extreme. Almost nothing is more embarrassing or damaging than being unable to continue a cross examination because your notes have become disorganized.

Written questions are best used as a pre-examination device. Write them out, study them, hone them, rearrange them, and then discard them in favor of a topical outline.

2. Using an Outline

The purpose of your outline should be to remind yourself of the points that you intend to make on cross examination and to ensure that you do not inadvertently omit anything. Do not regard your notes as a script, but rather as a set of cues or prompts, each of which introduces an area of questioning. Beneath each of the main prompts you will list the key details that you intend to elicit from the witness.

Your outline can follow the same format that you have used since high school. Principal topics are represented by Roman numerals, subtopics are denoted by capital letters, and smaller points or component details are represented by Arabic numerals. Although the form for academic outlines goes on to involve lower case letters, small Roman numerals, and other levels *ad infinitum*, the outline for a cross examination will become too complex if it extends beyond the third level.

The main topics for the cross examination of the defendant in the fire truck case would probably include the defendant's background, the events of the accident, and his post-accident conduct. In abbreviated form, an outline for that cross examination might look like this:

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II. Accident

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I. **Background**

- A. **Business consultant**
  - 1. **Sole proprietor**
  - 2. **Clients are important**
  - 3. **Timeliness and efficiency**
- B. **Locations and distances**
  - 1. **His home**
  - 2. **His office**
  - 3. **Parking lot**

II. **Accident**

- A. **Plans for day**
  - 1. **Left home at 7:55 a.m.**
  - 2. **Meeting at 8:30 a.m.**
- B. **Weather**
- C. **Fire truck**
  - 1. **Didn't see**
  - 2. **Didn't hear**
  - 3. **Didn't stop**

III. **Post-accident**

- A. **Phoned office/important client**
- B. **Didn't call ambulance for plaintiff**

Note that the use of sub-parts will vary according to the importance of, and your need to remember, discrete details. Depending upon your level of confidence, for example, you might want to fill in additional details for the weather conditions. On the other hand, you can usually expect to remember what was important to your case about the weather.

More importantly, note that the indented headings make it very easy to follow an outline in this form. It is not organized merely to tell the story, it also has a visual pattern that allows you to keep your

place. Even when you lose your place, the sparsity of words makes recovery that much simpler. Moreover, the use of single-word or short-phrase headings should allow you to keep your outline short. It may be possible to limit your notes to a single sheet of paper, and it should almost never be necessary to use more than a few pages.

Finally, your zinger has to be the very last Roman numeral at the bottom of the final page of your outline. Even if you do not fill the last page, put the zinger at the bottom so that it will have maximum visual impact. You will want it to stand out when you need it.

3. "Referencing" Your Outline

Once you have drafted the outline for your cross examination you should proceed to "reference" it. Referencing allows you to refresh the recollection of forgetful witnesses and to impeach or contradict witnesses who give you evasive, unexpected, or false answers.

Across from every important subtopic and crucial detail, make a note that records the source for the point that you intend to make. You need not reference the major topic headings, but other than that it will often prove useful to reference your notes line by line. At a minimum, you must reference every point that you consider essential to your case, as well as those that you expect to be controverted or challenging to the witness. For example, assume that you know about the defendant's meeting plans because he testified to them at his deposition. At the point in your outline where you reach the defendant's intended destination on the morning of the accident, make a note of the page and line in his deposition where he testified that he had an 8:30 a.m. meeting with an important client.

In addition to deposition transcripts, reference sources can come from letters, reports, memoranda, notes, and even photographs. The best sources, of course, are the witness's own prior words. Adequate secondary sources may include documents that the witness reviewed, acted upon, or affirmed by silence. In most circumstances, the testimony of a different person, though perhaps useful, will not be a reliable source for referencing a cross examination.

Many lawyers prepare their outlines by first drawing a vertical line slightly to the right of the center of the page. They then write the outline for the examination on the left side of the line, while references are noted on the right side. The right column may also be used for note-taking during the witness's direct examination. The first part of such a note pad would look like this:

Cross Examination of Defendant

I. Background	
A. Business consultant	Dep., p. 6, line 11
1. Sole proprietor	Dep., p. 7, line 2
2. Clients important	Dep., p. 26, line 23
3. Timeliness	Dep., p. 19, line 4
B. Locations and distance	
1. His home	Dep., p. 2, line 16
2. His office	Lease
3. Parking lot	Rental contract

It is also useful to devote the top of your first page to a sort of mini-reference chart where you list all of the important times, dates, and addresses in the case. Although by the time of trial you may think that you know these details as well as your own name, no lawyer is forever safe from "drawing a blank" on crucial details at crucial moments. The last thing you want to do is cross examine a witness as to her whereabouts for the wrong date. Cautious lawyers have even been known to write the names of the key witnesses—including their own clients—at the top of the first page.

B. Questions That Achieve Control

Having organized and outlined the cross examination, we are now ready to consider the precise techniques that provide maximum control over a witness's testimony. Many of the following rules will seem familiar since most are based upon the principles of apposition, duration, indirection, and misdirection. As with all of trial advocacy, it will seldom be possible to apply every rule in any given examination (although some lawyers have managed somehow to break every rule during a single examination). Rather, you must use your own good judgment to determine which principles will be most effective in your particular situation.

1. Use Incremental Questions

Cross examination should proceed in a series of small, steady steps. No matter how certain you are that a witness must grant you an answer, there is always a risk that she will disagree.

Disagreement can hurt. While it is true that you may often bring a witness back under control,[6] at a minimum that effort will generally waste time and distract attention from your more important goals.

The larger the scope of your question, the more likely you are to give the witness room to disagree. It is therefore preferable to divide areas of questioning into their smallest component parts. For example, assume that you are about to cross examine the defendant in the fire truck case. You want to establish the distance from his parking garage to his office in order to show that he was in a hurry to get to his meeting that morning. You could ask one question: "Your parking garage is located three blocks from your office, isn't it?" If the witness says "yes" you will have achieved your purpose, but what will you do if the witness says "no"? Make no mistake about it: no matter how carefully you have planned your cross examination, some witnesses will find a way to say "no." In the above scenario, for example, the defendant may decide that the distance is somewhere between two and three blocks, since his office building is not exactly on the corner. Or he may quibble with you over whether you can call the parking lot "his" garage. You may even have made a mistake about the facts. In any event, you can head off such potential problems by asking incremental questions, such as these:

QUESTION: You have a monthly parking contract at the Garrick garage?

QUESTION: The Garrick is located at the northwest corner of Randolph and Dearborn?

QUESTION: Your office is located at 48 South Dearborn?

QUESTION: The shortest distance from the Garrick to your office is to go south on Dearborn?

QUESTION: First you must cross Randolph? Then you must cross Washington? Then you must cross Madison?

QUESTION: And your office is further south on that block, isn't it?

This technique allows you to do two things. First, it cuts off the escape route for a witness who is inclined to argue or prevaricate. The incremental questions provide small targets for a witness's inventiveness. More importantly, it lets you know early in the sequence whether the witness is likely to disagree with you. The use of

6. Techniques for reasserting control are discussed in Section V D, *infra* at p. 125.

incremental questions allows you to test the witness for cooperation, and to determine whether your own factual assumptions are correct, before you reach an embarrassing point of no return.

2. Use Sequenced Questions for Impact

Sequencing may be used on cross examination for a variety of purposes. First, as on direct, you may use sequencing (or apposition) to clarify your story or enhance its impact upon the trier of fact. Eliciting two facts in close proximity can underscore relationships, contrasts, inconsistencies, connections, or motives. In the fire truck case you may sequence your cross examination so that the defendant testifies within a very short time about the important meeting that he had to attend on the morning of the accident and his earlier decision to leave the auto repair shop without servicing his brakes. The apposition of these otherwise disparate facts can help develop your theme, "Too busy to be careful."

The defendant, of course, will not want to draw the connection for you that his busy professional life leads him to neglect safety. You may be able to control the witness, however, by sequencing your examination in a way that multiplies the impact of two otherwise unconnected facts.

3. Use Sequenced Questions for Indirection

Unfortunately, what is clear to the jury will also be clear to the witness. Alerted that you have decided to exploit his busy schedule, the defendant may decide not to concede so readily the key details of his visit to the mechanic. In such situations you may use sequencing not for clarity and impact, but for indirection. You may therefore decide simply to abandon apposition and instead to "scatter" the information about the defendant's busy schedule.

Alternatively, however, you may still use sequencing to make your point. The key lies in the order of the examination. Assume that you still want to elicit in close proximity the information about the repair shop and the client meeting. Neither event is a necessary predicate to the other; which one should you establish first?

Although it may seem counterintuitive, the answer is to save the "surest" topic for last. In the above example you can probably be the most "sure" that the defendant will admit going directly to his office following the accident. The issue is purely factual, and there are, no doubt, other witnesses who will place him at the office that morning. You can also be fairly sure that the witness will admit having been at the repair shop, since again there will be witnesses to place him there.

On the other hand, you must be decidedly less sure that he will concede that he opted not to have his brakes fixed because he was busy that day. The defendant's motivations are his own, and they can seldom be established from a collateral source.[7]

Thus, motivation is your touchiest subject. It should therefore come at the beginning of your sequence, for two reasons. First, recall that the witness will be most cooperative before he understands where the examination is headed. Since proof of motivation depends most on the witness's own cooperation, you will want to address that issue at the beginning of that part of the examination. Second, you know that you want to conclude every area of the examination successfully. You will therefore save your more "provable" points for last.

How will this particular exercise in sequencing work? Assume that the brake shop incident occurred on Monday and that the accident was on Friday. Begin by asking the witness about his business schedule on that Monday. Do not bring up automobile repairs until you have completely established all of his appointments and time commitments for that day. Then ask him about his visit to the mechanic, concluding with the fact that he did not leave his car there. You may now go on to the day of the accident, establishing that the defendant went on to his office following the collision. Through careful sequencing you should be able to maintain sufficient control of the witness and keep both events in close apposition.

4. Use Sequenced Questions for Commitment

Using sequenced questions in combination with incremental questions may occasionally allow you to compel an unwilling witness to make important concessions. Facts can often be arranged in a manner that gives their progression a logic of its own. When the initial facts in a sequence are sufficiently small and innocuous, a witness may be led to embark upon a course of concessions that will be impossible to stop.

Suppose that you represent the defendant in the fire truck case, and you want to prove that the plaintiff was not as seriously injured as she claims. There is, of course, absolutely no possibility that the witness will admit flatly to having exaggerated her injuries. On the other hand, she may initially admit the accuracy of a series of smaller, more innocuous assertions. Note that the sequencing of the following questions commits the witness to a premise that will later be expanded in a way that she will not be able to deny:

7. This discussion assumes that you do not have available a prior statement from the defendant that admits the facts that you are seeking to establish.

QUESTION: You have testified that the accident has interfered with your enjoyment of life?

QUESTION: For example, you have given up playing tennis?

QUESTION: Tennis, of course, requires considerable physical exertion?

QUESTION: Because of that, you have dropped your membership in the North Shore Tennis Club?

QUESTION: One of your other interests is the fine arts, isn't that right?

QUESTION: In particular, you admire the French impressionists, correct?

QUESTION: Of course, the accident has not diminished your appreciation for the French impressionists?

QUESTION: In fact, you are a fairly serious student of nineteenth century art?

QUESTION: You share that interest with your friends and children, don't you?

QUESTION: You have maintained your membership in the Art Institute, haven't you?

QUESTION: You attended the special Monet exhibition, didn't you? And your membership allowed you to bring along some friends as guests, correct?

QUESTION: And in fact, you have continued to serve as a guide for schoolchildren?

QUESTION: Being a guide, of course, involves accompanying the children throughout the museum?

Sequencing was used in this example to commit the witness to several premises that were later expanded in a way that she would be unable to deny. Tennis is strenuous. She continues to enjoy the French impressionists. She was able to keep up with her friends at a crowded museum exhibit. And eventually, she is still capable of chasing children around the Art Institute.

5. Create a "Conceptual Corral"

As we have seen, the purpose of cross examination is often to "box in" a witness so that crucial facts cannot be averted or denied. It is often useful to think of this process as building a "conceptual corral"

around the witness. After building the first three sides of the corral, you may then close the gate with your final proposition.

Each side of the conceptual corral is formed by a different sort of question. One side consists of the witness's own previous admissions or actions, another is formed by undeniable facts, and the third is based upon everyday plausibility. The length of any particular side, or the extent to which you will rely on any of the three sorts of information, will differ from case to case. With almost every witness, however, the three sides of the corral can be constructed to form an enclosure from which the witness cannot escape.

Suppose that you want to prove that the defendant in the accident case ignored the fire truck. That proposition will be the gate of your corral; you won't make it obvious until all three sides have been put into place.

The first side is formed by the witness's own admissions, gathered from his deposition, documents in the case, or his earlier testimony on direct: He was driving south on Sheridan Road, he was late for an appointment, he had over ten miles yet to go, he had to park a few blocks from his office, and he didn't hit his brakes before the collision.

Side two consists of undeniable facts that have already been established or that can readily be proved by other witnesses: The fire truck was the largest vehicle on the road. It was red. The other traffic stopped. The weather was clear.

The last side is based upon plausibility. A fire truck can be seen at a distance of over one-hundred yards. Fire trucks have red lights to increase their visibility. Traveling at thirty miles per hour it only takes about ninety feet to stop an automobile.

The three sides having been constructed, the gate will simply fall into place: The defendant could only have missed the fire truck by ignoring the roadway.

Note that the fourth side of the corral often will not require any questions at all. Admissions, facts, and plausibility will frequently be all that you need to establish your ultimate point. And, as we will discuss below, it is usually preferable not to confront the witness with your ultimate proposition.

6. Avoid Ultimate Questions

It will often be tempting to confront an adverse witness with one last conclusory question: "So you just ignored the fire truck, didn't you?" Resist this temptation. If you have already established all of the

incremental facts that lead to your conclusion, then you will have little to gain by making the question explicit. At best you will repeat what has become obvious, and at worst you will give the witness an opportunity to recant or amend the foundational testimony.

Even worse, you may not have established the incremental facts as fully as you thought. Under these circumstances you can expect the witness not only to disagree with your ultimate proposition but to be prepared to explain exactly why you are wrong.

The classic approach to cross examination calls for the lawyer to elicit all of the facts that lead to the ultimate conclusion, and to then stop. The final proposition is saved for final argument. By saving the ultimate point for final argument, you ensure that the witness will not be able to change or add to the testimony. To a certain extent you also avoid informing opposing counsel of your argument, and you diminish the likelihood of having your position refuted either on redirect or through another witness.

While some writers state flatly that you should always save your ultimate point for argument, a more flexible rule is also more realistic. Perhaps it could best be stated as "Save the ultimate point for argument unless you are certain that it will be inescapable." For example, the witness may already have admitted your ultimate point during her deposition. Or your proposition might have been so firmly established by the evidence as to be undeniable. Occasionally, you might even want the witness to disagree with your conclusion so that you may exploit the sheer implausibility of the denial. Short of these circumstances, however, the safest route is generally to be satisfied with establishing a chain of incremental facts and to reserve the capstone for argument.

7. Listen to the Witness and Insist on an Answer

There is more to controlling a witness on cross examination than asking the right questions. You must also make sure that you have gotten the correct answers. This requires that you listen to the witness. Even the most painstakingly prepared question can elicit the wrong answer. The witness may not have understood you, or she may have detected an ambiguity in your inquiry. Some witnesses will argue with you for the sake of argument, some will try to deflect your examination, and some will simply answer a question different from the one that you asked. In any event, you must always recall that it is the witness's answer that constitutes evidence, and you must listen carefully to ensure that the evidence is what you expected.

You can often correct an answer by restating your question. Consider the following scenario from the fire truck case:

QUESTION: Isn't it true that all of the other traffic stopped for the fire truck?

ANSWER: How would they know to stop? There was no siren.

QUESTION: You didn't answer my question. All of the other cars did stop?

ANSWER: Yes.

In the above example, the defendant apparently decided that he did not want to respond to the cross examiner's question, so he deflected it by answering a different question. An inattentive lawyer might have interpreted that answer as a denial or otherwise let it go by. The advocate listened more carefully, however, and was able to obtain the precise information sought.

Note as well that the cross examiner in this situation would be equally satisfied with either an affirmative or negative answer. If the defendant admitted that all of the other traffic stopped, then the point is made. If the defendant insisted that the traffic hadn't stopped, he would be subject to contradiction by numerous other witnesses. Either way, the cross examination would be successful. The greater problem, then, is the non-answer. There are many techniques for requiring difficult or evasive witnesses to answer your questions,[8] but the first step is always to listen to the witness and to insist upon an answer.

C. Questions That Lose Control

The pitfalls of cross examination are well known: refusals to answer, unexpected answers, argumentative witnesses, evasive and slippery witnesses. Significantly, virtually all of these problems derive from the same basic error on the part of the cross examiner—failure to control the testimony.

Control of testimony on cross examination means ensuring (1) that all of your questions are answered with the information that you want, and (2) that no information is produced other than what you have requested. In other words, the witness must answer your questions and only your questions. An examination goes slightly out of control when a witness hedges or withholds answers. It goes

8. *See* Section V D, *infra* at p. 125.

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While some witnesses are intractable by nature, it is more usual that lawyers bring these problems upon themselves. Certain questions and styles of questioning constitute virtual invitations to a witness to set up an independent shop. The most common of these are detailed below. From time to time there may be a reason to use one of the following sorts of questions, but as a general proposition they are all to be avoided.

1. Non-leading Questions

The cardinal rule on cross examination is to use leading questions. The cardinal sin is to abandon that tool. We have discussed at length the advantages of stating your questions in the form of leading propositions. For some reason, however, many lawyers seem impelled to drift into non-leading questions once an examination has begun. You can control a witness this way:

> QUESTION: You were thirty feet away from plaintiff's car when you first applied your brakes, correct?

But you lose control when you ask,

> QUESTION: How far from the plaintiff's car were you when you applied your brakes?

Why would a lawyer make such an elementary mistake? The principal reason no doubt lies in lack of confidence. It is awkward to put words in another person's mouth. We do not generally conduct conversations by telling others exactly what to say. It is even more uncomfortable when you are uncertain about the content yourself. How odd it feels to tell the driver of an automobile exactly where and when he applied his brakes. An easy response mechanism to this unease is to revert to a more natural style of discourse: Just ask what happened. We all occasionally fall into the trap of turning control of the examination over to the witness.

The solution to this problem is preparation. If you are unsure of where the witness applied his brakes, of course you will not tell him that it was thirty feet. So be sure. Read his deposition, scour the police report, measure the skid marks, talk to other witnesses, calculate his speed and stopping distance. Then, once you are certain that there is no plausible denial, tell him exactly what he did. Because your leading question is based upon verifiable facts, the great likelihood is that the witness will agree with you. If the witness disagrees, all is still

well and good. After all, you have the facts to use in further cross examination or to introduce through another witness.

There are two legitimate reasons to suspend temporarily the use of leading questions. Neither is without its risks, and both should be used with care. First, you will occasionally need to learn a bit of information from a witness in order to continue a cross examination. For example, there might have been two routes available for the fire truck defendant to reach his office from the scene of the accident. Having prepared thoroughly, you know that you will be able to show that he was already so late that neither route would have gotten him to his appointment on time. Thus, even if you don't know the answer to the question, you can safely ask a non-leading question: "What road did you intend to take downtown?" You need that information to structure the balance of your examination, and you can handle whichever answer you are given. Never employ this approach because you are curious or because you hope that the answer will be helpful. The potential for backfiring is great. You must truly be certain that you need to ask an informational question and that you have prepared alternate examinations depending on which answer you are given.

Second, and even less frequently, you may believe that an answer will have more impact if it comes in the witness's words instead of yours. Sometimes this works, but often it does not. Suppose that you are cross examining the fire truck plaintiff on the extent of her injuries. You know that she is still able to work at her job and that she recently went on a three-day camping trip. It would indeed heighten the drama of the moment if you could obtain the damning testimony in her own words:

QUESTION: Ma'am, please tell us all of the things that you were able to do on your recent camping trip.

ANSWER: Oh, I was able to hike, fish, swim, pitch the tent, carry my backpack, and sleep on the ground.

Perhaps the witness testified to all of that during her deposition. By the time of trial, however, the more likely scenario will be:

QUESTION: Ma'am, please tell us all of the things that you were able to do on your recent camping trip.

ANSWER: I was hardly able to do anything. Everything I tried caused me pain, even sleeping.

Non-leading questions might have a terrific potential impact, but leading questions have the incalculable advantage of greater safety. Consider:

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QUESTION: Ma'am, you went on a three-day camping trip?

ANSWER: Yes.

QUESTION: You went hiking?

ANSWER: Yes, but it caused me pain.

QUESTION: You went fishing and swimming?

ANSWER: Yes.

QUESTION: You pitched the tent?

ANSWER: Yes, but that hurt too.

QUESTION: You stayed out in the woods for three days?

ANSWER: Yes.

Note that the witness may be able to argue with you notwithstanding your use of leading questions. The difference, however, is that short, leading questions limit her ability to do so, while increasing your ability to bring her back under control. Furthermore, the "yes, but" nature of her embellishments necessarily makes them less convincing.

Still, there may be times when it is truly advantageous to extract cross examination testimony in a witness's own words. This technique is most likely to work when the information you are after is well-documented, factual, and short. In the above example, assuming that you have adequate deposition testimony, you might be able to use non-leading questions to the following extent:

QUESTION: Where did you spend last Labor Day weekend?

ANSWER: At Eagle River Falls.

QUESTION: What is Eagle River Falls?

ANSWER: It is a campground.

That is enough; do not push your luck. Since the last thing you want to do is lose control of the testimony, now is the time to go back to leading questions.

2. "Why" or Explanation Questions

It is almost impossible to imagine a need to ask a witness to explain something on cross examination. If you already know the explanation, then use leading questions to tell it to the witness. If you do not already know the explanation, then cross examination surely is not the time to learn it. No matter how assiduously you have

prepared, no matter how well you think you understand the witness's motives and reasons, a witness can always surprise you by explaining the unexplainable.

The greatest temptation to ask for an explanation arises when a witness offers a completely unexpected answer. The dissonance between the expectation and the actual response cries out for resolution. The natural reaction is to resolve the inconsistency by asking the witness, "Please explain what you mean by that." Unfortunately, the witness will be more than happy to explain, almost always to the detriment of the cross examiner. The following scenario is not unrealistic:

QUESTION: Your parking garage was located three blocks from your office, correct?

ANSWER: Yes.

QUESTION: And the sidewalks are always very crowded between 8:00 and 8:30 in the morning?

ANSWER: That's right.

QUESTION: You usually have to wait for one or more traffic lights between the garage and your office, don't you?

ANSWER: I do.

QUESTION: So you have to plan on at least ten minutes to get from your garage to your office, right?

ANSWER: No, that is not right. I usually make it in three to five minutes.

QUESTION: Please explain how you can travel that distance, under those circumstances, in only three to five minutes.

ANSWER: It's simple. There is an express bus that travels that route in a bus lane. I get on in front of the garage and its next stop is right in front of the office. Even in heavy traffic it never takes more than five minutes since the bus lane is always clear and the traffic lights are coordinated.

There are numerous common questions that invite such long, unwelcome answers. They should all be excised from your cross examination vocabulary. Do not ask a witness to explain. Do not ask a "why"

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question. Do not ask a question that begins with "How do you know" or "Tell us the reason." If you receive an unexpected answer, the fault probably lies with the original question. The best solution is usually to move on or rephrase your inquiry.[9] It cannot help you to allow the witness to dig the hole a little deeper.

Asking a witness to explain is the equivalent of saying, "I've grown tired of controlling this cross examination. Why don't you take over for a while?"

3. "Fishing" Questions

Fishing questions are the ones that you ask in the hope that you might catch something. It has been said before and it is worth repeating here: Do not ask questions to which you do not know the answers. For every reason that you have to think that the answer will be favorable, there are a dozen reasons you haven't thought of, all of which suggest disaster.

Very few lawyers actually intend to go fishing during cross examination; most lawyers plan only to elicit information that they have developed during preparation for trial. Nonetheless, temptation has been known to strike. A witness, during either direct or cross, may expose an enticing, but incomplete, morsel of information. It is difficult to resist exploring such an opening, just to see if anything is really there. That is how the fishing starts.

In our intersection case, for example, suppose that during discovery the plaintiff produced medical reports indicating that she would need to participate in extensive physical therapy for the next several years. During her direct testimony at trial, however, she has unexpectedly stated, "My doctor said that I did not need to go to physical therapy any longer, and I ended it several months ago." The suggestion seems obvious; her injuries are not as severe as was previously thought, and she is now well on the way to resuming her normal life. Defense counsel immediately sees a vision of reduced damages. The temptation to go fishing on cross is now nearly irresistible; the defendant's lawyer wants to make sure that the record is clear as to the plaintiff's recovery.

Unfortunately, defendant's counsel is likely to "catch" information sharply different from that which was sought:

QUESTION: You have told us that your doctor terminated your physical therapy.

9. Reasserting control in such situations is discussed in greater detail below. *See* Section V D *infra* at p. 125.

ANSWER: That is correct.

QUESTION: Isn't that because your recovery has been quicker than was expected, and you don't need the therapy any longer?

ANSWER: No. It is because the therapy was too painful and I wasn't making any progress.

The defendant's lawyer in the above scenario had a good reason to hope that the "therapy" questions would produce helpful information. The most important part of the answer, however, was unknown. Counsel simply had no way of predicting what the witness would say as to why the physical therapy ended. Reasonably hoping to turn up a good answer, counsel instead made the plaintiff's case stronger. That is what can happen when you go fishing.

4. Long Questions

Long questions have an almost limitless capacity to deprive a cross examiner of witness control. Recall that short, single-fact, propositional questions give a witness the least room to take issue with your point. By contrast, long questions, by their very nature, multiply a witness's opportunity to find something with which to disagree. The more words you use, the more chance there is that a witness will refuse to adopt them all.

A second problem with long questions is that they are easily forgotten or misunderstood. Even a witness with every reasonable intention can be misled or baffled by a lengthy question. Thereafter, the witness may insist on answering the question that she thought you asked rather than the one that you meant to ask.

Finally, long questions diminish your ability to enlist the judge in your efforts to control a witness. It is a little-known, and even less acknowledged, characteristic of trial judges that they do not all tend to pay close attention to attorneys' questions, particularly in jury trials. It is, after all, the answer that constitutes evidence. Given the principle of primacy, long questions have the greatest potential to lose a judge's attention. In ordinary circumstances this is not of great moment, since the judge's impression, or even understanding, of the question may not be essential. Once a witness has avoided answering, however, the judge's perception of the question can become crucial.

Counsel will often want to request the judge to direct a witness to answer a question "yes or no." Understandably, a judge will only be inclined to do this if she has heard and comprehended the entire

question. Even if your question is completely susceptible of a "yes or no" answer, a judge who has tuned out the last two-thirds of your inquiry is extremely unlikely to restrict the witness's answer.

There is no fixed point at which a question becomes "long." Some inquiries, depending upon the nature of the concept and the cooperativeness of the witness, may call for more words than others. A useful rule of thumb is that any question of ten words or fewer may be considered "short." You may wish to exceed this length, but only for a reason.

5. "Gap" Questions

"Gap" questions constitute an especially enticing subset of explanation questions. Interestingly, they are often most irresistible to lawyers who are particularly well-prepared or attentive.

Imagine that you are the prosecutor in a hit-and-run case. You know the date on which the crime occurred, but because there were no eyewitnesses, you have been able to narrow the time of the crime only to a six-hour window. The defendant has raised the defense of alibi. You have thoroughly researched the law and meticulously prepared the facts of your case, which is based entirely on circumstantial evidence. The defendant has taken the stand and testified in his own defense. Listening carefully, you were surprised to notice that he left several half-hour gaps in his alibi.

The defendant is now available for cross examination. The temptation may be overwhelming to alert the jury to the gaps in the defendant's alibi: "Mr. Defendant, you told us where you were at 2:00 p.m., but you didn't say anything about 2:30 p.m., did you?" Do not ask that question; you will lose control. It is an unspoken invitation to the witness to fill in the gap. Even if the witness does not take the opportunity to complete his alibi, you can be certain that opposing counsel will do it for him on redirect. The far better tactic is to allow the omission to remain unexplained and then to point it out during final argument.

Gaps are found in direct testimony more often than one might expect. A witness may neglect to testify about one of a series of important events or may omit testimony concerning a crucial document. Alternatively, a witness might leave out important evidence on damages or may fail entirely to testify as to an element, such as proximate cause, of the opposition's case.

How can you avoid the temptation to ask "gap" questions? The key is to remember that it is the opposition's burden to prove their case. Everything that they leave out of their case works in your favor.

In most circumstances the absence of proof can be interpreted as negative proof.[10]

Of course, your opposition may also create gaps in their testimony by design, purposely leaving out facts that damage their case but are helpful to yours. Needless to say, you will want to address these omissions during your cross examination. The fatal "gap" questions are the ones that are directed at omissions in the other side's case. A useful way to keep this distinction in mind is the following: Do not cross examine on omissions in testimony. Do cross examine on the absence of facts.

Thus, when your opposition has failed to prove something, simply allow the gap to remain. Comment on it during final argument, not cross examination.

6. "You testified" Questions

Another common method of surrendering control to a witness is through the use of questions that seem to challenge the witness to recall the content of her earlier direct testimony. These can be referred to as "you testified" questions because they inevitably contain some variant on those words. Each of the following is a "you testified" question:

QUESTION: You testified that the assailant had brown hair?

QUESTION: Wasn't it your testimony that you left your house at 8:00 a.m.?

QUESTION: On direct examination you testified that the last possible delivery date was May 17, didn't you?

What is wrong with these questions? In each case they seem to call for relevant information. They are all leading. They are all short. They are all propositional.

The problem with "you testified" questions is that they invite the witness to quibble over the precise wording used on direct examination. The exact language of the witness's earlier answer is seldom essential,[11] but the "you testified" format inflates its apparent

10. The most obvious exception to this rule is a criminal defendant's decision not to testify at all, from which no negative inference may be drawn.

11. The precise wording of a witness's previous answer can be essential when you intend to impeach the witness through the use of a prior inconsistent statement. In that situation it is usually necessary, and indeed some courts require, that you "recommit" the witness to the testimony that you intend to impeach. Thus, the classic foundation for impeachment by a prior inconsistent statement includes a preliminary "you testified" question. Note, however, that the subject of the impeachment is the witness's earlier testimony and not the actual underlying events. For further information on the specifics of impeachment, *see* Chapter Six, Section II *infra* at p. 158.

importance, often almost to the point of seeming to pick a fight. Imagine these answers to the above questions, with the witness's unspoken thoughts given in parentheses:

QUESTION: You testified that the assailant had brown hair?

ANSWER: No. (I testified that he had sort of sandy brown hair.)

QUESTION: Wasn't it your testimony that you left your house at 8:00 a.m.?

ANSWER: That was not my testimony. (I said that I believed that I left my house at approximately 8:00 a.m.)

QUESTION: On direct examination you testified that the last possible delivery date was May 17, didn't you?

ANSWER: I do not believe that is correct. (I think I said that we could not accept delivery any later than May 17.)

Even if you have correctly remembered the witness's precise testimony down to the last word, there is no guarantee that the witness will remember it equally well. At best, you may end up with a response on the order of, "I cannot remember whether those were my exact words." At that point you have lost control, since the examination has now shifted away from your agenda and onto the issue of the superiority of your memory. The court reporter can be called upon to resolve the dispute, but that exercise, at a minimum, will be disruptive to your pace. Besides, you might turn out to be embarrassingly wrong.

It is far less risky, and generally much more effective, to cross examine witnesses on facts and events, rather than on prior testimony: "You left your home at 8:00 a.m.?" "You expected delivery no later than May 17?" In situations where you want to make it clear that you challenge the witness's version of events, use a formulation such as this one: "You now claim that the assailant had brown hair?"

It may be helpful to think of possible cross examination questions using the following hierarchy. As a general rule, you should prefer questions that are higher on the list:

Best, direct your questions to what happened.

Next, direct your questions to what the witness claims happened.

Last, direct your questions to what the witness said happened.

The closer you can stay to "real life," the less likely you are to lose witness control.

7. Characterizations and Conclusions

Another way to risk losing control on cross examination is to request that a witness agree with a characterization or conclusion. Assume that you are cross examining the complaining witness in a robbery case. The witness testified on direct that the crime occurred at midnight on a seldom-traveled country road. Your defense is misidentification. Wishing to take advantage of the time and place of the events, you ask this question:

"It was too dark to see very well, wasn't it?"

You have just asked the witness to agree with your characterization of the lighting conditions. The witness, being nobody's fool, answers:

"I could see just fine."

Instead, you should have asked the witness about the facts that led you to the characterization: the sun had gone down, there was no moon that night, there were no street lamps, there were no house lights, and there were no illuminated signs. The characterization could then be saved for final argument.

Some outstanding trial lawyers, through force of personality, splendid preparation, or stunningly good luck, have been quite successful in obtaining a witness's agreement to their characterizations. In the above example it would be of inestimable value to have the witness concede that it was too dark to see very well. For most lawyers, however, the risk to these questions usually outweighs the gain.

Bear in mind that it may be difficult to draw the line between characterization and fact. It will depend on the specifics of the case, the inclinations of the witness, the context of the question, and numerous other factors. On the one hand, a question such as, "It was midnight?" is clearly one of fact. On the other hand, a question such as, "Your identification was mistaken?" is no doubt a characterization. There are numerous possibilities in between. Even the question, "It was too dark to see?" might be regarded as either characterization or fact, depending upon the witness's background. While most people would regard that statement as conclusory—who is to say when it becomes too dark to see?—a photo-physicist, or perhaps a forensic ophthalmologist, might regard the inquiry as calling for an absolute fact.

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Recognizing the impossibility of stating an absolute rule, the wisest course is to examine your questions for their potential to be taken as characterizations. Then make sure that you phrase them as facts.

D. Reasserting Control

Notwithstanding your best efforts and preparation, some witnesses will inevitably wander beyond your control. Your perfectly reasonable question may result in an absolute torrent of unwelcome, and uncalled for, information. While your first reaction to such testimony may range from anger to panic, the better response is to ask yourself, "Why is this witness out of control?" Once you have answered that question, you can proceed to apply the techniques for reasserting witness control.

A witness typically falls out of control in one of three ways: (1) she has refused to agree with you; (2) she has been invited to explain an answer; or (3) she is being impermissibly uncooperative.[12] In the first two instances the problem is your fault, and you can usually cure it with further questions. In the third case the witness is at fault, and you may need help from the judge.

1. Refusal to Agree

a. Determine why the witness has refused to agree

What happens when you ask a short, propositional, leading question and the witness simply disagrees with you? You are well prepared, you have done your homework, your question is in good form, you know what the answer should be—but the witness will not give you the right answer. The witness is clearly beyond your control, but why?

Imagine that you have asked a purely factual leading question but that the witness will not give you the answer you expect. Perhaps things have gone along the line of one of the following scenarios:

QUESTION: You are the plaintiff's next door neighbor, aren't you?

ANSWER: No, I am not.

Or,

QUESTION: When you entered the operating room the chief surgeon was already there, wasn't she?

12. A fourth circumstance, where the witness has changed her testimony, will be covered in the discussion of impeachment. *See* Chapter Six.

ANSWER: That is not correct.

Or,

QUESTION: Wasn't the gun sitting on the desk?

ANSWER: No.

In each of these situations you expected an affirmative answer, but you received a resounding negative. Why did it happen? As Shakespeare's Cassius remarked, "The fault, dear Brutus, is not in our stars, but in ourselves." Unless the witness is lying,[13] intentionally uncooperative,[14] or sincerely mistaken,[15] you received the wrong answer because of the nature of your question. This usually happens for one of three reasons: (1) you were wrong about your facts; (2) you included a "compound detail"; or (3) your question contained an "imbedded" characterization.

In the first example above it is possible that you were simply wrong on the facts. This happens to everyone. Perhaps the witness lives across the street or down the block from the plaintiff. Perhaps your investigator gave you erroneous information. Perhaps the police report that you relied upon was incorrect. Perhaps you simply got two witnesses confused. These are all common occurrences.

In the second example it is likely that the cross examiner included what we will call a compound detail. Recall the question: "When you entered the operating room the chief surgeon was already there, wasn't she?" The chief surgeon's presence in the operating room exactly at the time of the witness's entry is an extra detail. It may be superfluous, but it gives the witness the opportunity to seize upon that nuance as a reason for answering "No" to the entire question. The witness is not disagreeing about the chief surgeon's presence, but only about the timing of her arrival. Note, by the way, that the question is not technically compound in form; it asks only for a single fact. Still, the inclusion of an unnecessary detail has the effect of "compounding" the question and releasing the witness from control.

Finally, the question in the third example, while appearing factual on its face, may have been interpreted by the witness as

13. If the witness is lying or otherwise changing her testimony you will, of course, impeach her through the use of her own prior statement. We know that you have access to a prior statement or other impeaching material, because otherwise you would not have asked the question in the first place. Regarding the mechanics of impeachment, see Chapter Six.

14. Methods for dealing with impermissibly uncooperative witnesses are discussed in Section V D(3), *infra* at p. 137.

15. If the witness is mistaken, you will refresh her recollection.

including a characterization. This sort of "imbedded characterization" is frequently the reason for an unexpected negative answer. How could a question so purely factual be taken as an imbedded characterization? The witness, after all, was asked whether the gun was on the desk. That question calls only for a simple observation; there is no room for interpretation. If all of the facts point to the gun's location on the desk, how can this witness respond otherwise? The answer is that one person's fact may indeed be another's characterization. Although you may be quite confident that the piece of furniture in question is a desk, the witness may regard it as a vanity or computer table. Moreover, the distinction may be important to the witness, if, for example, there had been several similar pieces of furniture in the room.

b. Retreat to constituent facts

Once you have determined why a witness has refused to agree with you, you can generally bring the witness back under control simply by asking further questions. Of course, you will never ask a witness for an explanation or elaboration. Rather, your following questions should retreat to constituent facts. This method can work regardless of the reason the witness has chosen to disagree. It involves breaking your original question into a series of ever-smaller "constituent facts" until the basis of the witness's disagreement can be eliminated.

The retreat to constituent facts is a retreat only in the tactical sense. By using this method you are not giving up or abandoning your line of questioning. You are "retreating" from an insistence that the witness adopt your exact language. By changing your wording, while maintaining the substance of your question, you can effectively reassert control over the witness. In other words, you can accomplish your advocacy objective without the need for direct confrontation.

i. Mistaken facts

In employing the retreat to constituent facts, you must first consider that you may have been mistaken in the first place. If your facts were wrong, then the witness obviously will not agree. Reconsider your question. Are you certain of its premise? Are you depending upon a reliable source? Is the answer you want truly beyond controversy? If you conclude that the witness may have disagreed with you because of misinformation, then rephrase your question to include only those facts of which you are the most certain.

In the next-door-neighbor example above, for instance, your retreat might take the following form:

QUESTION: You are the defendant's next door neighbor, aren't you?

ANSWER: No, I am not.

QUESTION: It is true that you know the defendant?

ANSWER: Yes, that is true.

QUESTION: And you do live near the defendant?

ANSWER: Yes, I do.

At this point, having established the constituent facts of which you are the most certain, you will stop. Of course, if the witness denies knowing or living near the defendant, then it is obvious that something else is wrong with your cross examination. Under those circumstances your best recourse is to move on to another line of questioning and to reexamine your notes and files during a break in the testimony.

ii. Compound details

Compound details are those which are unnecessary to the question, but which have the effect of compounding the inquiry and making possible a denial or disagreement. You can usually reassert control over the witness simply by rephrasing your question without the superfluous detail. Note, however, that not all details are "compound"; some may be quite necessary, even crucial, to your case. Consider the two following examples:

QUESTION: You saw a red car run the stop light, didn't you?

QUESTION: The next car that you saw was red, correct?

In the first question the car's color may well be irrelevant. So long as the witness saw a car run the stop light, it may not matter what color it was. If your case does not depend on the color of the automobile, you may rephrase the question by omitting the detail and retreating to a constituent fact: "You did see a car run the stop light?"

In the second question, on the other hand, it seems apparent that the color of the car does matter, since the cross examiner has taken pains to point out that the very next automobile was red. Thus, the detail is probably not compound. You can proceed to ask another question to establish that the witness did indeed see a car, but at some point the color will have to be established as well.

Identifying compound details, then, calls for the exercise of judgment. Only the lawyer who prepared the case will know whether a particular detail is essential or unnecessary. In either event, however,

you can begin to reassert control over the witness by disaggregating the details and continuing your examination on the basis of constituent facts. Consider the operating room example from the previous section:

QUESTION: When you entered the operating room the chief surgeon was already there, wasn't she?

ANSWER: That is not correct.

QUESTION: Well, you did enter the operating room?

ANSWER: I did.

QUESTION: You and the chief surgeon were present in the operating room at the same time?

ANSWER: We were.

QUESTION: You observed the operation?

ANSWER: Yes.

QUESTION: The chief surgeon was there when the procedure began?

ANSWER: She was.

Note that the cross examiner was able to elicit all of the important facts, while omitting the compound detail. Of course, if the exact time of the surgeon's entry was relevant to the case, another approach would have to be taken. Such an approach, as utilized with "imbedded characterizations," is discussed in the next section.

iii. Imbedded characterizations

"Imbedded characterizations" are statements that appear to be factual but which, upon examination, turn out to contain unspoken characterizations or assumptions. In the example in the introductory section above we saw that even a simple noun like "desk" can contain an imbedded characterization, since the term expresses an assumption as to the intended use for the piece of furniture.

Our language, as imprecise as it is, is filled with opportunities for the use of imbedded characterizations. They may arise through the use of technical language, professional or occupational jargon, slang, or as we saw above, simply as the result of a differentiated understanding of an otherwise simple noun or verb.

Imagine, for example, that a murder was committed on a Hollywood soundstage just as a studio tour was passing through. A member of the cast was charged with the crime and has raised the

SODDI[16] defense. One of the tourists has testified on direct and is now being cross examined:

QUESTION: You were on the set when you heard a shot?

ANSWER: I was.

QUESTION: You looked over and saw a gun on the floor?

ANSWER: I did.

QUESTION: It was at the feet of the best boy?

ANSWER: No, I don't think so.

As it happens, "best boy" is the professional term for the first assistant electrician on a film crew. The lawyer, apparently a Los Angeles native, thought nothing about using this term. The tourist-witness, however, gave the term its ordinary meaning, and therefore gave the cross examiner the wrong answer.

Of course, the "best boy" story is a fanciful example, since only the most star-struck lawyer would fail to recognize it immediately as containing an ambiguity. Even still, the characterization can be unpacked via retreat to constituent facts:

QUESTION: You were on the set when you heard a shot?

ANSWER: I was.

QUESTION: You looked over and saw a gun on the floor?

ANSWER: I did.

QUESTION: It was at the feet of the best boy?

ANSWER: No, I don't think so.

QUESTION: Well, it was at the feet of a member of the film crew?

ANSWER: Yes, that's right.

QUESTION: And that person was holding a tool box?

ANSWER: Yes, I believe he was.

QUESTION: He was wearing an apron?

ANSWER: Yes.

QUESTION: And he was off to the side, away from the actors?

ANSWER: Correct.

16. Some Other Dude Did It.

At this point the constituent facts have been established: The weapon was seen near a member of the crew, not in the vicinity of the defendant-actor. It is not necessary to insist that the witness adopt the lawyer's language, or even to define the term "best boy." Facts are important, not words, and it is almost always possible to rephrase a question so as to employ more basic facts.

How would one retreat to constituent facts concerning a more realistic question? Assume that you are cross examining an eye witness to a crime that occurred at 8:30 p.m. on May 21. You want to establish that it was too dark for anyone to see clearly, but the witness will not agree with your imbedded characterization. Therefore, you retreat to constituent facts:

QUESTION: It was already dark at the time of the crime, wasn't it?

ANSWER: No, I wouldn't say so.

QUESTION: Well, it was 8:30 p.m., wasn't it?

ANSWER: Yes.

QUESTION: And it was still May?

ANSWER: Of course.

QUESTION: The sun had set?

ANSWER: Yes.

QUESTION: The street lights had gone on?

ANSWER: I think that is right.

QUESTION: The cars had their headlights on?

ANSWER: I believe so.

QUESTION: Certainly it was no longer daylight, correct?

ANSWER: Correct.

At this point you will stop. You have elicited the constituent facts that establish "darkness." It is not necessary to drag a concession out of the witness that it was too dark to see; the facts, and your final argument, will speak for themselves. Note also that most of the constituent facts can be proven through other means. The time of the sunset can be shown from Weather Bureau publications, and the time of street light illumination should be available from municipal records. Thus, a witness who disagrees with your constituent facts can be shown as untrustworthy during your case in chief.

Imbedded characterizations lurk everywhere. They are particularly tricky precisely because they generally involve a witness's unforeseen interpretation of a term or idea. It is important, therefore, not to become obsessed with avoiding imbedded characterizations. To do so would turn your cross examination into an interminable series of overwhelming details. You should never ask, "Was the gun on a piece of furniture with a flat horizontal surface and four vertical legs?" Go ahead and ask whether it was on the desk. By the same token, go ahead and ask the witness whether it was dark. Maybe she will agree with you, in which case there will be no need to retreat to constituent facts.

It is only when the witness unexpectedly disagrees that you must break your reasonable question into its smallest factual components. This places a premium on quick reaction. Since you cannot plan a response to a witness's unexpected answer, how can you know which constituent facts to use? It is impossible to list constituent facts for every noun and verb in your cross examination, just in case you might need them.

The answer lies in your theory of the case. You may not anticipate a witness's answer to your question, but you should always know why you asked the question. Why was the question necessary? How will it contribute to your final argument? What did you want to prove? The answers to these questions should almost always supply you with more than sufficient constituent facts.

2. Invited Explanation

a. Determine why the witness has explained

Most witnesses launch into unsolicited explanations because they think that they have been requested, or at least allowed, to do so. Whenever a witness begins to answer you at length, you must ask yourself what it was about the question that the witness took as a cue. Certainly you did not directly ask the witness to explain something, but perhaps the question was long, compound, fishing, or a "gap" question.

In addition to those enumerated in the previous section,[17] many questions contain implicit invitations to explain. Questions that use words such as "yet" and "still" are often regarded by witnesses as challenges that call for explanations. Consider this example, in which the last question uses both of the challenging words:

17. *See* "Questions That Lose Control," Section V C, *supra* at p. 114.

QUESTION: Immediately before the accident you were waiting for a bus?

ANSWER: That's right.

QUESTION: The bus was coming from the north, wasn't it?

ANSWER: Correct.

QUESTION: You had to look north for your bus?

ANSWER: I did.

QUESTION: The accident took place to the south of the intersection?

ANSWER: I guess it did.

QUESTION: Yet you still say that you could see the accident clearly?

ANSWER: Well, I turned my head when I heard the brakes screech.

Note that the "yet, still" question added virtually nothing to the examination, other than to alert the witness to the need for an explanation.

Other questions that frequently evoke explanations include those that are argumentative or unfair. Every time you take issue with or confront a witness, and especially when you mischaracterize testimony, you are inviting the witness to offer an explanation. This is not to say that you should never confront a witness during cross examination; indeed, it frequently is essential that you do so. Rather, you must be aware that confrontation will not always result in meek acquiescence on the witness's part. On the other hand, you should not knowingly mischaracterize a witness's testimony, for reasons both tactical and ethical.

In any event, the first step toward reasserting control of an explaining witness is to understand why the witness has begun to explain. This knowledge is crucial, so that you may avoid perpetuating your mistake in your subsequent questions.

b. Reasserting control, part one

How do you reassert control over a witness whom you have, even if unintentionally, invited to explain an answer? For many lawyers, the initial reaction to the beginning of an explanation lies somewhere between panic and fury. It is not hard to imagine the mental response when the unwanted explanation begins to emerge: The witness is not supposed to be doing this! The witness is just supposed to be giving the answer that I want! The witness is being unfair!

In these circumstances it is not surprising that the first tendency is to try to get the witness to shut up. Most lawyers try to achieve this in one of two ways: the impolite and the not-so-polite.

The rude way to terminate a witness's explanation is simply by interrupting with an instruction to the witness on the order of "Please just answer the question." Slightly more polite is the common interjection that begins, "Thank you, you have answered my question." Both interruptions ignore the fact that the witness was invited to explain. While the lawyer may not have recognized the invitation as it was issued, there is no guarantee that the judge or jury will take the attorney's side of the dispute. In fact, there is every reason to think that the judge and jury will take the witness's side. Nobody likes to see a witness interrupted.

As a rule of thumb, it is best to avoid interrupting a witness. Not only will you appear rude, but the tactic is likely to be ineffective. The witness may persist in explaining or the judge may insist that you allow the explanation to go forward. More to the point, even when your interruption is successful, the explanation is almost certain to be elicited on redirect examination. You will have lost "rudeness" points for no reason.

There are really only two situations that call for interrupting a witness. The first is when you believe that the witness is about to blurt out some devastating fact that is otherwise absolutely inadmissible. Under these circumstances redirect examination is not a concern, and you do indeed need to shut up the witness. The second situation in which you may want to interrupt a witness is when the witness deserves it, and you consequently have earned the right to interrupt. This occurs when the witness, despite your valiant efforts to be reasonable and precise, insists on continuing to volunteer collateral information. This witness is actually being impermissibly uncooperative, and the techniques for resolving this problem are

discussed below.[18] Suffice it to say here that you should hesitate to interrupt even when you are dealing with a flagrantly uncooperative witness.

Well, if you are not going to interrupt the witness, what can you do? As a first line of defense, there are a fair number of nonverbal techniques that can be used to get a witness to stop talking. A stern look can be surprisingly effective, especially when the witness knows that she has gone beyond the legitimate bounds of your original question. Guilt, even for those on the witness stand, plays its part in human motivation. A second approach is to raise your hand in the universal "stop" symbol. This works particularly well if you do it at a natural pause in the witness's testimony or when the witness displays some hesitancy about continuing.

A pause or hesitation by the witness is an excellent opportunity to recover the initiative by putting an entirely new question to the witness. Artfully done, this will not seem like an interruption, but rather as though you simply moved on after allowing the witness to finish the reply. This technique works best when it can be accomplished unobtrusively. Try to "slide" your question into the space where the witness is catching her breath or visibly deciding whether to continue. You do not need to change the subject entirely, but your question should be new. Be certain that it does not resuggest the subject of the explanation that you are attempting to abort.

These first three techniques—glare, upraised hand, and fill-in-the-blank—will sometimes work. Sometimes they will not. Their effectiveness depends in large part upon the level of control that you established at the outset of your examination of the witness. A witness who has become accustomed to answering short, leading, propositional questions will be more likely to stop explaining. In contrast, a witness who repeatedly has been given latitude to explain will be inclined to keep it up. Additionally, your own level of confidence, not to mention the witness's natural degree of loquaciousness, will play a large part in your ability to reassert control through these means.

c. Reasserting control, part two

Assuming that you cannot stare or "slide" the witness back under control, what are your remaining alternatives? While this may seem counterintuitive or insufficiently activist, the best approach for coping with invited explanations may well be to do nothing. Allow the

18. See Section V D (3) *infra* at p. 137, regarding the reassertion of control over an impermissibly uncooperative witness.

witness to finish the answer and then proceed to another question that does not invite explanation.

Recall that we are dealing here with a witness who has been allowed or invited to explain. It is therefore unnecessary, and may be counterproductive, to attempt to prove that the witness took unfair license. Many lawyers attempt to discipline the witness or otherwise make a point by saying something such as:

QUESTION: You haven't answered my question. Can you please answer yes or no?

Or,

QUESTION: Are you finished? Would you like to answer my question now?

Or,

QUESTION: Please listen carefully. I am going to ask you a very simple question.

While these questions, and others like them, may be satisfying to the ego, they accomplish little and may actually result in making the witness more combative. It is very unlikely that the witness will retract the previous answer. "Was I explaining? I'm sorry. The answer should have been that I could not really see." That simply will not happen. Once an invited explanation has been given it is almost certain to stand. Do not argue about it or attempt to undo it; your time will be better spent making sure that it does not happen again. There is no reason to announce that you are going to ask a simple question. Just ask one.

The best way to bring an "invited" witness back under control is to terminate the invitation. Make sure that the next question is short, propositional, and leading. Ask yourself what it was about the previous question that was taken as an invitation, and then cure the problem with your next question. Recall the witness to the intersection accident who was invited to explain with a "yet, still" question. Instead of arguing with her, bring her back under control by reverting to controlling questions:

QUESTION: Immediately before the accident you were waiting for a bus?

ANSWER: That's right.

QUESTION: The bus was coming from the north, wasn't it?

ANSWER: Correct.

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QUESTION: You had to look north for your bus?

ANSWER: I did.

QUESTION: The accident took place to the south of the intersection?

ANSWER: I guess it did.

QUESTION: Yet you still say that you could see the accident clearly?

ANSWER: Well, I turned my head when I heard the brakes screech.

QUESTION: So before you turned your head you were looking to the north.

ANSWER: Yes.

QUESTION: And the accident occurred to the south of where you were standing.

ANSWER: That is right.

A witness who is inclined to play fairly will generally be brought back under control if you ignore the explanation and proceed with leading questions. Some witnesses will continue to interject information and to explain every answer, whether invited to or not. These witnesses are impermissibly uncooperative, and the techniques for dealing with them are discussed in the next section.

3. Impermissible Lack of Cooperation

Not all witnesses are inclined to play fairly. Some witnesses are overtly partisan, some are subtly uncooperative, and some are just plain ornery. While there is no requirement that a witness facilitate or enhance the goals of your cross examination, there is a requirement that the witness, within her ability, provide fair answers to fair questions. Unfair answers take a number of forms, including speechmaking, deflection, and obstinance.

Speechmaking occurs when a witness insists on responding to a question with an uninvited explanation. In contrast to the invited explanation, where some aspect of the question encouraged the witness to explain the answer, a speechmaking witness is actually attempting to take control of the cross examination by inserting an explanation where none has been called for:

QUESTION: Didn't the accident occur at 8:20 a.m.?

ANSWER: Yes it did.

QUESTION: You had a business meeting scheduled for 8:30 that same morning, didn't you?

ANSWER: It really wasn't a very important meeting. We were just going to exchange a few papers. One of my partners could easily have taken care of it, and, in fact, I had pretty much decided to skip it by the time I left home.

The witness in this example believes that he has figured out where the cross examination is headed, and he has determined to cut off the line of questioning by offering an explanation in advance. There was nothing about the question that prompted or suggested the need for an immediate explanation, but the witness's own agenda nonetheless impelled one.

Deflection occurs when the witness decides to answer a question other than the one that was asked:

QUESTION: You know that traffic must stop for fire trucks, don't you?

ANSWER: There was no bell and no siren; I had no reason to stop.

Here the witness ignored the question, interjecting instead the information that he believes will be most helpful to his case.

Finally, a witness is obstinate when he simply refuses to answer the question, either by hedging the answer or by arguing with the cross examiner:

QUESTION: You left home at 7:55 that morning?

ANSWER: I guess so.

QUESTION: It is a sixteen-mile drive to your office?

ANSWER: You could say that.

QUESTION: You had a business meeting that morning?

ANSWER: It depends on what you mean by business.

QUESTION: It was important that you be on time?

ANSWER: Don't you try to be on time for your meetings?

This witness, in essence, has refused to participate in the cross examination. He does not want to answer any questions, so he responds with a series of non-answers.

In each of the above examples the witness was impermissibly uncooperative. The questions were simple, straightforward, and easily capable of "yes or no" answers. The witnesses, however, intentionally sought to thwart the cross examination. How can such witnesses be brought back under control?

There are two basic methods for reasserting control over intentionally uncooperative witnesses. The preferred way is to do it yourself; the other way is to ask the judge for help.

a. Obtaining help from the judge

As a cross examiner you are entitled to reasonably responsive answers from a witness. It is the judge's obligation to ensure not only that the witness respond to your questions, but also to "strike" any answers that are unresponsive. Thus, the ultimate solution to the problem of the impermissibly uncooperative witness is to seek the judge's intervention:

QUESTION: Your Honor, could you please instruct the witness to answer my question?

QUESTION: Your Honor, could you please direct the witness to answer that question yes or no?

QUESTION: I move to strike that answer as non-responsive to my question, and I request that the court instruct the jury to disregard it.

There are a number of reasons, however, to be wary of seeking the judge's help in controlling your witness on cross examination.

First, early recourse to the judge may seem petty or picky. Just as lawyers do not object to every conceivably objectionable question, there is no reason to go running to the judge every time a witness fails to answer in precisely the manner that you expected. It looks bad, maybe even childish, to go looking for outside help when circumstances do not really call for it.

Moreover, many judges dislike interceding in cross examinations. They expect the lawyers to handle their own questioning, and they do not want to appear to take sides between a lawyer and a witness. Some judges, regrettably, have a nasty habit of not paying attention during jury trials, and they will be unable to tell whether your request is reasonable. For these reasons, a request for help from the judge is often met with something like "Proceed, counsel" or "Just ask another question."

Finally, never underestimate the possibility that the judge might disagree with you. You may think that the question can be answered "yes or no," and you might think that the witness was clearly non-responsive, but the judge might have an entirely different view of things. Imagine the difficulty of returning to a cross examination following this scenario:

LAWYER: Your Honor, will you please direct the witness to give me a "yes or no" answer?

COURT: I don't think that your question can be answered "yes or no." The witness is entitled to explain.

Or,

LAWYER: I move to strike the last answer as unresponsive to my question.

COURT: I think that the answer was perfectly responsive, given the nature of your question. Proceed, counsel.

How, then, can you be certain of obtaining the court's help when you ask for it? And in the process, how can you avoid appearing petty or ineffectual when you finally resort to the judge? The answer is to earn the right to seek outside assistance with the witness by first attempting to reassert control by yourself. This method will not only validate your later attempt to invoke judicial authority, it will also have the added benefit of demonstrating to the witness the futility of any subsequent efforts to evade your questions.

If your own attempts to control the witness do not succeed there will still be an opportunity to turn to the judge. By that time, of course, you will have demonstrated that you are not being petty and, with luck, you also will have ensured that you have the judge's full attention.

b. Reasserting control by yourself

The one thing that you can always do in cross examination is to ask more questions.

i. Pointed repetition

You can frequently reassert control over even a recalcitrant witness simply by repeating your original question, while using your voice or demeanor to emphasize the need for a direct answer:

QUESTION: You had a business meeting scheduled for 8:30 that same morning, didn't you?

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ANSWER: It really wasn't a very important meeting. We were just going to exchange a few papers. One of my partners could easily have taken care of it, and, in fact, I had pretty much decided to skip it by the time I left home.

QUESTION: You *did* have a business meeting scheduled for 8:30 that morning, didn't you?

Many witnesses will provide you with an answer at this point. Some will continue to resist. In these circumstances, an explanation from you may help:

QUESTION: You *did* have a business meeting scheduled for 8:30 that morning, didn't you?

ANSWER: Like I said, it wasn't very important.

QUESTION: We will discuss importance in a little while. Right now I am asking you whether you had a meeting scheduled for 8:30 that morning.

If the witness refuses to answer at this point he has obviously decided never to answer. There is little to be gained by squabbling with the witness, although there are a few additional rhetorical flourishes that work from time to time:

QUESTION: Mr. Witness, surely you do not deny that you had a business meeting scheduled for 8:30 that morning?

In any event, assuming that the information is important to your case, you have by this time earned the right to go to the judge.

ii. Discipline

A witness who deflected your question can frequently be brought back under control if you restate the question firmly. If this doesn't work, there are a variety of ways to "discipline" the witness by pointing out the flaw in the deflection:

QUESTION: You know that traffic must stop for fire trucks, don't you?

ANSWER: There was no bell and no siren; I had no reason to stop.

QUESTION: But my question was this: You know that traffic must stop for fire trucks?

ANSWER: What I am trying to tell you is that there was no siren, so why should I stop?

QUESTION: Mr. Witness, you are thirty-five years old, aren't you?

ANSWER: Yes, I am.

QUESTION: You have been driving an automobile for over fifteen years?

ANSWER: That seems right.

QUESTION: You took driver's education in high school?

ANSWER: I did.

QUESTION: You passed the written test to get your license?

ANSWER: Of course.

QUESTION: And you passed subsequent written tests for periodic renewals?

ANSWER: I did.

QUESTION: So can't you agree with me that the rules of the road require you to stop for fire trucks?

ANSWER: I guess so.

QUESTION: And you have known that for years, haven't' you?

Note that the cross examiner in the above example earned the right to discipline the witness. The original question was short and factual; it did not invite an explanation. The witness was then given a second chance to answer. Only after the repeated deflection did the cross examiner set out to bring the witness to heel. The identical technique would have been considerably less useful under other circumstances. If the witness had not persisted in the refusal to answer, or if the question had been less precise, the lawyer's "disciplinary" line of questions might have appeared to be nasty or bullying.

There are a number of ways to "discipline" a witness. One of the surest is to confront the witness with his own previous words or actions. While impeachment through the use of prior statements is covered in the next chapter,[19] the following is a short example of using the witness's own prior actions to reassert control:

19. *See* Chapter Six *infra* at p. 149.

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QUESTION: You know that traffic must stop for fire trucks, don't you?

ANSWER: There was no bell and no siren; I had no reason to stop.

QUESTION: Well, you did eventually hit your brakes, didn't you?

ANSWER: Yes.

QUESTION: As soon as you saw the fire truck?

ANSWER: Yes.

QUESTION: And that was because you knew that traffic had to stop for fire trucks, isn't that right?

This technique involves the use of short, factual questions that combine to demonstrate the utter reasonableness of the original question. By painstakingly eliciting the logical basis for the inquiry you, in a sense, shame the witness into providing you with a direct answer.

More aggressive means are also available. A final method of reasserting control, short of seeking the court's assistance, is through the judicious use of what we might call semi-sarcasm. Sarcasm is always risky in the courtroom, especially for beginning lawyers, and it should be used only when the witness clearly deserves it. Save this approach for the truly evasive, partisan, or oily witness—the witness who has resisted your every well-moderated effort to extract a plain answer:

QUESTION: You left home at 7:55 that morning?

ANSWER: I guess so.

QUESTION: Well you know that you left home, don't you?

ANSWER: Yes.

QUESTION: And you testified earlier that you left at about 7:55 a.m., right?

ANSWER: Yes.

QUESTION: So it isn't a guess at all when I say that you left home at 7:55 on the morning of the accident?

Similarly,

QUESTION: It is a sixteen-mile drive to your office?

ANSWER: You could say that.

QUESTION: Is there a reason that *you* don't want to say that?

ANSWER: No.

QUESTION: Then it is sixteen miles to your office?

Or,

QUESTION: You had a business meeting that morning?

ANSWER: It depends on what you mean by business.

QUESTION: You were wearing your jacket and tie, weren't you?

ANSWER: Yes.

QUESTION: You weren't going golfing at 8:30 that morning?

ANSWER: No.

QUESTION: You were headed toward your office?

ANSWER: Yes.

QUESTION: Toward your place of business, right?

And finally,

QUESTION: It was important that you be on time?

ANSWER: Don't you try to be on time for your meetings?

QUESTION: Unfortunately, the rules of evidence do not allow me to answer your questions, but I would like you to answer mine. You don't have a problem with that, do you?

ANSWER: No.

QUESTION: Good. You do try to be on time for your business meetings, don't you?

Semi-sarcasm, as illustrated above, is a questioning technique that is aimed at exposing the groundless obstinacy of the witness's answers. It is called "semi-sarcasm" precisely because its goal is not to demonstrate the lawyer's superior wit and intelligence, but rather to underline the witness's unreasonable lack of cooperation. Such sarcasm comes more easily to some lawyers than to others. Some judges and juries receive it well; others do not. The decision to use semi-sarcasm is a personal one, with one near-universal requirement. You can only use this technique on a witness who truly deserves it.

VI. ETHICS O

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VI. ETHICS OF CROSS EXAMINATION

While lawyers generally consider cross examination to be an "engine" of truth-seeking, we are often criticized for using cross as a device for distortion and obfuscation. And in truth, as with all powerful rhetorical tools, cross examination can be used to mislead and deceive. Accordingly, certain ethical principles have developed that circumscribe a lawyer's use of cross examination.

A. Basis for Questioning

1. Factual Basis

Many cross examinations contain inherent assertions of fact. Indeed, many of the best cross examination questions are strictly "propositional." Consider these examples from the fire engine case:

QUESTION: You did not have your brakes fixed, did you?

QUESTION: You slept on the ground while on your camping trip, correct?

QUESTION: You were on your way to an important business meeting, right?

QUESTION: You have continued to work as a guide at the Art Institute, haven't you?

Each question contains a single fact that counsel is urging to be true. The danger arises that counsel might also propose baseless or knowingly false points. The witness, of course, can deny any untrue assertions, but the denials are likely to ring hollow in the face of an attorney's presumably superior persuasive skills. Enormous damage can be done by false or groundless accusations. Imagine the impact of this examination:

QUESTION: Isn't it true that you had been drinking on the morning of the accident?

ANSWER: No, not at all.

QUESTION: Didn't you arrive at Mayer's Bar at 7:00 a.m.?

ANSWER: Certainly not.

QUESTION: Well, the truth is that you ran up a $16.00 tab that morning, didn't you?

ANSWER: No.

QUESTION: $16.00 would cover at least four drinks, right?

ANSWER: I'm telling you that I wasn't drinking.

The precision of the details in the questions appears to add reliability to the cross examination, while the denials can be made to appear superficial. The cross examiner's ability to control the interchange puts the witness at an extreme disadvantage. This cross examination raises no problems if the witness was indeed drinking at Mayer's Bar, but it is intolerable if the charge is untrue.

To protect against the unscrupulous use of cross examination, it is required that every question have a "good faith basis" in fact.[20] Counsel is not free to make up assertions or even to fish for possibly incriminating material. Rather, as a predicate to any "propositional" question, counsel must be aware of specific facts that support the allegation.

2. Legal Basis

The "good faith basis" for a cross examination question cannot be comprised solely of inadmissible evidence. Counsel cannot allude to any matter "that will not be supported by admissible evidence."[21] Thus, a good faith basis cannot be provided by rumors, uncorroborated hearsay, or pure speculation.

Allegations lacking a basis in admissible evidence may lead to a sustained objection, an admonition by the court, or even a mistrial. Moreover, many jurisdictions require counsel to offer admissible extrinsic evidence to "prove up" certain assertions made on cross examination, such as past conviction of a felony.

B. Assertions of Personal Knowledge

It is unethical to "assert personal knowledge of facts in issue ... or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused."[22] While this problem most frequently occurs during final argument,[23] it also arises during cross examination.

Cross examination questions sometimes take a "Do you know?" or "Didn't you tell me?" format. Both types of question are improper because they put the lawyer's own credibility in issue. "Do you know?" questions suggest that the lawyer is aware of true facts which, while

20. A lawyer shall not "in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence." Rule 3.4(e), Model Rules of Professional Conduct.

21. *Id.*

22. Rule 3.4(e), Model Rules of Professional Conduct.

23. *See* Chapter Twelve, Section VI A(1), *infra* at p. 460.

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not appearing on the record, contradict the witness's testimony. "Didn't you tell me?" questions argue that the witness and the lawyer had a conversation, and that the lawyer's version is more believable. In either case, the questions amount to an assertion of personal knowledge.[24]

C. Derogatory Questions

It is unethical to ask questions that are intended solely to harass, degrade, or humiliate a witness, or to discourage him from testifying.

D. Discrediting a Truthful Witness

To what extent may cross examination be used to discredit the testimony of a witness whom counsel knows to be telling the truth?

The answer to this question is reasonably straightforward in criminal cases. Defense counsel is entitled to insist that the government prove its case through evidence that is persuasive beyond a reasonable doubt. Thus, witnesses must not only be truthful, they must also be convincing to the required degree of certainty. A discrediting cross is simply an additional safeguard.

Conversely, a criminal prosecutor has a public duty to avoid conviction of the innocent. A truthful witness, therefore, should not be discredited simply for the sake of the exercise.

The rule is less certain in civil cases. It is clear, however, that a witness cannot be degraded or debased simply to cast doubt on otherwise unchallenged testimony. On the other hand, true factual information may be used to undermine the credibility of a witness whose testimony is legitimately controverted.

E. Misusing Evidence

The same rules apply on cross as on direct with regard to misusing evidence that has been admitted for a limited purpose.[25]

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24. "Do you know?" questions may be permissible in limited circumstances. A witness claiming compendious knowledge, for example, could legitimately be questioned as to her lack of certain information. Similarly, a character witness could be questioned concerning unknown facts about a witness's reputation. In each situation, however, the question must have a good faith basis.

25. *See* Chapter Four, Section VI B, *supra* at p. 81.