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Off the Record

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by Maureen A. Howard

In the wonderfully entertaining and instructive video, *The Ten Commandments of Cross-Examination*,[1] the late Irving Younger offered this appraisal of lawyers' ability to conduct cross-exam: "Most lawyers do it badly all the time, no lawyer does it well all the time, and no lawyer in the early stages of his career does it well at all." Happily, we've come a long way since Younger's grim 1975 assessment, due to the instruction of maestros like Younger, Terrence McCarthy (*McCarthy on Cross-Examination*), and Larry Pozner and Roger Dodd (*Cross-Examination: Science and Techniques*). All too often, however, lawyers still find themselves in trouble on cross-examination, sparring with an out-of-control witness. There is, however, a simple system for maintaining witness control on cross-exam, and there are some easy techniques for regaining control if things go awry.

A lawyer has lost control of a cross-examination when she engages in an *ad hoc* dialogue with the witness. That's because, despite the question-answer format, cross-exam is not a conversation. A trial lawyer who finds herself embroiled in an impromptu discussion with a witness on cross-exam (or worse, an argument) has lost control of the witness and the examination. The key to avoiding this loss of control is preparation, preparation, preparation!

Get the Facts Before Trial. Once trial begins, a lawyer must accept the fact that the time for discovery has come and gone. A good cross-examiner will have mastered the facts of the case before trial and constructed a cross-examination based exclusively on those facts. No matter how desperately a lawyer is itching to learn the answer to a newly conceived question during trial, she will resist the urge if she wants to maximize witness control. The best cross-examiners will tell you they ask questions only when they already know the answers. This strategy maximizes predictability and control on cross-exam and allows for quick impeachment if the witness fails to agree on any fact.

Source Every Fact. A corollary to the maxim "ask only questions you know the answer to" is "source the answer to each question." This means that for each question, a lawyer should not only know the fact-based answer in advance, she should know where to quickly access the evidence to prove up that fact if needed. In most cases, this will be a prior inconsistent statement, such as a deposition. Do not rely on your memory in this circumstance. Rather, annotate the source of each answer right next to the question. It is frustrating for jurors (and the judge) to wait for a lawyer to search for impeachment evidence. And when the adrenaline is pumping and a witness stubbornly refuses to confirm that a straightforward fact is true, it can be difficult for a lawyer to maintain composure and put a finger on a fact in a deposition based on memory alone.

Just the Facts. A foolproof cross-exam is constructed of facts, because a witness can quibble with anything subjective, such as conclusions, opinions, or inferences. Therefore, a tight cross-exam does not include any comparators or adjectives, because they invite dialogue. For example, in a trial for assault:

Q: There were a lot of people present when the fight broke out?
A: Nah, I wouldn't say that.
Q: Well, this was at Safeco Field?
A: Yes.
Q: During a Mariners baseball game?
A: Yes.
Q: During the middle of the fourth inning?
A: Yes.
Q: And the fight broke out on the pitcher's mound?
A: Yes.
Q: So, there were a lot of people present?
A: Not really. Safeco Field holds about 50,000 fans, but it was raining that day and the Ms were playing the Texas Rangers — so there were only about 6,000 people there.

As the above illustrates, "shortcut" adjectives or conclusions are often anything but shortcuts. A more reliable route is to rely only on facts, sequencing them so jurors come to the subjective conclusion on their own.

Often, lawyers find themselves in trouble on cross-examination, sparring with an out-of-control witness. There is, however, a simple system for maintaining witness control on cross-exam.

One New Fact at a Time. Another technique to maximize witness control on cross-exam is to include only one new fact per question. A question may contain multiple facts, but only one of them should be new. Otherwise, if the witness rejects the facts as presented, the lawyer is left unsure where the fight is. Which fact, or facts, is the witness disputing? For example, suppose the question is, "You were walking down Third Avenue in Seattle at noon on August 14 when you saw three men run out of the Bank of America?" If the witness responds, "No," the lawyer is forced to retreat and review each fact one by one to identify which one is disputed. This method is awkward and time-consuming, and it can damage the lawyer's credibility with the jury.

Techniques to Regain Control. Even lawyers who craft short, simple, single-fact, leading questions may sometimes find themselves facing a witness who refuses to cooperate. In that case, there are techniques to expose such a witness as evasive and uncooperative without injuring your credibility with the jury.

• **Do Not Interrupt the Witness.** If the witness refuses to give a straight answer to your clean, short, one-new-fact question, do not become agitated and declare war. Unless the witness is damaging your case, such as starting to talk about a matter previously ruled inadmissible (or one you'd like to have the judge rule inadmissible), do not interrupt him. You will appear rude

and seem like you're trying to hide the ball from the jury. If the witness refuses to give a straight answer to a simple fact-based question, let him blather on. The jury will see him for the truth-dodging weasel he is.

• **The Hand Stop.** Although you shouldn't interrupt a witness, you can sometimes silently direct him to stop speaking by putting your hand up as if to say, "Stop." It is amazing how well this technique works, even with arrogant, caustic witnesses. Perhaps this is because the nonverbal command is rooted in childhood and hard-wired into us. The hand gesture should not be flamboyant, however. The goal is to subtly cue the witness to stop, not to draw the jury's attention to you by parodying a police officer directing traffic. The beauty of the subtle hand stop is that the lawyer regains control of the witness without appearing rude.

• **Repeat Your Question.** If the witness blathers on nonresponsively, just repeat your simple question. Doing this three times underscores for the jury the witness's refusal to cooperate. It can also be effective to write the question down for the witness to drive home to the jury the simplicity of the question and the inherent unfairness of his refusal to answer the question.

• **"Okay" and "That's Right."** Another reason foolproof cross-exam includes only simple leading questions the lawyer knows the answer to (and can readily impeach with pre-sourced answers) is because a question put to a witness on cross-exam but not admitted is often viewed by the jury not as yet unproven — but rather that the opposite is proved! If the witness is refuses to acquiesce, you must impeach. If the witness gives a substantively comparable answer, however, do not fight it. Instead, use the "Okay" technique:

Q: The traffic was heavy?
A: Well, there were a lot of cars.
Q: *Okay*, there were a lot of cars.

Likewise, if the witness gives a better (but different than you expected) answer, do not fight it! Instead, use the "That's Right" technique:

Q: Sir, you had two insurance policies on your wife's life at the time of her death?
A: No, I had three.
Q: *That's right:* you had three insurance policies on your wife's life.

• **The "Reverse/Repeat."** If a witness will not answer a simple, one-fact question after multiple attempts, try flipping the question 180 degrees and putting the polar opposite fact to him. For example:

Q: There were other people at the office party aside from you and Mr. Smith?
A: Well, it was really late and pretty much everyone had left early...
Q: There were other people at the office party besides you and Mr. Smith?
A: Well, all the people from my department had left well before 7:00...
Q: So, you and Mr. Smith were the only ones left at the office party?

It is amazing how a witness who will stubbornly refuse to agree with something will quickly reject the 180-degree opposite proposition.

• **Beware the "Nonresponsive" Objection.** It is the prerogative of the examining attorney to object when a witness is nonresponsive. The danger is that the objection may well highlight the nonresponsive testimony for the jury. As a general proposition, the "nonresponsive" objection is a tripartite endeavor: the lawyer 1) objects to the testimony as "nonresponsive"; 2) moves to strike; and 3) asks the judge to give an instruction to the jury to disregard the testimony. Doing this can have the unintended consequence of having the testimony repeated multiple times in front of the jury, which is counterproductive. The better road is often to let the nonresponsive answer slide.

• **Do Not Go to the Judge for Help.** If you have crafted clean, short, one-new-fact questions, you will not need to seek help from the bench. If you use the "repeat the question three times" technique, it is unlikely the judge will need to jump in and instruct the witness that he needs to answer the question. You, as the lawyer, do not ask the judge to do this — it signals your loss of control to everyone in the courtroom.

• **Do Not Spank the Witness Until 10 Minutes After the Judge and Jury Want You To.** Although cross-exam need not be "cross," there are times when it is appropriate to deliver some attitude to the witness. Just make sure the judge and jurors are grateful when you do this. Remember, the goal on cross-exam is to discredit the witness, not yourself. Having an attitude with a witness before it feels appropriate to the jurors conveys that you are motivated by emotion instead of logic. This undermines your credibility, which is your most valuable asset as a trial lawyer. ◊

Notes

1.Younger's Commandments are: 1) be brief; 2) short questions, plain words; 3) ask only leading questions; 4) never ask a question unless you know the answer; 5) listen to the answer; 6) do not quarrel with the witness; 7) do not repeat the direct exam; 8) do not allow the witness to explain; 9) do not ask the one-question-too-many; and 10) stop when you have accomplished your goals.

"Off the Record" is a regular column on various aspects of trial practice by Professor Maureen Howard, director of trial advocacy at the University of Washington School of Law. She can be contacted at mahoward@u.washington.edu. Visit her webpage at www.law.washington.edu/Directory/Profile.aspx?ID=110.