

# CROSS-EXAMINATION

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## **CROSS-EXAMINATION OF WITNESSES**

Cross Examination is often the most critical part of a trial. To put it in a more modern way, you close for show, but you cross for dough. Most often, the outcome of the trial depends on cross-examination, be it a civil or criminal case. No matter how good the *voir dire* or the opening statement, they are ineffective unless supported by facts developed at trial. Closing arguments come too late. The jury is too sophisticated to be swayed by arguments advanced in a closing that are not supported by facts developed on cross-examination.

### **The Philosophy of “Great” Cross-Examinations**

Too often stories are told of a cross-examiner who has taken great risks, used open-ended questions, and cross-examined without real preparation and thereby has accomplished wonderful cross-examination on two out of five witnesses at trial, or even four out of five witnesses at trial. The fifth witness is the witness who causes defeat to the cross-examiner. This is not a great cross-examiner. A less dramatic performance of well-thought-out, well-prepared material presented in a manner that minimizes risk to the examiner’s case while maximizing the damage done to the opponent’s case is truly wonderful cross. The duty is not to make cross-examination into breathtakingly difficult and daring adventures, but to make the always difficult task of cross-examination appear easy. The cross-examiner must strive for the consistency of success that comes from preparation advanced by sound technique.

Just *as* the physicians’ creed begins: “First, do no harm,” the cross-examiner’s creed must be: “First, do no harm to your clients case on cross-examination.”

Often an advocate claims numerous victories of witness destruction on cross-examination. However, a review of the entire transcript of cross-examination reveals that while telling points were scored against the witness, the cross-examiner became bloodied in the process, when the witness scored equally valuable points against the cross-examiner *as* well.

The object of cross-examination must be to score as many useful points as possible, but equally important, not to let the witness score *any* points against the cross-examiner’s case. This dual-edged mindset gives rise to the rule that control of the witness is critical in order to maximize the amount of favorable testimony put in through the witness, while simultaneously limiting the witness’s ability to insert unfavorable testimony.

The conventional wisdom is that if a witness has done no damage to the cross-examiner’s case, a lawyer might elect to ask no questions. If no questions are asked, certainly the witness can score no points. However, even in circumstances where no damage has been done, it may be that the witness could testify to several additional facts that aid the cross-examiner’s case. *Thus*, even the witness who, as yet, *has* done no damage may need to be cross-examined. In any event, it is the aim of the skillful cross-examiner to score *as many* points as possible while simultaneously offering the least number of opportunities for the witness to score points.

## Main Objective

In every trial you are trying to persuade. You must have credibility to be persuasive. So, the overriding objective in every trial should be to develop credibility and trust with the trier of fact. This objective should also guide all cross-examination. As the examiner, your credibility is being judged simultaneously with the witness. You are suggesting a version of the facts through your leading questions.

Credibility and trust are developed through a number of overlapping factors:

- Demeanor – Your attitude should be pleasant but firm, confident but not arrogant. The jury will generally identify with the witness more than the lawyer. They will expect you to be businesslike and not unnecessarily aggressive, unless the witness is clearly hostile, uncooperative or unresponsive. Most people will not trust someone they perceive as unjustifiably mean or aggressive. An obvious attack on the witness will not be well received unless the witness deserves it. While you are trying to control the witness on cross-examination you need to **control yourself** as well.

- Clarity – You cannot be completely trusted if you are not understood. You will not be understood unless you are organized, concise, and use plain words. Ramble too long, or use legalese, and you will lose the listener. Plan, organize, and condense your cross-examination and use visual aids/demonstrative exhibits whenever possible.

- Preparation – Credibility and trust also follow the perception that the cross-examiner has done the work necessary to thoroughly understand the relevant subject matter. How can you trust someone if you do not believe they know what they are talking about?

- Accuracy – Errors and omissions in your storyline raise doubts in the minds of the trier of fact. How can you be credible if you present inaccurate information, intentionally or unintentionally?

- Balance and fairness – Similarly, your version of the facts should be perceived as addressing the whole story, not just the version favorable to your client. Would you trust someone if you thought they were hiding or ignoring relevant facts to further their own interests? See the forest and the trees, and present both to the trier of fact to the extent necessary for a balanced cross-examination.

## Decision to Cross-Examine

One of the first decisions you have to make in your effort to achieve credibility is whether to cross-examine a particular witness. There is no rule requiring cross-examination of every witness and you may do more harm than good with your efforts. Usually, the witness is not on your side and will not willingly help your case, so do not give them the opportunity to hurt you unless there is a good reason.

Is this a key witness? Is the witness a dangerous expert witness? Did they damage your case on direct? Was he or she a good witness in the eyes of the trier of fact? How did the jury react to the witness? Can you reasonably expect to further your credibility through this witness? Think about your purpose, reasons, and the likely result before you routinely cross-examine every witness.

### **Scope**

The scope of cross-examination in federal Court is “. . . limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.” Federal Rules of Evidence, 611(b). In Texas state courts, cross-examination may include “. . .any matter relevant to any issue in the case, including credibility.” Texas Rules of Evidence, 611(b).

### **Types of Cross-Examination**

In general, the purpose of cross-examination can be constructive, destructive (limiting), or both. With constructive cross-examination, your purpose is to prove or reinforce elements of your case by having the witness agree with at least some of your version of the facts. Destructive or limiting cross-examination attempts to destroy or limit the testimony of the witness by demonstrating the limitations, errors, omissions and excesses of the witness.

Is the witness speculating, assuming or deducing? Does the witness have an interest in the outcome, financial, personal, or otherwise? Was the witness in a position to have personal knowledge of the testimony? Did the witness observe and consider all relevant factors? Is the witness a small piece in the big picture? Is the witness a key piece of the story or a peripheral character? Is the witness exaggerating their own importance or knowledge? Is the witness consistent with his or her own statements and with other witnesses in the case? Is the testimony logical? These areas, and others, provide potential opportunities to raise doubts with the trier of fact regarding the credibility to be afforded each witness.

Constructive cross-examination is often more persuasive and easier to accept because it builds up rather than tears down. For this reason, it should be the first choice. If you plan to use both constructive and destructive cross, start with the positive because it will be more difficult to obtain helpful information after attempts to discredit the witness.

## **Three Rules of Cross-Examination**

- Rule 1: Leading questions only.
- Rule 2: One new fact per question. (add one variable per question).
- Rule 3: Logical progression to a specific goal for each section of cross. (funnel general questions to specific goals).

## **Tools of Control**

In any cross-examination, whatever the purpose or objectives, control of the witness is of primary importance. You are pitting your credibility against that of the witness, and the witness is usually adverse and uncooperative, or, at best, neutral. There are a number of well-known rules or techniques to maintain control of the cross-examination.

- Identify the smallest number of points you need to make with each witness and keep it brief. As Irving Younger said, “...cross-examination should be a commando raid, not the invasion of Normandy.” Cross-examination is not a discovery deposition. Discovery is over. If you do not know the answer, do not ask the question out of curiosity. Fewer points are easier to understand and remember. Fewer points also provide fewer opportunities to violate the remaining rules.

- Do not repeat the direct examination. Repetition is a persuasive tool that should be reserved for helpful evidence. The outline of the cross-examination should be prepared before the witness is first called to testify. Using your notes from the direct examination as an outline for the cross-examination will cause you to repeat the direct and should be avoided. Flexibility and listening to the witness are important because of the opportunities to enhance your predetermined plan with the words and admissions of the witness.

- Use short, one-part, factual questions and simple language. Compound questions, stilted language, or questions calling for opinions or conclusions lead inevitably to confusion and debates with the witness and a resulting loss of control. Each question should simply and clearly establish a single relevant fact. The witness then has less justification or opportunity to volunteer unsolicited information or unresponsive answers.

- Use leading questions. Hopefully, with each question you state a particular fact and the witness has no alternative but to agree. Ideally, you will tell a credible story through your questions, one fact at a time, and the witness will affirm the story, one fact at a time. Use non-leading questions only for preliminary matters or uncontested predicate questions.

- Save the conclusions for final argument. Questions that call for opinions or conclusions give the witness an opportunity to explain and disagree with the conclusion you want the jury to reach. It is impossible to control the witness or the cross-examination if the witness is asked to agree with the conclusions of the adverse party. The witness will not agree and will have an opening to argue the rationale behind the other side of the case. One-part factual questions in leading form will cause the witness to admit one-by-one a

set of facts supporting the conclusion you want the jury to reach. Let the jury think of the conclusion on their own. They will cling to their own conclusions more tenaciously than those fed to them by a lawyer in the case.

- Avoid arguing with the witness. These types of arguments or debates usually arise over subjective conclusions or interpretations to be derived from the underlying facts. Again, save your conclusions for final argument. Debates over conclusions to be reached from the facts give the witness an opportunity to explain and are usually very unhelpful to your case. The witness invariably has an explanation and will be more than happy to share it with the jury after you provide the opening. The only exception to this rule is when you already know the explanation the witness will give and it is patently absurd. Remember, however, that the judge or jury may find the answer plausible when you think it is ridiculous, so the safer course is to avoid debates and explanations entirely.

- Make your predetermined points and stop. Do not try to do too much. Do not try to make the entire case through one witness on cross-examination. Do not ask one question too many.

### **Unresponsive Witnesses**

Some witnesses are unable or unwilling to answer only the question asked. One of the most common and irritating problems encountered on cross-examination is the unresponsive witness. No matter how good you are at asking only leading, one-part, factual questions, some witnesses insist on volunteering their unsolicited version of the case. It is particularly important to avoid questions calling for an opinion or explanation with this type of witness.

Dealing with the unresponsive witness should be controlled by the overriding objective of building credibility with the trier of fact. Interrupting the witness and demanding an answer to only your question can be perceived as an attempt to keep the complete story from the jury. Letting the witness finish and then re-asking the original question illustrates that the witness is unfair and unresponsive. As the witness continues volunteering, the examiner can become more insistent. The short-term goal is to show the jury that the witness, not the examiner, is unfair and not abiding by the rules. It should be the goal of the cross-examiner to gain control without alienating the jury through perceived unfairness to the witness. There will be unresponsive and unhelpful answers, but showing your concern by interruptions of the witness or pleas to the court for assistance will emphasize the bad answer and potentially put you in a negative light with the judge and jury. By patiently redirecting the witness to the question asked, you build a foundation of fairness from which you can become more aggressive as necessary. Give the witness enough rope and the jury will begin to take your side.

## **Techniques That Don't Work**

### *“Just Answer Yes or No”*

Television, movies, and, unfortunately, some trial skill programs in law school have encouraged trial lawyers to fall back on the command “just answer my question yes or no” as a method of controlling the runaway witness. This is *not a* valid controlling technique. First, most judges will not permit the lawyer to do that. Most judges will inform the witness that they may explain their answer, at length if necessary.

Second, and more importantly, this signals the jury that the cross-examiner is not playing fair. The lack of choice given the witness suggests to the jury that the lawyer is trying to “trick” the witness. Non-lawyers resent this heavy-handed attempt to strait jacket the witness. To them it appears that the lawyer is attempting to “put words in the witness’s mouth.” A lawyer resorting to this method lowers both credibility and control.

Credibility is the paramount feature of the successful trial lawyer. When the trial lawyer loses his or her credibility, the case is lost. Credibility is severely damaged when you utter the words “just answer my question yes or no.” There are no two schools of thought on this issue: Don’t do it.

### *Asking the Judge for Help*

Asking the judge to help you is both an unaesthetic and impractical way to control a runaway witness. Few judges are predisposed to favor trial lawyers over witnesses. The judge figures, correctly, that since the lawyer was the one who lost control, the lawyer should be the one to suffer the consequences. If the cross-examiner asks for help, the judge is likely to say something to make a bad situation worse. At best the cross-examiner will get, “I will permit the witness to give a full and complete explanation if the witness thinks that explanation is necessary for a complete answer.” Who needs that help?

The judge, having been *invited* to participate, will often add their own commentary on the case: “You want this court to direct the witness to answer that question? I have been on the bench 40 years and I cannot understand your question!” or “I think the witness is answering your question.” Now we have a runaway witness and a runaway judge!

Trial lawyers should not be surprised with such responses from the bench. The purpose of the bench is not to assist the cross-examiner. The judge’s refusal to help sends a negative message to the witness, opposing attorney and jury. The witness sees and hears the frustration the cross-examiner is feeling. In the event the bench does not sanction the witness, the witness is encouraged to do more of the same.

The opposing lawyer now knows that the cross-examiner is not in control of the courtroom. This produces the confidence to make more objections, particularly speaking objections. Alternatively, opposing counsel may feign disinterest in the cross-examination. This apparent lack of interest signals the jury and the court that the cross-examination has degenerated into a personal battle of wills not having much to do with the search for truth. This in turn encourages judges to issue their favorite ruling: “Move it along.”

During the process, the jury observes the change of dynamics from trial lawyer in control and directing the examination to witness controlling the trial lawyer. The jury notices that now the judge and opposing counsel are active participants. The cross-examiner’s voice is no longer the voice of control. The scene is moving from clarity to chaos. And all of this is caused *not by the unresponsive witness*, but by the cross-examining lawyer who is unartfully dealing with that witness. It is therefore essential that trial counsel control their own witnesses. They do not invite the help of judges.

#### *Court-Offered Help*

Of course, if the court offers help, the lawyer should certainly accept it. Should the court spontaneously instruct the witness to answer, the cross-examiner should accept the power of the bench. When the court voluntarily gets involved in the effort to control the runaway witness, the witness has hurt his/her credibility, which tells the jury that this lawyer is being fair in his questioning. Permit the court to volunteer; do not seek its assistance.

#### *“The Deal”*

The Deal begins with the cross-examiner early in the examination suggesting to the witness that the cross-examiner will only ask fair questions that need only a “yes” or “no” answer and that in exchange for this type of questioning the witness will give only yes or no answers. The Deal is not a suggested method of controlling the witness. It is offered up by lawyers who fear that somewhere down the road they will lose control of the witness; it is an attempt to control the runaway witness before the witness has run. The Deal sends all the wrong messages to the fact finders in the trial and to the opponent, who is made aware that the lawyer believes she will have trouble with the examination. Again, most importantly, the signal is sent to the witness that this kind of conduct is feared by the lawyer.

When analyzed, this is nothing more than a sophisticated method of saying: “Just answer my questions ‘yes’ or ‘no.’”

The Deal signals the witness that the lawyer intends to unduly confine the witness’s answers. It also puts the judge on notice that the lawyer is attempting to cut off any explanation. Worse, it tells the jury that the lawyer is attempting to “put words in the witness’s mouth.” *Worst of all*, the offer of the Deal often generates an immediate objection, followed by a rebuke from the court on the witness’s right to answer fully and fairly. As a result, the cross-examination begins at the worst possible level. In an attempt to avoid the witness’s digging a hole for the cross-examiner, she has dug the hole herself. The advocate has denied her own credibility before the witness ever answered a question. The Deal will not work; do not propose it.

## **A General Technique That Assists All Other Techniques: Keep Eye Contact**

When cross-examining a difficult witness, always maintain eye contact. Avoiding eye contact is often interpreted as weakness. Our life experiences verify this. People who will not look us in the eye are uncomfortable and less than forthright. If the cross-examining lawyer suspects the witness will become unresponsive, the lawyer must keep their eyes fixed on the witness when asking questions and when receiving the answer. By directing your full attention at the witness's eyes, you serve nonverbal notice that you will put up with no nonsense and permit no deviation from the question and answer approach you have been following. Control the runaway witness's eyes until the witness is off the stand.

## **Body Movement**

When dealing with the expected runaway witness, not only must the examiner keep eye contact, there are times in the examination when the cross-examiner must control his or her body movement. A question has been asked; the witness has hesitated and is now mentally debating whether to give the answer that will undoubtedly hurt the witness or to give a longer, less-responsive answer. At that point, all body motion must stop by the examiner. Constant eye contact and no movement is necessary to convince the witness that the only acceptable answer is a simple "yes," and that it is the cross-examiner who is coiled to strike at the unresponsive answer.

## **Where to Use These Techniques**

Controlling the runaway witness is not just to be sought in the final jury trial of the matter. The skillful trial lawyer should not wait until the jury is empanelled to start conditioning the witness to give "yes" or "no" answers. The witness can be conditioned during the pretrial matters to give responsive answers. If one fears a particular witness, one should begin to exercise extra control over the witness at all pretrial opportunities, in order to avoid training the witness to give easy and rolling answers.

## **Depositions, et al.**

In civil trial work, lawyers certainly have the opportunity at temporary order hearings, motions hearings, and, most importantly, depositions to "teach" witnesses by the use of controlling techniques that any answer other than "yes" will result in unpleasantness for the witness. Each witness is different and calls for different techniques to be used. For example, at your deposition, find a technique that does successfully control the witness and reinforce it several times so that when that technique is used at trial, the witness immediately is conditioned to respond. If the advocate has conditioned and controlled the witness, prior to the jury being empaneled, then control in front of the jury is much easier to maintain.

### **Ask, Repeat, Repeat**

The lawyer has asked a good, basic question, in its briefest, simplest form, using words of common understanding. The answer can only be “yes.” In order to avoid giving the cross-examiner an answer, the witness has sidestepped with a non-answer.

Without taking your eyes from the witness, slowly ask the question again, in exactly the same words and tone of voice, articulating each word. If the witness is so foolish as to again ignore the obvious “yes,” slowly lean slightly forward, never taking your eyes from the witness. Repeat the identical brief, simply constructed question.

The successively slower repetition of the *identical words and tone* emphasizes to the witness, the court, and, most importantly, the jury that the witness is refusing to answer a short, straightforward, easily answered question. The forward body motion emphasizes that all are waiting for a response. A witness has never failed to answer the third posing of the question with anything but a straight “yes.”

Some question that the judge would permit the trial lawyer to ask the same question three times. In fact, this is a technique that maximizes the likelihood that the judge will voluntarily intervene and insist that the witness actually answer the question, in order to “move it along.” Further, it is not redundant or repetitious to ask the same questions, if that question has not been answered.

Q: The car was blue?

A: The car was traveling down the street, it started to go through the red light, I didn't even see brake lights . . . (babble, babble, babble) . . . and finally it did turn the corner and I still hadn't seen brake lights.

Q: (Slower) The car was blue?

A: Well, it happened so fact when it went through the red light.

Q: (Slower still) The car was blue?

A: Yes, it was blue.

### **Reversal, or Ask, Repeat, Reverse**

This technique is a variant of the first technique. Instead of repeating the question verbatim three times, the questioner asks the question twice in identical words — slightly slower the second time and leaning forward — giving the witness two opportunities to tell the truth before reversing it the third time.

For example, in a divorce case it is necessary to establish that the defendant-husband signed financial statements indicating a net worth of several hundred thousand dollars. The lawyer knows from prior depositions and interrogatories that the husband now contends that his net worth is really zero, and that the financial statements were exaggerated to obtain a bank loan. Undoubtedly, the defendant/witness has been warned by his lawyer that this subject will definitely come up at trial.

- Q: Mr. Allen, you signed Plaintiffs Exhibit 10, your financial statement, *as of* August 1, 1990?
- A: You have shown me so many documents, I am not sure. I know that I signed some financial statements and others I didn't sign. I was trying to borrow money to keep my family afloat for so long, I just wasn't sure what I was signing many times. They really don't mean anything.
- Q: Mr. Allen, you signed Plaintiffs Exhibit 10, your financial statement, *as of* August 1, 1990?
- A: Like I said, so many papers were signed.
- Q: Mr. Allen, you did *not* sign Plaintiffs Exhibit 10?
- A: (Mumble, mumble, mumble) I didn't say that. I signed it.

The third asking could also be phrased: "Mr. Allen, you did *not* sign Plaintiffs Exhibit 10, your financial statement, as of August 1, 1990?"

### *An Obvious and Indisputable Truth*

This technique is best used when the witness will not confirm even the most obvious and indisputable truth. When used early in the cross-examination during confrontations with the witness over simple questions, it dramatically sets the scene for later use of the ask, repeat, repeat technique.

Ask, repeat, reverse is often used in establishing foundational answers that will be used on numerous occasions during the remaining cross-examination of the witness. A witness who has experience testifying recognizes the sound of a foundational question and knows that there is an upcoming potential problem for the witness. The witness is then more likely to resist the foundation.

### **Objection: Non-Responsive Answer**

The cross-examining lawyer has only one legal objection that can be used as a technique to control the witness. The objection that the witness is being non-responsive in her answer will stop the unresponsive, runaway answer.

It is, in a sense, inviting the court to assist in controlling the witness. However, the cross-examiner will only use this objection when many other techniques have been used but have been unsuccessful in controlling the witness.

It is particularly helpful to use this objection when the court has nonverbally indicated to the cross-examiner that the court has tired of the witness not being responsive. The cross-examiner then takes the nonverbal cue from the court and gives the court an opportunity to volunteer to control the witness. The more malicious the unresponsive, rambling answer is, the more likely the trial court will accept the invitation to enter to help control, and the more likely that that entrance will be harsh and critical of the witness's behavior.

## **Physical Interruption Keying to the Jurors**

Effective methods for physically interrupting the runaway witness are numberless. The method of choice depends on the cross-examiner's personal characteristics — body size, sex, degree of aggressiveness, and overall personality. The right choice also depends on the behavior of the specific witness. The more offensive jurors find a witness, the more grandiose the physical interruption can be and still be tolerated by jurors. The lawyer must never show greater scorn for the witness than the jury has already shown. The jury must set the tone for the lawyer's disdain of the non-responsive witness.

## **The Hand**

A witness begins to answer the question with a long unresponsive answer. The lawyer simply holds up her hand like a traffic officer's stop signal. It sounds odd, but it works. Try it at a cocktail party on someone you don't like. (While it will stop the conversation, it will not improve the relationship.)

In a trial setting, the answer just trails off. One can tell when a physical interruption has been accomplished, since the answer ends with an ellipsis on the transcript:

Q: The aircraft was designed at Boeing?

A: It was designed at Boeing, but you have to understand that it has many component parts, all of which . . .

The lawyer has silently interrupted. Now the witness is waiting to see what will next happen. The safest way to get back on track is to remind the witness gently of where the lawyer is in the questioning:

Q: Let me make sure we understand each other. My question is "The aircraft was *designed* at Boeing?"

## **The Shaken Finger**

When the witness begins to answer the question unresponsively and at length, simply shake your index finger back and forth as you would at a naughty child. That simple gesture, with other appropriate body language to support it, makes the witness feel guilty. This technique seems most appropriate when other techniques (particularly, the hand) have been employed earlier in the cross-examination. Now, when the witness continues to demonstrate that they have not learned the lesson of responding to the question asked, the shaken finger (naughty witness!) is appropriate.

### *Child Witnesses*

This technique is also quite effective when cross-examining the child witness. Each cross-examiner has known the frustration of attempting to cross-examine a child witness when everyone in the courtroom is concentrating on whether the cross-examiner will attempt to trick,

confuse, intimidate, or otherwise mishandle the child. Controlling the runaway child witness is a difficult undertaking. “The Shaken Finger” has been found to be extremely effective to children. It seems less powerful or overbearing than many of the more sophisticated techniques.

The alleged child molestation victim is one of the most challenging witnesses that cross-examiners face today. The charge itself is so inflammatory and the witness’s testimony so readily accepted by the jury that control is essential, but the cross-examiner must be careful not to appear to be victimizing the child in the context of the jury trial.

Q: You never told your mother?

A: No, I never told her (sob, sob), but I was frightened of him. I was scared of him. He would put his finger in my . . . .

Q: (Shaken finger) Let’s take it a step at a time. You never told your mother?

### **The Seat**

This technique must be reserved for the witness who obviously is deliberately trying to evade the cross-examiner’s questions — a willful or maliciously non-responsive witness. Remember, physical interruption techniques can be used when the jury, if they could participate, would resort to the technique. This powerful technique, because of its particularly aggressive and insulting nature, must be reserved for the witness who has clearly and completely worn out his/her welcome with the jury. This witness refuses to answer even the most simple, straightforward question and is now viewed by the jury as actively evasive — one who is seeking to conceal the truth.

No one is immune to feeling humiliated when someone refuses to listen. You must communicate to the jury, the judge, your opponent, and the witness that you are refusing to acknowledge or listen to the non-answer.

Do this by walking slowly back to counsel table, sitting down and looking down at the table. Don’t read anything; don’t look at anything. Just stare down at the table. Counsel perhaps holds her head in her hands. Witnesses babble and stutter to a full stop when confronted with this deliberate effort to offend.

This technique works best when the lawyer *has* been following the principle to never take your eyes off a non-responsive witness. It will heighten the impression that this witness is behaving so badly that he/she should be ignored. If you have calculated correctly, and jurors consider this witness to be malicious and willfully non-responsive, they will side with you. They may even emulate your conduct and turn their heads away from the witness.

### **The Court Reporter**

While the judge is certainly the highest ranking member of the courtroom staff, the jury views all court personnel as holding powers. All members of the judge’s staff are seen as “official” and are treated by the jury with special respect. Most importantly, the courtroom staff is

seen as neutral. When they use their power to aid one or the other side this states added significance, a leaning to the “right” side.

Having asked the witness a leading question and having received a rambling monologue, turn to the court reporter and ask, “May I please have my question read back to the witness?” All action in the courtroom will be stilled as the reporter slowly articulates each word of the stenographic record.

Having the question repeated by a court official and read back (or played back) with great clarity in the same tone and language intimidates the runaway witness and immediately brings a short, responsive answer.

If the lawyer has the misfortune to be working in a system in which tape recorders have replaced court reporters, some forewarning to the court clerk is required. Before trial or before the cross-examination, the advocate should let the court reporter know that she is going to employ this control technique. Most court clerks enjoy the experience if forewarned.

Interestingly, even judges view this technique as employing official powers of the court. The judge believes the court reporter is an extension of the court. When using the court reporter technique, the judge seems to listen more intently to the read back and often visually, if not verbally, directs the witness to answer the question as read back. This is a very subtle way of having the judge volunteer to get involved by directing the witness to answer the question.

## **Blackboard**

The blackboard can serve in much the same way as having the court reporter read the question back. If a witness is consistently unresponsive and the question is short and to the point (as it must be for any of these techniques to work), the cross-examiner may simply write the question on the blackboard during or after hearing the unresponsive answer. When faced with the written question, the witness often will stop the unresponsive answer, but even if the witness does not stop the unresponsive answer, he or she will recognize that they must respond to this question in the final analysis.

If the cross-examiner is fortunate, the witness will see the question being written and respond to it. The lawyer can then highlight the answer by asking the witness if they are responding to the question you have written on the board. Inevitably the answer is “yes.”

If the cross-examiner is very fortunate, the witness will ignore the question written on the board, finish his or her answer and permit the questioner, while pointing to each individual word on the blackboard, to repeat the question. The graphic simplicity of the question on the blackboard requires the witness to provide a short, plain answer. Further, because it is time-consuming, the judge will often follow up the blackboard’s use with a request that everyone “move it along.” The witness gets the point of this indirect scolding, as does the jury.

## **Poster**

If a blackboard is effective, the poster is not only effective but completely intimidating to the witness and the opponent. The poster further demonstrates to the jury and the judge the cross-examiner's complete and absolute preparation for the trial.

Trial counsel knows the heart of their cross-examination. Trial lawyers are often quite able to predict at which point in certain cross-examinations certain witnesses will rebel or try to evade answering the critical questions. If the big question can be predicted, and the non-responsive answer is feared or foreshadowed through discovery or pre-trial hearings, then an appropriate poster can be developed before trial. If there is no discovery, careful listening to direct examination questions can develop the material for the poster. The poster can be drawn during a recess. Then, when the predicted evasion comes to the big, critical question, cross-examining counsel can prop the poster on the desk and slowly repeat the critical leading question. It is already written on the poster in the identical language.

An example comes from a typical personal injury case. The cross-examining attorney has questioned this witness at deposition. The witness has attempted not to answer a critical question at the deposition, but finally, and after a great deal of questioning, has admitted that she suffered from low back pain before the date of the collision and that it was caused by an unrelated, on-the-job, lifting injury:

Q: Your back was hurt before this collision?

A: My back really hurts now. It has hurt so long and it has hurt so much since your client hit me. I wasn't doing anything wrong. I was sitting there stopped at the red light.

Q: (The cross-examining attorney pulls out a poster prepared before the trial, with the identical question printed on the poster.)

There is a long pause. The cross-examiner points to the poster but does not repeat the question. The witness spontaneously answers:

A: Yes, my back was hurt before the collision.

The witness also must think that the cross-examiner must be psychic to understand and to know ahead of time what identical question would be asked and that the witness would be unresponsive.

## **"My Question Was ...."**

This manner of controlling is less confrontational than the immediately preceding technique. It has the same effect, particularly when used after the prior technique that is so confrontational.

The jury is reminded that your question was not answered. They are reminded of the very specific wording of your question. In that sense, this technique is much like a verbal blackboard and to the same effect.

### **“So Your Answer Is Yes”**

This technique is disarmingly simple and easily understood by jurors. It can be used with any witness, whether that witness is a willfully non-responsive witness or just cannot help answering at length. The cross-examiner's tone is adjusted depending on the circumstances, but not the question itself. That is to say, if the unresponsiveness is obvious and is only the latest in a string of non-responsive answers, the tone can be firm, perhaps even critical. If the witness's personality type leads to unresponsive answers or answers at length, then the lawyer can be more kind, gentle, and understanding. Regardless of where on the emotional spectrum the voice falls, the question remains the same: “So your answer is yes?”

This is best delivered after a long unresponsive answer, without moving or taking your eyes from the witness's eyes and with a slight, helpful smile. Usually the affirmative response is quickly forthcoming.

### **If the Truthful Answer Is “Yes,” Will You Say “Yes”?**

This is a more powerful version of the technique just described. It should be reserved for the obstinate witness — particularly one being discredited.

This technique should be employed when a non-responsive answer is given to a very short, simple question in which no one contests that the fair answer is “yes.” Immediately after the non-responsive answer, say “If the truthful answer is ‘yes,’ will you say ‘yes’?” Obviously the witness has to answer “yes” to the question.

Immediately follow by repeating the identical question that received the non-responsive answer. The witness will answer with a simple “yes.”

### **Preparation**

- Identify the purpose of the cross-examination—constructive, destructive or both. Can the witness confirm some elements of your case? Is the witness speculating? Both? For instance, can the witness confirm that he was present when the disputed document was signed by the opposing party (constructive cross) but not when payment was made (destructive or limiting cross)?
- Identify the fewest number of points required to achieve your purpose. A point is simply an ultimate or controlling fact or conclusion you want to make with the jury.
- Prepare an outline of the points you want to make and the facts supporting each point. Avoid writing questions verbatim because you will invariably have to read the question when you should be listening to the witness. Witnesses say the most helpful things if you will only listen.

- Collect and organize any prior statements by the witness, or others, relating to the points you want to make. Use the same phrasing during cross-examination as in the prior statement to eliminate wiggle room. Have the prior statement referenced and quickly available for impeachment if necessary.

- Determine the order you plan to use in making your points. Chronological order is easier to follow but the direct examination or the need for emphasis may dictate a topical order for your cross. Think about your case themes and how the cross-examination of a particular witness fits best with those themes and the case as a whole. Even though you have a planned order, listen to the witness on direct and stay flexible.

- Organize your preparation so you can listen to the witness and be flexible. In other words, arrange your outline and prior statements so you can add, delete or change the order as the testimony develops.