THE KEY TO CROSS IS CONTROL

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Lawyers are a lot like lion tamers when cross examining opposing witnesses, especially those who have their own ideas about answering questions and get ornery and unresponsive when confronted. Though lawyers don't wield a whip or hold up a chair to keep the hostile ones at bay (and avoid losing their heads), they have the benefit of information (contained in prior statements, testimony and police reports) that they can use to good advantage if it favors their case, discredits the witness or otherwise casts doubt on the prosecution's case. The key to doing so is establishing, maintaining and never relinquishing control. Keeping it is not only important to survival but essential to a successful outcome. Losing it reveals vulnerability, exposes weakness and invites disaster.

Unlike direct examination where the questioning attorney stands stage left (or right), and puts the witness in the center of attention with open-ended questions that invite him/her to tell his/her version of events in narrative fashion, cross examination puts the questioning attorney squarely in the center ring under the big top where counsel really doesn't (or shouldn't) ask any questions at all. Rather, the cross examiner is (and should) present the witness with facts (that counsel knows or believes to true) in a declaratory manner that demands a specific response (e.g. "yes," , "no," "I don't know," or " I don't recall.").

The way that is best accomplished is with LEADING QUESTIONS which are clear (one point at a time), concise (no confusing, run-on questions), and constricting insofar as they should only be answered as described immediately above. Anything else and the witness is being unresponsive, and if counsel doesn't reign him/her in, the battle for control can be lost at the start.

A leading question, then, is one which contains the answer it seeks and calls upon the witness to admit it, deny it or claim no knowledge or memory about it. For example, while a direct examiner may ask his/her witness to "describe the traffic conditions" as he/she approached the intersection (e.g where the accident occurred), the cross examiner will say something more like: "as you approached the intersection, traffic was light, wasn't it," or " you would agree, wouldn't you, that traffic was light as you approached the intersection?" (Counsel knows this fact to be so perhaps because the witness so testified at a deposition or gave a statement to that effect to the investigating officer).

If the witness gives an evasive or unresponsive answer (e.g. "I remember that the sun was shining in my windshield", or " I was looking straight ahead as I approached the intersection,"), counsel must steer the witness right back to the question that was asked. (e.g. "my question, sir/ma'am, was not about the sunshine or the direction you were looking. It was about the traffic, and you agree, don't you, that traffic was light as you approached the intersection.").

If the witness gives the expected answer, counsel has demonstrated to the witness (and to the jury) that he/she knows exactly what he/she is looking for and will not back off until he/she gets the answer to which he/she is entitled. Unless the witness is especially nervous, has faulty memory or is evasive (or mendacious) by nature, counsel will have taken the first step toward showing the witness who is in charge.

If the witness persists in being unresponsive (or gives contradictory answers), counsel should take a transcript of the witness' prior testimony (EBT in civil case, grand jury or felony hearing testimony, supporting deposition in a criminal case), get it marked for identification and CONFRONT the witness with his his/her prior sworn statement on the point in question.

Unless the witness is sympathetic (e.g. elderly person, child, special witness), counsel SHOULD NOT BE REFRESHING THE WITNESS' RECOLLECTION ON CROSS EXAMINATION. Refreshing recollection should be reserved for friendly witnesses NOT adversarial ones. Counsel on cross exam is IMPEACHING the witness to show that his/her story has changed, thereby calling his/her credibility into question.

The impeachment may go something like:

Q. As I understand it, you're telling this jury that you don't recall what the traffic was like as you approached the intersection, is that right?

A. Correct.

Q. Well, you testified under oath about this accident at a deposition at my office on _____.

A. Yes.

Q. Showing you defendant's exhibit one for identification, this is a transcript of your deposition testimony, is it not?

A. Yes.

Q. During the deposition, you answered questions asked of you about this case?

A. Yes.

Q. You swore that your answers were true?

A. Yes.

Q. And you did tell the truth, didn't you?

A. Of course.

Q. It's fair to say, isn't it, that your memory of this accident was fresher at the time of the deposition than it is today?

A. I imagine so.

Q. Well, you're not suggesting that your memory is like good wine that gets better over time, are you?

A. No.

Q. Now, directing your attention to page 25, lines eight through twelve, were you asked this question and did you give this answer: "QUESTION: DESCRIBE THE TRAFFIC AS YOU APPROACHED THE INTERSECTION? ANSWER: THE TRAFFIC WAS LIGHT." That's what you testified to at your deposition, did you not?"

A. Yes, it appears that I did.

Counsel may consider cutting to the chase sooner by asking the witness at the outset of the impeachment: "Isn't it a fact that you testified under oath at a deposition (counsel holds the transcript in hand like the lion tamer's whip), that the traffic was light?" If the witness agrees, the impeachment had been accomplished. If not, counsel can the proceed as above.

For all intents and purposes, impeachment should be a deliberate sequence of choreographed commands that compel the witness to roll over like a well-trained circus lion who does as his master directs. The key, however, is that counsel has prepared by becoming fully familiar with the witness' prior testimony, and knows exactly where to find it (and use it to full advantage) when the witness gets frisky or uncooperative.

The FOUR C'S OF WITNESS CONTROL BY IMPEACHMENT (whether by prior inconsistent statement or previous omission of facts mentioned for the first time trial) are:

1: CONFIRM: (e.g "On direct examination, you testified that traffic at the intersection was heavy as you approached, is that right?'

2. CLUE: "This is not the first time you've testified under oath about this matter, is it?" (or, "You testified in the grand jury about this matter on _____").

3. CREDIT: "Showing you defense exhibit A for identification, this is a transcript of your grand jury testimony from ____"

a. "You were under oath when you testified in the grand jury, correct?"

b. "You answered all the questions put to you truthfully and completely?"

4. CONFRONT/CONTRADICT: "Directing your attention to page 10, lines 9-12, you were asked this question and you gave this answer: "QUESTION: WHAT WAS TRAFFIC LIKE AS YOU APPROACHED THE INTERSECTION?....ANSWER: " IT WAS LIGHT." (IMPEACHMENT ACCOMPLISHED. MOVE ON).

Counsel should resist the temptation to ask hackneyed, argumentative questions like: "so we're you lying then or now?" It could well be that the witness plumb forgot, and if he/she is/was lying at one time or other, it is better to save the editorial comment for summation when the witness can no longer explain him/herself.

One of the most effective ways to control a witness on cross examination is to frame the questions with his/her own words from direct exam or prior testimony, assuming counsel is doing more than just rehashing what the witness said before for the sake of repetition (in which case, counsel becomes an ally for the prosecution). In so doing, when the witness strays from his/her previous testimony, counsel can CONFRONT the witness with EXACTLY what the witness said before.

If counsel relies instead on a summary or his/her own interpretation of the witness' prior testimony, the witness now has room to wriggle around the question or wrestle with counsel over what he/she actually said. When that happens, the examination can resemble feeding time in the lion's den where counsel (and ultimately the client), end up paying dearly because counsel was lazy in preparation or sloppy in formulating his/her questions.

One of the essential components of witness control is COUNSEL'S CONFIDENCE (or at least the appearance thereof), which is borne not of cockiness or arrogance (which jurors seldom find endearing), but of TOTAL PREPARATION and COMPLETE COMMAND of the facts. Now that the defense is entitled to discovery so much earlier than before, there is simply no excuse for walking into a courtroom with anything less than full mastery of the facts and a well-planned (but flexible) strategy for examining every witness.

When counsel is in command of his/her case, EVERYBODY KNOWS IT, including the judge, jury, prosecutor and the witnesses who will immediately recognize from your obvious preparation, poise and patient persistence that, as legendary defense attorney Bob Murphy used to say, you OWN THE COURT ROOM. They will also know that you will not give up until you've gotten the answer to which you are entitled.

If the witness continues to duck, dodge or evade a question, counsel should not become flustered but rather keep at it until the witness finally relents (assuming the question is properly asked, the answer is unresponsive and the subject matter is important enough to spend time on). If the witness is one who answers everything with an attempted explanation (e.g. "yes but," "what I meant was,"), counsel must be prepared to shut that down right away. (e.g. Mr _____, I didn't hear myself ask you for an explanation. My question was, "when the officer asked you what happened that night, you didn't say a word about seeing a gun, did you?"

A witness' evasiveness is certainly something that counsel can comment upon in summation when discussing witness credibility. "The judge is going to instruct you that one of the things you can consider is a witness' demeanor on the stand and whether he/she answered questions directly and forthrightly or in a manner that was convoluted or unresponsive. Recall Mr _____. Did you notice how friendly, cooperative and responsive he was with the prosecutor on direct examination, but as soon as I started asking him questions on cross examination, up went the quills. All of a sudden the cuddly koala became a prickly porcupine who argued over every little thing and flat-out refused to give straight answers to straight-forward questions. Why was that? What was he trying to hide?"

If counsel is concerned that a witness will be unresponsive or even hostile, he/she can begin the cross exam by asking a series of seemingly innocuous questions that the witness can't help but agree with or otherwise answer with a single-word response. (e.g. "Detective, you've been employed with BPD for 22 years, is that right? ...You spent your first seven years as a patrol officer? ...Then, for eight years, you were assigned to the detective bureau? ...And for the past two years, you've been a homicide detective, is that right?"

With such questions, the witness is not likely to feel threatened or perceive some hidden agenda designed to discredit him. Counsel also is able to develop a rhythm and condition the witness to being responsive with a string of short, tight inquiries that elicit basic, undisputed (and, ideally favorable), facts.

Then, where appropriate, counsel can posit certain fundamental and generally accepted principles (e.g of good police work) that the witness, while perhaps now a little wary of where counsel is headed, (e.g. demonstrating where the witness' investigation fell short of such principles), must agree with.

For example:

Q: Detective, you would agree, wouldn't you, that good police work requires a detective to be as thorough and complete as possible when he/she is investigating a crime?

A. Yes.

Q. And you'd also agree that curiosity and attention to detail are are important qualities of a good detective, true?

A. Sure.

Q. You believe, don't you, that a detective should keep an open mind when conducting an investigation and let the facts lead you to a conclusion rather that try and force the facts to fit a conclusion that's already been reached?

A. Well, you may have a preliminary conclusion based on your investigation so far and then see if new facts support or refute that conclusion.

Q. Understood, but that requires you to let the facts determine the conclusion, rather than the other way around.

A. Okay.

Q.I mean, if you reach a preliminary conclusion as you suggest, and new facts refute that conclusion, you don't just stick to that conclusion, you go back to the drawing board, and see where the facts ultimately lead you, right?

A. I see, yes, I agree with that.

Q. My point simply is that as a detective, you follow the facts to a conclusion and not vice versa, true?

A. True.

In this example, counsel begins with a premise/proposition that the witness is likely to confirm, explains what he/she means when the witness expresses some uncertainty and then brings the witness back around (picking up on his or her own answers), to the principal point in this line of inquiry. By listening to the witness' answers and positing the questions in leading form, counsel NEVER LOSES CONTROL of the witness or the examination.

Assume the cross examination continues as follows:

Q. Detective, as a homicide detective, you know that murder is the most serious crime in the penal law, true?

A. Of course.

Q. And when you are interviewing a murder suspect, meaning someone whom you suspect based on the evidence so far, may have committed the crime, it's important for you to be as prepared as you can be for such interview, right?

A. Sure but you don't always have the luxury to be as prepared as you'd like.

Q. I understand, but when you're interviewing a suspect, the more information that you have about the crime you're investigating ,the better you are able to understand what the suspect is talking about, true?

A. Okay, yes.

Q. And the information that you already have can help you form the questions that you will ask, isn't that right?

A. Yes.

Q. For example, if you have learned that the victim was strangled and bound with a rope that was fastened with a specialized, sophisticated knot, asking the suspect whether he was ever a Boy Scout or has boating experience could be helpful, couldn't it?

A. I suppose it could.

Q. For example, if he said "yes," you would then know that he has some familiarity with specialized knots and therefore, could have tied the one found on the victim?

A. That's possible.

Q. And knowing that, you might then ask for a DNA swabbing from him to compare to any DNA found on the rope that was not the victim's, correct?

A. I might do that anyway, but that would certainly pique my curiosity.

Q. Or, if the suspect knows where you're going and denies any prior scouting or nautical experience, you could follow up on that to see whether he was being truthful?

A. I could.

Q. And if you find a witness who knew the defendant when he was a boy scout or sailed with him in college or wherever, you would then know that the defendant was lying to you, true?

A. Yes.

Q. And you'd want to know why he lied, wouldn't you?

A. Of course.

Q. And that might well cause you to re-interview the suspect and confront him with the lie, wouldn't it?

A. It could yes.

Q. And you know that the fact of the lie could be used against him if he got charged with the murder, right?

A. True.

Q. And you also know, that sometimes, that fact that a suspect clearly lied about an important detail can be powerful, incriminating evidence, right?

A. It may not be a confession but it can be the next best thing because it allows you to argue that he lied because he knew the truth would incriminate him.

Q. Agreed, but knowing such a detail allows you to ask the right kind of questions, isn't that right?

A. Sure.

Q. Detective, before interviewing my client in this case, you didn't go to the scene, did you?

A. No. I was called from home to go directly to the homicide office because there was a suspect who I needed to interview.

Q. Okay, did you call any detective at the scene to find out how the killing occurred?

A. Not exactly. All I knew from the message I received was that there was a homicide with a female victim who was may have been strangled.

Q. So you didn't call anyone to get any details, did you?

A. No.

Q. There was nothing stopping you from doing so, was there?

A. I was called to interview a witness who was already in the homicide office so there was no need for me to go to the scene which was already covered by other detectives. (CLASSIC UNRESPONSIVE ANSWER).

Q. My question, detective, was: "there was nothing stopping you from calling one of the detectives at the scene to ask for details about the death, isn't that right?"

A. Uh....

Q. Isn't that right, detective?

A. What do you mean?

Q. Detective, isn't it true that you could have called one of the detectives at the scene and asked, "what have we got here?"

A. I could have.

Q. But you didn't do that, did you?

A. I just did what I was called in to do which was to interview a suspect, who turned out to be your client."

Q. Forgive me, detective, perhaps you didn't hear what I asked you. "YOU COULD HAVE CALLED A DETECTIVE AT THE SCENE BEFORE QUESTIONING MY CLIENT, BUT YOU DIDN'T DO THAT, DID YOU?

BY THE PROSECUTOR: Objection. Asked and answered.

BY THE COURT: Overruled. It's cross

Q. I'll ask the reporter to kindly read the question back verbatim.

COURT REPORTER READS BACK THE QUESTION:

A. No.

Q. And, by the way, detective, in your investigation into this homicide, you found nothing to indicate that my client was ever a Boy Scout, did you?

A. Not to my knowledge.

Q. Or that he's ever been on a boat in his life?

A. I'm not aware of that.

Q, I'll rephrase. You found nothing to indicate that my client was ever a sailor, a boater or was ever even on a boat in his life?

A. No, I didn't.

Q. And detective, as you were interviewing my client, did you notice that my client's hands were gnarled from severe osteoarthritis?

BY THE PROSECUTOR: Objection. Assumes facts not in evidence.

BY THE COURT: SUSTAINED.

Q. I'll rephrase. Detective, as you were interviewing my client, you did notice, didn't you, that my client's hands were gnarled and misshapen?

A. I was more interested in what he had to say?

Q. Getting back to my earlier question about the importance of attention to detail, detective, you didn't think that my client's physical appearance and condition could be informative?

A. Sometimes it can be.

Q. For example, fresh scars on a murder suspect's face might be worth exploring to see whether they're consistent with a physical altercation with another person, right?

A. Can be, yes.

Q. And you didn't see any scars on my client's face or anywhere else on his body, did you?

A. Not that I could see.

Q. And you're telling us that you didn't notice the shape and condition of his hands?

A. Not really, no.

Q. Well, detective. I'm going to ask my client to stand up now and hold out his hands and you can describe for us what you see.

BY THE PROSECUTOR: I object. This is highly improper.

BY THE COURT: What's improper about it?

BY THE PROSECUTOR: Counsel is using the defendant as an exhibit and I can't cross examine him. Also, this witness testified that he didn't look at the defendant's hands during the interview, so he can't say if their current appearance fairly and accurately depicts the way they looked at the time of the interview several months ago.

BY THE COURT: Counsel?

DEFENSE COUNSEL: Your honor, putting aside the incredibility of an experienced homicide detective not noticing a suspect's physical condition, I believe the court is aware that arthritis is not something that develops overnight.

THE COURT: Counsel, what evidence other than your say-so is thereto establish that your client had arthritis?

COUNSEL: Your honor, we all know what arthritis looks like.

THE COURT: Sustained.

COUNSEL: Your honor, I'll go about it this way: Detective, before you concluded the interview of my client, you took some photographs of him in the interview room didn't you?

A. Yes.

Q. And one of the photos was of him standing up with his hands at his sides.

A. I believe so, yes.

Q. Detective, showing you defense exhibit B for identification, this is a photo that you took of my client at the conclusion of your interview, isn't it?

A. Yes.

Q. And it's a fair and accurate representation of his physical appearance including his hands, correct?

A. Appears to be, yes.

BY DEFENSE COUNSEL: Your honor, we offer defense exhibit B into evidence.

BY THE PROSECUTOR: Objection.

BY THE COURT: Overruled.

BY COUNSEL: Detective posting defense exhibit B on the Elmo projector here, you'd agree that my client's hands appear to be gnarled and misshapen, don't they?.

A. Seem so.

Q. They seem what?

A. Like you said, gnarled and misshapen.

COUNSEL: No further questions.

In this protracted exchange, counsel pursues a a deliberate (if not somewhat lengthy course) of inquiry that begins with basic undeniable facts, proceeds to set the standard for proper police procedure and gradually takes the witness to task for the ways in which his approach to the interview fell short of the mark. When the witness wandered from the questions asked, counsel prodded him back to the point with repetition and occasional rephrasing, using the detective's own answers as a springboard to further inquiry. In that way, the examination unfolds as a natural dialogue in which the attorney sets the tone, leads the witness in the desired direction and NEVER RELINQUISHES CONTROL.

And even where counsel runs into a wall (when the court shuts down the demonstrative), he/she finds the nearest open door by using a photograph that not only depicts the defendant's physical condition at the relevant time but also tends to impeach the detective's testimony that he didn't notice the defendant's hands. As is evident, counsel is limited only by the level of his/her preparedness, persistence and adaptability in eliciting evidence that hurts the prosecution's case and enables the client (hopefully) to walk out the courtroom doorway when it's over.

If a witness absolutely refuses to give responsive answers to proper questions, counsel may, AS A LAST RESORT, ask the judge to direct the witness to answer the question that was asked. Some judges will oblige and others will leave counsel to his/her own devices. Hopefully, counsel's own devices will be enough to elicit a proper response.

Counsel should be mindful, however, that seeking the judge's intervention suggests an inability to control the witness, not unlike the lion tamer who has dropped his/her whip and chair. The better way, it seems, is to set the witness up and, if necessary, knock him/her down with a snap, crackle and pop of crisp fact-based questions that the witness cannot properly deny without suffering the sting of impeachment.