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More on cross-examination: characterizations, conclusions

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We've talked in prior columns about the importance of control in cross-examination. If you give the witness room to wiggle, he'll almost certainly take it. The most important control device is simply asking short, clear questions. But proper word choice is almost as important.

As with so many things in the courtroom, when it comes to word choice you need to be disciplined and avoid temptation. On cross, one of the principal temptations is to try to get the witness to agree to your characterizations and conclusions of the events. It rarely works and usually causes some harm.

As a general matter, on cross-examination you want to limit your questions to what the witness saw, heard or did. Within that universe, you want to further limit questions to things where you know the answer, or can control the witness into giving you the correct answer.

Lawyers often ignore that principle and instead pepper the witness with characterizations or conclusions, hoping that the witness will agree, or maybe that the jury will ignore the answers. That may come in the form of loaded conclusory words ("*You were speeding*"), or suggestive adjectives and adverbs ("*You were driving pretty fast*").

However you do it, it likely won't work, and you'll quickly lose control.

For example, suppose that it is important to you to establish on cross-examination that the witness was rushing across the street at the critical moment. Many lawyers, succumbing to temptation, ask the witness to adopt that conclusion directly: "*You were rushing across the street, weren't you?*"

If the witness has used that word in a prior statement or testimony, then fine. Use the word (that precise word, not your own synonym or paraphrase of it), and be prepared to use the prior statement to impeach the witness if he doesn't give you exactly that word.

But what if the witness has not given you that word in a prior statement or testimony? If it is an adverse witness (presumably so, if it's cross-examination), then he is not interested in helping you. Unless the witness is unusually dense or inattentive, he is listening to where you are going and will want to block you from getting there — and avoid looking like a liar or a fool.

Thus, when you ask your question ("*You were rushing across the street, weren't you?*"), all you've achieved is telegraphing where you're going, and doing so without forcing the witness to go there. As a result, you are likely to get an evasive or deflecting answer ("*Well, no, I wouldn't say that. It's a busy street, and I was being very careful.*").

If you push harder ("*The truth is, you were rushing, weren't you?*"), it won't get any better ("*I'm not sure what you're implying. I looked carefully both ways.*"). Or maybe you'll just get an outright denial.

Because it isn't likely to work, you shouldn't do it. Instead, establish all the little factual pieces that compel the conclusion you want the jury to draw, without using the characterizations and conclusions that the witness won't be willing to adopt.

Ideally, when you get to the end of your line of questions, you won't even have to ask the magic question, because the answer to it will be obvious. And that answer will likely be more significant — and more memorable — to the jury.

So, for example, instead of asking, "*You were rushing across the street, weren't you?*" how about a line of questions like this:

- *You had an appointment at 4 o'clock?*

- *It took you two weeks to get that appointment?*
- *That was a medical appointment that was not easy to get?*
- *You drove into town for your appointment?*
- *You don't drive into town often?*
- *You hit some traffic on the way?*
- *You parked your car?*
- *That was about five minutes to 4?*
- *While you were parking, you got a call from your daughter?*
- *We know from the phone records that the call came in at 3:56, right?*
- *She was upset about something?*
- *You talked to her for a few minutes?*
- *The call ended at 4:03?*
- *You had parked at a meter?*
- *But you couldn't find change for the meter?*
- *So you were concerned about getting a parking ticket?*
- *You looked for change in the car?*
- *After a while you gave up on finding any change and decided to risk getting a ticket?*
- *Your parking space was three blocks from the doctor's office?*
- *That walk took about five minutes?*
- *Then at the end of the walk you had to get across the street?*
- *By that point, it was about 10 minutes after 4?*

And so on. Trial lawyers use different analogies for this: building a wall, one brick at a time; or painting a picture, one short brushstroke at a time. The point remains the same. By the time you get through this line of short, simple questions, the answer ought to be clear to everyone in the courtroom: The witness was in a hurry. And you can say so, directly, in your closing, when the witness won't have a chance to fight back and try to derail you.

If you're new to this, try this exercise: Take a piece of paper, and write the characterization you want at the top of the page (in this example, "rushing"). Go through the record and list on the page every fact — no matter how small — that supports that conclusion. Remember to include any absent facts (that is, things that should have happened, but did not). Break those facts down into short, clear, one-fact-at-a-time questions, as many as you can think of. Then ask those questions of the witness.

Characterizations and conclusions come in lots of different flavors, but the more they make the witness look bad, the more likely the witness is to fight back. That's particularly so with emotions (no one likes to admit being angry, jealous or irrational) and matters that bear directly on credibility (no one likes to admit it was hard to see or that his memory is faulty).

One category of words deserves special attention. Vague adjectives (such as "very" or "pretty") almost never achieve anything useful on cross, at least not as to contested issues. Those words give the witness all kinds of room to wiggle. If you ask the witness whether the meeting was "very" important, the most that she'll probably give you is that it was only "important," or no more important than lots of other meetings that week.

The key is not to rush to the conclusion, but to take time to let it develop. In the words of Arnold Glasow, "The key to everything is patience. You get the chicken by hatching the egg, not by smashing it."

Let the point you want to make hatch slowly. Do that by resisting temptation and sticking to the facts.

Previous installments of Tried & True can be found here. Judge F. Dennis Saylor IV sits on the U.S. District Court in Boston. Prior to his appointment to the bench, he was a federal prosecutor and an attorney in private practice. Daniel I. Small is a partner in the Boston and Miami offices of Holland & Knight. He is a former federal prosecutor and teaches CLE programs across the country.