MASSACHUSETTS LAWYERS WEEKLY

# Control in cross-examination

By: F. Dennis Saylor IV and Daniel I. Small October 5, 2017

Effective cross-examination requires that the questioner maintain both control and credibility. Achieving and maintaining that control is one of the great challenges of cross-examination.

It does not just happen; it takes careful preparation and practice. It also takes discipline — in particular, the discipline not to squabble with the witness.

Obviously, most opposing witnesses will not cheerfully give you everything that you ask for. Sometimes they don't understand what you want from them. Much of the time, though, they understand perfectly well and are looking for opportunities to resist.

All too often, cross-examiners give the witnesses those opportunities. And they become frustrated if they aren't getting responsive answers and either move on to something else or start arguing with the witness. Either way the witness wins.

Don't abandon a good topic, or a good question, just because the witness is pushing back. But don't waste everyone's time and patience (and your own credibility) by arguing with the witness.

Again, the place to start is by asking the right types of questions. A clear factual question that calls for a clear factual answer won't give the witness much room to maneuver. Remember:

1. The longer the question, the longer the answer is likely to be.
2. The more adjectives or adverbs you pack into your question, the more wiggle room you are giving the witness.
3. The more facts or assertions you pack into your question, the more things you are giving the witness to disagree with.
4. The more argumentative or unfair your question, the more likely the witness is to fight back.
5. The clearer the question, the more likely the witness will be responsive, and the more obvious it will be when he is not.

Sometimes, though, witnesses are just being difficult and won't give you a straight answer. How should you handle this? If you demand a "yes" or "no" answer, the witness may argue with you.

*Isn't it true you were sued as a result of that transaction?*

*The lawsuit was dismissed as frivolous, and the other guy had to pay my attorneys' fees.*

*Mr. Jones, answer yes or no. Isn't it true you were sued as a result of that transaction?*

*I can't answer that yes or no, because the lawsuit was dismissed as frivolous.*

*Mr. Jones —*

*I'm just trying to tell you what happened.*

*Mr. Jones, are you having trouble understanding my question?*

*It's not a fair question.*

If you argue back, it won't produce results, and pretty soon everyone in the courtroom will be unhappy. If you ask the judge for help, it might work, but you're taking a chance. Among other things, you risk looking petty or foolish.

Normally, a patient attack using terse, focused questions will leave the witness no room to escape. Simply repeating a short, simple question will usually get the desired result.

*You were driving a Chevrolet, right?*

*The point isn't what kind of car I was driving. The point is, he ran the red light.*

*Were you driving a Chevrolet?*

*He ran the red light, not me.*

*Mr. Jones, you were driving a Chevrolet, were you not?*

*Yes.*

Even if it doesn't work, at least everyone in the courtroom knows which one of you is being a jerk.

Cross-examining a witness who wants to add an explanation to his or her answers is particularly challenging. The goal is to keep the witness under a reasonable degree of control, without squabbling and without appearing as if you are seeking to hide from the truth.

*Did you attend college?*

*No, my family couldn't afford it.*

There are two schools of thought on how this ought to be handled. The first (which Dan favors) is that the answer must correspond exactly to the question. On cross-examination, this normally leads to lots of "yes" and "no" answers:

*Did you attend college?*

*No.*

Under the second approach (which Judge Saylor leans toward), some latitude is given to the witness in order to ensure that he or she has an opportunity to give a fair response.

*Isn't it true that you did not attend the critical meeting?*

*Yes. On my way to the meeting, my wife called to say that my 8-year-old son had been hit by a car. I went to the hospital instead.*

Both approaches have their virtues and vices, and for that reason most judges allow both approaches depending on the circumstances. The principal virtue of the first approach is that it keeps the witness (and the proceeding) under strict control. Witnesses may wander far afield and waste time (or, worse, discuss forbidden topics).

The principal virtue of the second approach is that it avoids distorted and disjointed testimony and misleading and half-true answers.

One vice of the strict approach is that it almost always involves interrupting the witness:

*Isn't it true that you did not attend the critical meeting?*

*Yes. On my way to the meeting, my wife —*

(interrupting) *Your honor, I move to strike the answer as non-responsive.*

Or:

(interrupting) *Thank you, you've answered the question.*

When this happens, the lawyer often appears to be (and sometimes actually is) bullying the witness and seeking to hide the truth. Unduly aggressive tactics may rub the judge and jury the wrong way. Interrupting a witness may lead to the lawyer and witness talking over one another, which, if nothing else, will irritate the stenographer.

Interrupting the witness's response may also lead to the following on redirect:

*Do you remember on cross-examination you were asked about the fact that you did not attend the critical meeting?*

*Yes.*

*You started to explain why, and Mr. Smith cut you off. Would you please tell the jury what it is you wanted to explain?*

Of course, a witness cannot simply be given free rein to do as he pleases; the lawyer must maintain a reasonable degree of control. There is no universally applicable way to handle these situations. Every witness is different, and judges have considerably different styles.

Here are some basic rules of thumb to minimize the "explanatory answer" problem:

1. Again, ask clear questions.
2. Again, ask fair questions.
3. Even when you're asserting tight control, don't create the impression that you're a bully.
4. Don't act like you want to hide the truth.
5. Pick your spots. Don't try to enforce every non-responsive answer aggressively.
6. Interrupt only if you really have to.
7. Try to take care of the problem on your own. Appeal to the judge only when truly necessary.

Controlling a hostile witness on cross-examination is probably the hardest thing to do in the courtroom. Chances are, things won't go perfectly. But a thoughtfully prepared, carefully disciplined approach ought to allow you to make your points reasonably effectively. And once you've done that, get out and sit down.

*Previous installments of Tried & True can be found at masslawyersweekly.com. 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.*