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## Cross Examination: Beyond Lead, Lead, Lead

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By **Ben Rubinowitz and Evan Torgan**

The long taught trial technique for asking questions on cross examination has been singular and to the point: lead, lead, lead. The attorney's ability to effectively ask leading questions serves to both control the witness and to develop fodder for argument during summation. In addition to being able to effectively cross-examine a witness, it is equally important for the attorney to know why she is cross-examining the witness and where she is going with the cross. In other words, the attorney must answer a fundamental question before beginning any cross: What do I need to prove? The attorney who has a clear goal for the cross-examination and knows how to get there is well on her way to scoring points that will form a winning summation.

All crosses must start at the end. To prepare a cross-examination the attorney must know what she intends to argue in summation. That question is invariably answered by consulting the Pattern Jury Instructions and knowing the charge the judge will give to the jury. Once the attorney is familiar with the charge and the proof needed to support that charge, the attorney will have a roadmap to guide her through cross-examination.

When the trial attorney knows where she is going, she can then focus on how to get there. Generally, the use of leading questions forces the witness to answer the questions put to him with a simple "yes" or "no" response. If phrased properly, the leading question will suggest the answer and demand a non-narrative response. To secure the appropriate "yes" or "no" response the word choices become important. Questions beginning with the following words, for example, will secure a "yes" or "no" answer if the witness is responsive: "Did/Didn't," "Were/Weren't," "Had/Hadn't," and "Could/Couldn't." For example:

Q: Were you holding the gun?

Q: Did you point the gun at the man?

Q: Could you see him standing across the street?

Q: Did you pull the trigger?

There is a problem, however, that frequently arises during cross examination when such questions are asked. While the questions are technically leading and call for a "yes" or "no" response, the questions nevertheless give the witness too much leeway in the way he answers. The questions allow the witness to push back, avoid answering altogether or answer with a self-serving explanation. Take the following exchange, for example:

Q: Were you carrying a gun?

A: Only after he threatened me.

Q: Did you point it at the man?

A: After he ran towards me.

Q: Did you pull the trigger?

A: Only after we struggled and he was going to hurt me.

Here, the trial lawyer has lost control and failed to secure responsive answers despite the leading questions. To better deal with non-responsive answers there are a number of techniques the attorney can use to control the witness and force the witness to answer responsively. The first technique is to ask the question again verbatim but with a change in tone and voice to emphasize the word that is most important:

Q: Were YOU holding a gun?

Q: Were you HOLDING a gun?

Q: Were you holding a GUN?

To the extent the witness is still offering non-responsive answers another technique to demand a responsive answer is to make clear to the witness that no explanation is called for:

Q: Were you holding a gun?

A: Only after he threatened me.

Q: My question is specific: Were you holding a gun?

A: Yes.

Q: Did you pull the trigger?

A: I had to defend myself.

Q: I am not asking for an explanation. All I am asking is this: Did you pull the trigger?

Generally, with this type of questioning the witness will have no choice but to answer the question “yes” or “no” and if he does not it will become apparent to the jury that he is deliberately trying to avoid answering. However, to the extent these techniques do not work and the witness continues to be evasive, another technique is to object and seek the Court’s intervention directing the witness to answer:

Q: Did you look at the northeast corner for pedestrians before turning left?

A: I looked around.

Q: Sir, I am being specific: Did you look at the northeast corner for pedestrians?

A: I checked everywhere.

I object Your Honor. The witness is being non-responsive.

The problem with this technique, however, is that the trial lawyer has relinquished control over the witness and now has to rely on the Court to make a favorable ruling. To the extent the Court rules against the examining attorney the Court has validated the witness's responses, prevented the attorney from getting a responsive answer, and affirmed the witness's ability to continue to offer non-responsive or self-serving answers.

A much better approach to obtaining responsive answers is to use the technique referred to as the "Tell, Don't Ask" approach to cross examination. With this technique the trial attorney tells the witness the answer rather than asking the witness a question. The trial lawyer puts a definitive, finely tuned statement to the witness and merely adds a question at the end. This technique is most effective when the statements are simple and contain only one fact per question.

Q: You never saw Ms. Jones before the accident, true?

A: True.

Although the attorney has elicited the necessary fact from the witness, the attorney can make the cross much more powerful by expanding the questioning to highlight the ultimate fact. Take the example of a left turning car that strikes a pedestrian.

Q: You approached the intersection, true?

Q: You knew you would be turning left, correct?

Q: You knew that while you had the green light to turn, pedestrians would also have a signal in their favor, true?

Q: Knowing pedestrians would be crossing you knew you would have to look for pedestrians, true?

Q: To the extent you did not look, we can agree that would be completely improper, true?

Q: Now, when you approached the intersection you looked to the left, true?

Q: You looked in front of you correct?

Q: You looked to your right, true?

Q: You made sure you looked not only in the street but the sidewalk for people who may be crossing, true?

Q: We can agree sir that if you saw a pedestrian crossing while you were turning left you would stop, true?

Q: No question about that, correct?

Q: Because you always yield for pedestrians, true?

Q: And if you did not yield for a pedestrian that would be wrong, correct?

Q: And that's why you checked many times for people crossing, true?

Q: Now, as you finished your left you heard a thud, correct?

Q: But you never saw anyone, true?

Q: It was only after you heard that thud that you saw Ms. Jones in the street, correct?

With questions put to the witness in this manner the attorney controls the witness's answers and develops support for his argument in summation that the driver failed to keep a reasonable and proper look out for pedestrians.

A final technique to consider on cross is the low risk open-ended question. While the conventional teaching is to only lead on cross there are times when an open-ended question can work to the examiners benefit. Although the use of open ended questions on cross is a departure from conventional teaching, if used properly it can serve to enhance both the cross examination itself and set up a beautiful argument for summation. But there is a caveat. This technique should only be used when asking low-risk open-ended questions. Low risk open-ended questions are those where the trial lawyer knows the answer and knows she cannot get hurt by asking such a question.

Imagine, for example, a medical negligence case where a patient was injured because a nurse gave a patient a contraindicated medication. The chart and medication orders were not clearly written according to the nurse and the most recent medications administered to the patient were omitted from the chart altogether. Here the trial lawyer could ask the defendant doctor:

Q: Did you write an order for medications?

A: I wrote an order that was clear.

Q: Did you understand the nurses would administer the medications to the patient?

A: Yes. And if the nurse had any question at all about the medications or dosages all she had to do was ask me.

Here, although the questions are technically leading, the trial lawyer lost control and failed to demand and receive responsive answers. Here, the trial attorney has allowed the doctor to advance his theory of the case. The better technique would be to demand responsive answers by telling the witness the answer, setting the witness up with voice of reason questions,<sup>1</sup> using low risk open-ended questions to develop fodder for cross and then locking in the answers to create a compelling, cogent and winning argument on summation:

Q: Doctor, can we agree your most important concern is the health of the patient?

Q: The well-being and safety of the patient are equally important, true?

Q: When you write orders for medications you understand they will be read by other people, true?

Q: Other people will be relying on what you write, correct?

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<sup>1</sup> Ben B. Rubinowitz & Evan Torgan, *The Voice of Reason: A Powerful Approach to Cross Examination*, NYLJ, Aug. 19, 2002

Q: Knowing that other people will be reading and relying on what you write can we agree that the orders must be accurate?

Q: The orders must be clearly written, true?

Q: To the extent they are not clearly written it could harm the patient, correct?

A: Yes.

After securing that answer the trial lawyer now has the opportunity to ask a low risk open-ended question that conventional teaching suggests should never be asked on cross – a “why” question:

Q: Doctor, tell us WHY medication orders must be accurate at all times?

A: To ensure that the correct medication is given, that the right dose is given and that no contraindicated medications are administered so that no harm comes to the patient.

Once the answer to the "why" question is given it can be broken down to its component parts to enhance the strength of the examination:

Q: To the extent incorrect medications are given that would be improper, true?

Q: To the extent improper medications are given it could hurt the patient, correct?

Q: To the extent medication orders are inaccurate that would be a departure from the standard of care, true?

Q: To the extent contraindicated medications are given, we can agree that can be harmful, true?

Q: To the extent contraindicated medications are given that would also be a departure from accepted standards of medical care, correct?

Q: And as you said doctor in the event the wrong dose is given, that would not be helpful to the patient, right?

The reason the lawyer was able to ask the last sequence of questions is because the answer to the low-risk open-ended question provided support for the continuing line of inquiry.

To be effective with cross-examination, the trial attorney must know what her objective is and how to get there. All crosses must start at the end - with what attorney intends to prove. Once the attorney knows what she intends to prove she can use different techniques such as changing the tone of her voice, focusing the question for the witness, asking low risk open ended questions and making statements with a question at the end. The trial attorney who masters these techniques is well on her way to scoring points to support a winning summation.

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