ADVANCED CROSS-EXAMINATION TECHNIQUES

CLE Credit: 2.5
Wednesday, June 6, 2012
2:50 p.m. - 5:30 p.m.
Grand Ballroom
Galt House Hotel
Louisville, Kentucky
A NOTE CONCERNING THE PROGRAM MATERIALS

The materials included in this Kentucky Bar Association Continuing Legal Education handbook are intended to provide current and accurate information about the subject matter covered. No representation or warranty is made concerning the application of the legal or other principles discussed by the instructors to any specific fact situation, nor is any prediction made concerning how any particular judge or jury will interpret or apply such principles. The proper interpretation or application of the principles discussed is a matter for the considered judgment of the individual legal practitioner. The faculty and staff of this Kentucky Bar Association CLE program disclaim liability therefore. Attorneys using these materials, or information otherwise conveyed during the program, in dealing with a specific legal matter have a duty to research original and current sources of authority.

Printed by: Kanet Pol & Bridges
7107 Shona Drive
Cincinnati, Ohio 45237

Kentucky Bar Association
# TABLE OF CONTENTS

The Presenter .......................................................................................................................... i
Agenda................................................................................................................................... 1
The Only Three Rules of Cross-Examination........................................................................ 3
The Chapter Method of Cross-Examination......................................................................... 17
Loops, Double Loops and Spontaneous Loops.................................................................... 31
Controlling the Runaway Witness ...................................................................................... 39
THE PRESENTER

Roger J. Dodd
Dodd & Burnham PC
613 North Patterson Street
Post Office Box 1066
Valdosta, Georgia 31603-1066
(229) 242-4470

ROGER J. DODD is a Board Certified Criminal Trial Specialist and Civil Trial Specialist and has represented clients in legal matters since 1976. Mr. Dodd has been a lecturer, expert witness, and teacher in all 50 states, the District of Columbia, Russia, St. Thomas, Puerto Rico, Canada, Mexico, and various Caribbean locations. He is a frequent guest and commentator on television programs, including Court TV, Good Morning America, Geraldo at Large, and is co-author of Cross-Examination: Science and Techniques. He is one of a select group of attorneys to receive the distinguished Super Lawyer rating in multiple states.

The majority of Mr. Dodd's practice focuses on serious or catastrophic personal injuries, trucking cases, medical malpractice, aviation accidents, and wrongful death.

In 1976, Mr. Dodd received his J.D. from the University of Pittsburgh, School of Law. He earned his B.A. from Bucknell University in 1973. Mr. Dodd was admitted to practice law in Georgia in 1976 and in Florida in 1977. He is also admitted to all applicable state and U.S. Courts, the Armed Forces Court of Appeals, and the U.S. Supreme Court. He is an advocate for the American Board of Trial Advocacy (ABOTA). His present and past faculty positions include positions with the National Criminal Defense College (1986-present), Georgia Institute of Trial Advocacy (1986-1991), and Advanced Cross Examination — National Criminal Defense College.

Mr. Dodd is a member of many organizations, including the National Association of Criminal Defense Lawyers (NACDL), Georgia Association of Criminal Defense Lawyers (GACDL), Association of Trial Lawyers of America, Georgia Trial Lawyers Association, American Association for Justice, Lawyers Foundation of Georgia, American College of Family Trial Lawyers, International Child Abduction Attorney Network, International Academy of Matrimonial Lawyers, National Board of Legal Specialty Certification, and American Academy of Matrimonial Lawyers

Mr. Dodd is heavily involved in charitable activities, including Kidski and The Boys and Girls Club of Valdosta, and is on the Caregivers Network Leadership Council. He is a member of the Select Advisory Board of Valwood School and has run private training courses for a number of entities, including Wilmer, Cutler & Pickering, the U.S. Department of Justice, Antitrust Division, the U.S. Department of Defense, the American Academy of Forensic Sciences, and the F.B.I. He is the father of two children.
AGENDA

THE ONLY THREE RULES OF CROSS-EXAMINATION

Using the Power of Leading Questions

- Forming questions to achieve control
- Avoiding the seven enemy words
- Training witnesses to say, “Yes”

Controlling Witnesses One Fact at a Time

- Shaping jurors’ perceptions of the fact
- Using simplicity to block escape
- Fixing the vague question

Creating Goal Oriented Questioning Sequences

- Encouraging truthful responses
- Putting facts into persuasive order
- Blocking witness evasions

THE CHAPTER METHOD OF CROSS-EXAMINATION

- Breaking cases into understandable parts
- Recognizing events valuable for cross-examination
- Putting facts into your best context
- Effect of chapter methods on the opponent’s case

LOOPS, DOUBLE LOOPS, SPONTANEOUS LOOPS

- How to emphasize your key facts
- Making hostile witnesses adopt your descriptions
- Beating witnesses with their own words

CONTROLLING THE RUNAWAY WITNESS

- Twenty methods of controlling the combative witness
- Psychological principles that establish witness control
- Punishing the non-responsive answer
SYNOPSIS (Sections in Bold are included in the handout in whole or in part)

§8.1  “Great” Cross-Examination: A Misleading Term
§8.2  Great Cross-Examination Teaches
§8.3  Cross-Examiners Control of Themselves
§8.4  Great Cross-Examinations Eliminate Distractions
§8.5  When to say “No Questions on Cross, Your Honor”
§8.6  Relationship of the Three Rules to Time
§8.7  Relationship of Cross-Examination to Anxiety and Confidence
§8.8  Real Time Learning in Cross-Examination
§8.9  Achieving Control and Real Time Understanding through the Form of the Question
§8.10  The Historical Context of the Only Three Rules of Cross-Examination
§8.11  Rule 1: Leading Questions Only
§8.12  Leading Questions Allow the Cross-Examiner to Become the Teacher
§8.13  Use Short Declarative Questions
§8.14  Declarative Questions Give Understanding to the Jury
§8.15  Dealing with Witnesses Who Don’t Want to Answer
§8.16  Five Ways to Retrieve Answers
§8.17  Avoid Enemy Words that Give Control to the Witness
§8.18  What Happens When Those Words are Used
§8.19  Open-Ended Questions Encourage Long-Winded Answers Even to Later Leading Questions
§8.20  Mood and Emphasis
§8.21  Word Selection, Tone of Voice, Word Emphasis
§8.22  Word Selection
§8.23  Word Selection Describes Theory
§8.24  Rule 2: One New Fact per Question
§8.25  A Time-Honored Method to Teach the Fact Finder
§8.26  Vague, Equivocal or Subjective Words do not Count as Facts
§8.27  Fixing the Vague Question
§8.28  Redefine the Disrupted Issue Using Objective Facts
§8.29  The More Detail The Better
§8.30  Subjective Interpretation
§8.31  Faster, Cleaner Crosses
§8.32  The Three-Step Method to Fix the Equivocal, Vague Question

*To Order Book, Video Tapes, Audio Tapes or CDs, contact: LexisNexis; Charlottesville, Virginia 1-800-446-3410
§8.33 Avoiding the Compound Question Avoids Objections
§8.34 The “Close Enough” Answer
§8.35 How Not to Fix the Bad Question
§8.36 Never Abandon the Valid and Necessary Leading Question
§8.37 Facts, Not Conclusions, Persuade
§8.38 Conclusions, Opinions, Generalities, and Legalisms Are Not Facts
§8.39 Conclusions Are Not Facts
§8.40 Opinions Are Not Facts
§8.41 Generalities Are Not Facts
§8.42 Legalisms Are Not Facts
§8.43 Creating Impact One Fact at a Time
§8.44 Infusion of Emotion Question by Question
§8.45 Word Selection Made Easier by Envisioning the Event
§8.46 Labeling
§8.47 Rule 3: Break Cross-Examination into a Series of Logical Progressions to Each Specific Goal
§8.48 From The Very General to Very Specific Goals
§8.49 General Questions Lock in and Make Easy the Specific
§8.50 Proceeding from the General Question One Fact at a Time Makes the Specific Answer Inescapable
§8.51 The General to the Specific Creates Interest
§8.52 The More Difficult the Witness, The More General The Chapter Must Start
§8.53 Checklist for Rules
§8.54 The “Yes” Answer is the Most Understood Response
§8.55 The Technique of Seeking a “No” Response
§8.56 Seeking the “No” Answer in Order to Marginalize the Witness
§8.57 Making Sure to Receive a “Yes” Where “Yes” is Really the Answer
§8.58 “If You Say So” Answer Helpful But Still Requires Interpretation
§8.59 Requiring the Unequivocal Answer for Impeachment and Appeal
§8.60 The Techniques of the Only Three Rules Can Lead to Unexpectedly Honest Answers
§8.61 Self Correcting the Cross-Examiner’s Honest Mistakes
§8.62 The Three Rules -- Building Blocks for Advanced Techniques
SELECTED AND EDITED PORTIONS OF CHAPTER 8 –
“THE ONLY THREE RULES OF CROSS-EXAMINATION”

§8.1 “Great” Cross-Examination: A Misleading Term (Book page 8-3)

The application of techniques discussed in this chapter will dramatically elevate the ability of the cross-examiner to obtain favorable admissions, provide support for the theory of the case, and minimize the ability of the witness to take the cross-examination into undesirable areas.

The cross-examiner must strive for the consistency of success that comes from preparation advanced by sound technique. Success in cross-examination is an imprecise determination, but can be summarized as the accomplishment of the factual goals set out by the cross-examiner. Few cross-examinations accomplish every goal, but with the sound application of techniques, the advocate can expect to accomplish far more of her goals than would have been accomplished without the application of the science and techniques of cross-examination.

Just as the physicians’ creed begins: “First, do no harm,” the cross-examiner’s creed must be: “First, do no harm to your client’s case on cross-examination.” There is an element of risk-taking in every cross-examination. Sound application of techniques can reduce the risks of cross-examination, but never extinguish the risks. One of the hallmarks of great cross-examination is the systematic application of techniques employed to establish the greatest amount of helpful information while minimizing the risks inherent in cross-examination.

The conventional wisdom is that if a witness has done no damage to the cross-examiner’s case, a lawyer might elect to forgo asking questions. If no questions are asked, certainly the witness can score no additional 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 (see Chapter 11, Sequences of Cross-Examination). Thus, even the witness who has done no damage may need to be cross-examined. In any event, the skillful cross-examiner views every witness as an opportunity to introduce testimony that supports the advocate’s theory of the case. Simultaneously the cross-examiner seeks to employ techniques designed to minimize the opportunities for the witness to enhance his previous testimony or to open up new areas that will damage the cross-examiner’s positions.

§8.2 Great Cross-Examination Teaches (Book page 8-4)

Cross-examination is not an exercise based on emotion, presence, and oratory. It is not the cross-examiner showing the witness and all of those who observe, (but primarily the witness) that the cross-examiner is smarter, quicker, louder, more demonstrative, or more fearsome. It is about teaching the cross-examiner’s theory of the case to the fact finder.

Cross-examinations are not about a performance by an advocate, but rather the teaching of facts that are critical to the cross-examiner’s theory of the case.

Lawyers who believe that cross-examinations are intellectual endeavors rebel against the idea of teaching. They want it to be a contest of egos. However, the jury does not
vote on which lawyer “looks good” or which lawyer performed eloquently. Rather the jury is called upon to vote on a theory of the case. When the lawyer realizes that a cross-examination teaches the cross-examiner’s theory of the case, pressure is reduced. The focus is shifted from the cross-examiner’s ego to the cross-examiner’s ability to convey to the listeners the logic behind the cross-examiner’s theory of the case. Once the focus is shifted from the cross-examiner as lawyer to cross-examiner as teacher, the focus becomes conveying understandable presentations that guide the fact finder in real time.

Problem:
Open ended questions seek facts, but don’t provide facts.

Solution:
Leading Questions = Answers
Answers = Facts
Facts = Learning

§8.3 Cross-Examiners Control of Themselves (Book page 8-4)

The system propounded in this text is not based on oratory, flamboyance, demonstrative abilities, or acting skills. Rather, it is based on simple rules designed to teach the fact finder the theory of the case well. It is also designed to teach the witness that disruption of the orderly introduction of facts to the jury will receive a negative reaction. Further, it will teach that the witness complying with the orderly presentation of facts to the jury will receive positive feedback. The sanctions will be that the witness is forced to verify the truthful facts sought to be established by the cross-examiner. This process may require endurance and pain by the witness but it will happen. On the other hand, the witness who honestly admits facts that help the cross-examiner’s or hurt the opponent’s theory of the case will be rewarded by the cross-examiner moving on to new facts and not punishing the witness for failure to admit desired facts.

§8.7 Relationship of Cross-Examination to Anxiety and Confidence (Book page 8-7)

Each cross-examiner performs better when her confidence is higher. When a cross-examiner is confident, the words come easier. When she is confident, the thoughts come quicker. When she is confident, the goal appears obtainable.

Anxiety impedes the processing of information. Anxiety destroys confidence. Anxiety undermines confidence. Anxiety leads to frustration, anger, embarrassment and fear. This goes for witnesses too.
With the three rules of cross-examination and other techniques in this text, the cross-examiner’s confidence can remain at a high point while the confidence of the witness is eroded and replaced with anxiety. The three rules are designed to keep the lawyer’s confidence at a high level while keeping the anxiety level of the witness at a high level. Said a different way, the rules are designed to keep the lawyer’s confidence high and her anxiety low, while keeping the anxiety of the witness high and his confidence low.

The relationship between the witness and the cross-examiner is an inverse ratio. When the cross-examiner’s confidence is high, the witness’s confidence is low. When the cross-examiner’s anxiety is high, the witness’s anxiety is low. When a witness’s anxiety is high and his confidence is low, he is less likely to carefully select words to explain his position. He is less likely to offer additional information to explain his position. He is less likely to volunteer new testimony. Ultimately the witness is less likely to tailor his testimony, whether in the obvious form of “lying” or in the less obvious form of carefully orchestrating his testimony to fit into the theory of the opponent’s case.

§8.8 Real Time Learning in Cross-Examination (Book page 8-8)

The three rules are designed to permit the fact finder to learn the cross-examiner’s theory of the case and to understand effective attacks upon the opponent’s theory of the case in real time. Real time is defined as being the instant when the questions and answers are spoken in trial. The opposite of real time is to suggest that the jury will only understand the significance of a question and answer in the closing argument, or worse, in the jury room. The jury must understand the significance of the questions and answers at the time of trial. It is only through the building of these facts, one at a time, that the fact finder can appreciate the significance of the testimony and the relationship of that testimony to other testimony that has come before this witness and will come after this witness.

The jurors must be able to say to themselves, “I understand why the lawyer is asking this question and I understand the significance of the admission.” Juries vote for what they understand.

§8.10 The Historical Context of the Only Three Rules of Cross-Examination (Book page 8-9)

This chapter sets out the foundation methods of obtaining control of the witness question by question. There are only three rules. That is something that can be remembered even in the middle of a cross-examination. The rules are all positive. Something that leads the cross-examiner to understand the rule before it is violated and the damage is done. Finally, the rules apply to every type of case, whether jury trial, a judge trial, an arbitration panel, or mediation. The rules apply in civil cases, criminal cases, administrative cases, and domestic relations cases. Consequently, because the rules have universal application, the rules afford the cross-examiner a predictability of result in any kind of setting. Because the rules provide predictable responses, results can be replicated. The cross-examiner is no longer required to learn a new system of cross-examination when venturing into a different factual setting. The rules are: (1) leading questions only, (2) one new fact per question, and (3) a logical progression to one specific goal.
§8.11 Rule 1: Leading Questions Only (Book page 8-9)

The Federal Rules of Evidence and the rules of evidence of all states, permit leading questions on cross-examination (Fed. Rules Evid. Rule 611(c); 28 U.S.C.A.). Simultaneously, the right to use leading questions is almost wholly denied the direct examiner. This is the fundamental distinguishing factor of cross-examination. It is the critical advantage given the cross-examiner that must always be pressed.

Despite this incredible opportunity, many lawyers do not take advantage of this rule and insist on asking open-ended questions. This is unnecessary at best and foolhardy at worst. A skillful lawyer must never forfeit the enormous advantage offered by the use of leading questions.

The “leading questions only” technique means that, in trial, the cross-examiner must endeavor to consistently phrase questions that are leading. No matter what the reason or rationale, a non-leading question introduces far greater dimensions of risk and occasions far less control than a question that is strictly leading.

One of the greatest risks occasioned by the use of open-ended questions is not the answer that may be given to that question. The answer may be perfectly acceptable to the cross-examiner. However, by asking the open-ended question the cross-examiner has failed to consistently train the witness to give short answers to leading questions and not to volunteer information. By teaching inconsistently, with every open-ended question the cross-examiner sows the seeds for later problems in the cross-examination. As will be discussed, cross-examiner must teach a consistent lesson to the witness: The cross-examiner will pose the question and the witness may verify or deny the suggested fact. The consistency of teaching through the repetitive form of the leading question is fundamental to the goal of witness control.

§8.12 Leading Questions Allow the Cross-Examiner to Become the Teacher (Book page 8-10)

If the lawyer is to teach the case, the lawyer must demonstrate that she understands the case. The leading question positions the cross-examiner as the teacher, while the open-ended question positions the cross-examiner as a student. Through the open-ended question it is the witness who becomes the teacher. The open-ended question focuses courtroom attention on the witness. The leading question focuses attention on the cross-examiner. The cross-examiner seeks that attention not for ego gratification, but for purposes of efficiently teaching the facts of the case. The cross-examiner/teacher using leading questions places the cross-examiner in control of the flow of information. The leading question also allows the cross-examiner to select the topics to be discussed within the cross-examination. These topics will be referred to throughout the book as the chapters of cross-examination.

§8.13 Use Short Declarative Questions (Book page 8-10)

Leading questions are often defined as questions that suggest the answer. This is too broad a definition. True leading questions do not merely suggest the answer; they declare the answer.
§8.14 Declarative Questions Give Understanding to the Jury (Book page 8-11)

Juries and judges understand when a leading question is put in a declarative style. The fact proposed is immediately understandable. It is learnable in real time.

<table>
<thead>
<tr>
<th>Leading Questions = Answers</th>
</tr>
</thead>
<tbody>
<tr>
<td>• How do you feel about drinking?</td>
</tr>
<tr>
<td>• Do you like to drink?</td>
</tr>
<tr>
<td>• You like to drink?</td>
</tr>
<tr>
<td>• You drink 🌈</td>
</tr>
<tr>
<td>• You like it 🌈</td>
</tr>
</tbody>
</table>

Problem:
Open ended questions seek facts, but do not provide facts.

Solution:
Leading Questions = Answers
Answers = Facts
Facts = Learning

§8.17 Avoid Enemy Words that Give Control to the Witness (Book page 8-14)

The adept cross-examiner never uses questions that begin with the following:

<table>
<thead>
<tr>
<th>Enemy Words</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Who</td>
</tr>
<tr>
<td>• What</td>
</tr>
<tr>
<td>• When</td>
</tr>
<tr>
<td>• Where</td>
</tr>
<tr>
<td>• How</td>
</tr>
<tr>
<td>• Why</td>
</tr>
<tr>
<td>• Explain</td>
</tr>
</tbody>
</table>

These words create the polar opposite of closed-ended questions. These words invite uncontrolled, unpredictable, and perhaps unending answers. These words invite the witness to seize the action, to become the focal point of the courtroom. They take the
jury’s mind off the fact the cross-examiner is trying to develop and allow the witness to insert a mishmash of facts, opinions, and stories designed to focus the jury on the issues the witness thinks are most important.

Cross-examiners are not journalists looking to present both sides of a story. Cross-examiners are not interested in having the witness explain everything that the witness wishes to explain. Cross-examiners strive to highlight those portions of the witness’s testimony that are helpful to the cross-examiner’s theory of the case.

There are those who maintain that they are so skillful that they can pose open-ended questions, the answers to which will always be of assistance. These lawyers are fond of saying, “I didn’t care how she answered,” or “There were no possible answers that could hurt me.” In response, those lawyers have only eliminated the answers they have thought of. None of us are so omniscient that we can confidently state that we have eliminated every possible negative answer. There are truly bad answers and non-responsive answers awaiting the open-ended question. Why take that unnecessary chance? This applies to the most experienced trial lawyer as well as the novice. No one outgrows this advice.

§8.22 Word Selection (Book page 8-17)

One of the most important benefits of the leading question permits the cross-examiner to select the words to describe the events to be discussed in the question. Most witnesses do not carefully consider their words nor carefully select words to describe what they are testifying. Normally, just as in everyday life, the witness offers the best word they can think of at the time. This may help the opponent’s theory of the case or may be neutral. The one predictable statement that could be made is that the word will not be selected to consciously help the cross-examiner’s theory of the case.

By use of a leading question, the cross-examiner controls the word selection and may more descriptively and vividly describe that which has occurred.

Compare the following two questions:

1) You saw a man lying on the side of the road?
2) You saw a man hurled from the car?

The first question describes with some precision a potential plaintiff in a personal injury suit. But when compared with the more descriptive word “hurled” in the second question, the first question is colorless.
§8.24 Rule 2: One New Fact per Question (Book page 8-19)

Cross-examiners need acceptable conclusions supported by facts to work successfully. They need to add only one new fact per question. This is a critical component in the quest for witness control. By placing only a single new fact before a witness, the witness’s ability to evade is dramatically diminished. Simultaneously, the ability of the fact finder to comprehend the significance of the fact at issue is greatly enhanced.

§8.25 A Time-Honored Method to Teach the Fact Finder (Book page 8-19)

Dr. Seuss, in his classic work *Hop on Pop*, repeatedly used the smallest component, a single word, and expanded it only so far as necessary to create a simple sentence:

Hop
Pop
We like to hop.
We like to hop on top of Pop.
Stop. You must not hop on Pop.

This teaching method is exactly that necessary to “teach” the witness to answer only “yes.” The jury best learns a case this way, too. Three questions are offered as an example:

1) You threw the ball?
2) The ball was red?
3) You threw the red ball to Sue?

The initial question discusses one fact. Each succeeding question contains one additional or new fact to be added to the body of facts established by previous questions.

By this method, the scope of the fact at issue is sharply controlled. As a result of the tight control over the scope of the question, the permissible scope of the witness's answer is tightly controlled.

§8.33 Avoiding the Compound Question Avoids Objections (Book page 8-25)

This method of asking only one fact per question also assists in meeting objections. As discussed, when the cross-examiner asks only one fact per question, she avoids having to interpret the meaning of a “no” answer. Similarly, when avoiding compound questions, counsel sidesteps multi-tiered objections that include objections to the form of the question, thus allowing counsel to better meet any forthcoming objection.

One New Fact per Question
Solves Problems

• No objection
• Certainty as to answer
• Easier impeachment
• Better juror comprehension

§8.37 Facts, Not Conclusions, Persuade (Book page 8-28)

The second rule of one fact per question tightly controls the witness. The witness has before him but a single new fact. It is hard for the witness to express confusion or be evasive. Moreover the jury is more easily educated by this technique of factual presentation. Because the facts are so detailed and because the facts are presented one at a time, the jury will reach the conclusion to which the facts inevitably point. The jury will embrace the same logical conclusion suggested by the cross-examiner.

One might say, the technique of one fact per question is akin to planting acorns in a jury box, not oak trees. Remember it is the lawyer, not the jury, who is intimately familiar with the facts. The jury must be slowly and carefully brought to the conclusion sought by the advocate. It is far safer to let the jury reach its own conclusion based on the facts rather than demanding that conclusion from a hostile witness. The structure of one fact per question meticulously builds the picture so that the jury reaches the cross-examiner’s desired conclusion, even though the conclusion itself may never be put to the witness. See chapter 9, The Chapter Method of Cross-Examination and chapter 10, Page Preparation of Cross-Examination.
§8.45 Word Selection Made Easier by Envisioning the Event (Book page 8-35)

While presenting one fact per question, the cross-examiner must make certain that the words used are adequate to create the desired case scenario. There is a technique to aid the cross-examiner in selecting the descriptive words that can make the picture clearer and the facts more vivid. If the cross-examiner will form a mental image of what she is seeking to describe, and then present that mental image through leading questions, the result is a series of leading questions of finer texture. The cross-examiner wishes the fact finder to see the picture, so it would only stand to reason that the cross-examiner must first see that picture.

The cross-examiner must strive to use descriptive words to describe accurately the facts questioned upon. The descriptive words will come naturally to mind when the cross-examiner will look into her own head to see the event.

§8.46 Labeling (Book page 8-35)

In this age where more and more information floods our senses daily, jurors and judges find it difficult to remember names and events. Word selection is critical in labeling all major witnesses, all major pieces of evidence, and all major events within the theory of the cross-examiner’s case. In the example above, Jim is labeled “the big boy” and Dave is labeled the “little boy”. The action is labeled a “beating” (beat on). These are fair, reasonable descriptions of what happened that vividly illustrate the cross-examiner’s theory of the case. For more on labeling, see chapter 26, Loops, Double Loops, and Spontaneous Loops.

§8.47 Rule 3: Break Cross-Examination into a Series of Logical Progressions to Each Specific Goal (Book page 8-35)

Cross-examination of a witness is not a monolithic exercise. Instead, the cross-examination of any witness is a series of goal-oriented exercises. The third technique of the only three rules of cross-examination is to break the cross-examination into separate and definable goals.

Each section of cross-examination must have a specific goal. It must be so specific and so clear that the cross-examiner, if asked at any time without notice (as judges are inclined to do), can identify the factual point she is seeking to make. Another way of envisioning this is to view cross-examination as a series of pictures that must be painted.

There are two reasons for developing specific factual goals. First, it is easier for the jury to follow any line of questioning if it clearly and logically progresses to a specific goal. An organized presentation that is broken down into several individual points invites attention. Even a reluctant listener can focus attention when there is clear sense of organization and defined points being made by the speaker.

The second value in breaking cross-examination into individual factual goals is that it allows the judge to know where the cross-examiner is proceeding so that she will permit the cross-examiner to continue. Long gone is the age when a trial was a civic event. Trials are now statistics. Judges want cross-examiners to “move it along.” There is undoubtedly a general right to cross-examine witnesses. But that is insufficient.
must be a reason to cross-examine the witness. Before rising to cross-examine, the advocate must have firmly in mind the individual goals of that cross-examination.

Each specific goal within a cross-examination should either assist the cross-examiner in building her theory of the case, or assist the cross-examiner in undermining the opponent’s period of the case. It is unnecessary and unwise to pursue factual goals that do not impact the contrasting theories of the case.

§8.48 From the Very General to Very Specific Goals (Book page 8-37)

A logical progression dictates that the issue to be developed must proceed from the very general to the specific goal. Think of it as a funnel. The general questions funnel the witness to specifics.

Witnesses will find it easier to agree to general issue questioning before they are brought to specifics. This is true particularly when specific facts will be harmful to the witness. The witness will not respond in a monosyllable manner to the question unless that entire issue has been developed from the general to the specific.

A witness is unlikely to admit at the onset of cross-examination that he is a chronic liar. However, a series of facts may well establish that the witness can understand why people would lie, has been in situations where a lie benefited the witness, and has lied in those situations. The cross-examiner should start out generally and proceed slowly and methodically, one fact at a time, to the specific goal of establishing that the witness is a “liar.” The cross-examiner is advised to recall that “liar” is a conclusion, and one that the witness is unlikely to adopt. That is not the goal of the cross-examination chapter. The goal is to provide the fact finder with sufficient facts by which they may infer that the witness is a liar. The technique, as always, is to provide facts to the witness through leading questions making it more likely that the witness will give truthful “yes” answers. The cross-examiner should strive to score the points factually, leaving it up to the fact finder to draw the appropriate inference.
§8.52 The More Difficult the Witness, the More General the Chapter Must Start (Book page 8-40)

By proceeding from the general to the specific one fact at a time, the cross-examiner is putting the witness in the dilemma of answering general questions before the witness knows where the general questions will lead to specifically. More experienced witnesses, professional witnesses, and expert witnesses are more adept at realizing where the specifics factual goals may lie when a general question is introduced. Consequently, that witness will begin to fight the cross-examiner intentionally at the very beginning of general questions.

There is a technique to disarm this type of witness. It is to start more generally.

§8.54 The “Yes” Answer is the Most Understood Response (Book page 8-41)

The techniques discussed in the only three rules of cross-examination are designed to produce a great many “yes” answers. When the cross-examiner has placed a fact before the witness and the jury through a leading question, the “yes” answer efficiently allows the fact finder to understand what has been proven. The short leading question followed by the short verification is the best teaching method. All answers other than “yes” require more concentration and risk more misunderstanding. That is not to say that in order to be successful the cross-examiner must always get a “yes” response. As will be discussed there are other ways of making important points even when a witness denies the leading question.
§8.62 The Three Rules -- Building Blocks for Advanced Techniques (Book page 8-48)

It cannot be stressed enough that these three rules are the basic building blocks for all future advanced techniques. If the lawyer can perform the three building block techniques in every question, she can advance to the more artistic techniques. Each new technique builds upon the solid foundational techniques of: (1) leading questions only; (2) one new fact per question; and (3) building toward a specific goal.
THE CHAPTER METHOD OF CROSS-EXAMINATION*
Larry S. Pozner and Roger J. Dodd
Adapted from their book Cross-Examination: Science and Techniques, 2nd Edition
Seminar Handout & PowerPoint Presentation Copyrighted 2011©. All rights reserved.
These materials are provided for the sole benefit of persons in attendance at this seminar.
No right of reproduction in whole or in part is granted. © Larry S. Pozner & Roger J. Dodd

SYNOPSIS (Sections in Bold are included in the handout in whole or in part)

§9.1  The Chapter Method Defined
§9.2  Chapter Defined
§9.3  The Definition of a Chapter Bundle
§9.4  The Chapter Method Gives the Cross-Examiner Control of the Topics of Cross-Examination
§9.5  The Chapter Method Gives the Cross-Examiner Witness Control
§9.6  The Chapter Method Builds Support for the Advocate’s Theory of the Case
§9.7  A Chief Advantage of the Chapter Method: Better Use of the Available Facts
§9.8  Purpose of a Chapter
§9.9  Breaking Cases into Understandable Parts
§9.10  The Development of Chapters: The Process
§9.11  The Most Important Topics Ordinarily Deserve the Most Detailed Presentations
§9.12  Recognizing Events Suitable for Cross-Examination
§9.13  Possible Chapters of Cross-Examination Deserve Preparation, Even Though They May Later be Dropped
§9.14  Events or Areas Versus Chapters
§9.15  Examples of Preliminary Analysis of Chapter Development in a Particular Case
§9.16  Putting Facts into Context
§9.17  Breaking Chapters Out of the Analysis
§9.18  Even Bad Events May Contain Good Facts Deserving of a Chapter
§9.19  Chapter Size
§9.20  Draft Chapters Backwards
§9.21  The Building of a Chapter, Step One: Select a Specific Factual Goal
§9.22  Detailed Notes for Detailed Chapters
§9.23  Examples of Chapters in a Domestic Relations Case
§9.24  Example of a Series of Potential Chapters in a Commercial Case
§9.25  Example of a Series of Chapters Necessary to Portray a Complex Character Impeachment
§9.26  Give Each Chapter a Title
§9.27  The Building of a Chapter, Step Two
§9.28  The Chapter Method Gives Clarity to an Event
§9.29  Vivid Chapters Showing the Strong Factual Support for a Prior Inconsistent Statement Cause Jurors to Accept the Prior Statement as More Accurate

*To Order Book, Video Tapes, Audio Tapes or CDs, contact: LexisNexis, Charlottesville, Virginia 1-800-446-3410
§9.30  The Building of a Chapter, Step Three: Accumulating the Facts in Support of the Goal
§9.31  Conclusions May Normally be Disputed but Facts That Support the Conclusion May Not be Disputed
§9.32  Chapters are About Facts Not About Conclusions
§9.33  One Question is Never a Chapter
§9.34  Separate Chapter -- Separate Development
§9.35  Drafting Chapters: Putting Facts into Context
§9.36  The Building of a Chapter, Step Four: If, While Drafting a Chapter, an Additional Goal is Identified, Separate That Goal and its Supporting Material Into its Own Chapter
§9.37  In Matters of Importance, a More Exacting Breakdown is Preferred
§9.38  How to Avoid Spending Time on Unproductive Chapters
§9.1 The Chapter Method Defined (Book page 9-2)

There is a structure to the materials gathered and the questions asked within any cross-examination. The term “chapter method” is meant to reinforce the understanding that the cross-examination of any witness is not a flowing discussion with a single unifying purpose. Instead the advocate must think of the cross-examination of any witness as a series of small discussions (chapters) on individual topics of importance to the cross-examiner. Cross-examination in the chapter method seldom flows. Instead it moves from topic to topic, not necessarily in chronological order. It virtually never covers everything a witness might know about the case. Chapters sometimes relate to each other. Sometimes the transition from one chapter to another chapter amounts to an abrupt jump to a completely separate area of the case. What can be said is that there is a beginning and an end to each chapter. The beginning and the end of each chapter are largely mapped out before the cross-examination begins. The chapters are designed to maximize the good evidence available. As a result, chapters do not trail off. They end crisply. A chapter that has not accomplished its purpose using the best facts available is not likely to get better through additional questions. If the best evidence didn’t work, the second best evidence or the unknown evidence is likely to produce worse results.

A trial is a book of information. The individual witness examinations are themselves large accumulations of information. (Parts of the books.) The individual topics within the cross-examinations are the chapters of the book. Each chapter has a designed purpose or goal. The jurors can understand the purpose of each chapter as the cross-examiner assembles related facts into one logical sequence, designed to paint one picture. The chapter method is the polar opposite of the freewheeling style of cross-examination. The chapter method of cross-examination is designed as the optimum teaching model in an adversary system. An advocate working without benefit of the chapter method of cross-examination can establish many important facts, but does so in no particular order. As a result, the jurors must reassemble the facts in order to understand the points being made by the cross-examiner.

§9.2 Chapter Defined (Book page 9-3)

Cross-examination is a series of goal-oriented exercises. Each of these individual exercises is a cluster of related facts grouped to establish one particular point useful to the questioning party. The chapters of cross-examination are each composed of a series of goal-focused, leading questions. Any one topic of cross-examination will be presented through one or more chapters of cross-examination.
§9.3 The Definition of a Chapter Bundle (Book page 9-3)

A chapter bundle is a grouping of related chapters that need to be used together in order to create a full picture of a topic. A single topic within a cross-examination may well require several chapters. For instance, in a civil suit alleging that a customized computer software program was defective and therefore need not be paid for, the topic of whether the software was defective may require a great many chapters each focusing on one of the various alleged defects within the program. In addition there would almost certainly be one or more chapters detailing the consequences of each of those defects.

§9.5 The Chapter Method Gives the Cross-Examiner Witness Control (Book page 9-5)

Not every part of the opponent’s story is capable or deserving of attack. There are parts of the direct examination that potentially help the cross-examiner, and there are parts that cannot successfully be disputed. There are other parts of the direct examination that simply do not matter. It is critical that the cross-examiner work from a method that ensures only the topics of importance to the cross-examiner will be discussed.

The chapter method is fundamental to the process of witness control. The witness was called by the opponent. If left to pick his own topics for discussion, the witness is likely to take the jury into areas calculated to help the opponent. On the other hand, far greater witness control would be established by a method of offering leading questions only. By

---

Chapters

- A group of leading questions.
- Progressing in a logical sequence.
- Starting generally.
- Becoming increasingly specific.
- Establishing a factual goal. (Finish that picture)
grouping questions into narrow fields of inquiry selected by the cross-examiner, the result is far greater control over matters discussed by the witness.

The chapter method recognizes that the cross-examiner is not going to attack or retell the entire story of the direct examination. The cross-examiner is going to attack, introduce, or highlight only portions of it. She will undoubtedly agree with many facts testified to on direct examination. As to these facts, she may choose to offer no cross-examination. In some instances, some cross-examination will occur as to agreed facts, not to weaken a factual assertion but to highlight these agreeable facts. That is done in order to put those admitted facts into context and show the fact finder that those facts have greater significance than given by the opponent. In such instances, the purpose of cross-examination is not to cast doubt upon such facts, but to make sure that these facts indeed come to the attention of the jurors, so that they can appreciate the significance of those facts in an alternative context -- the context created in cross-examination.

Often there are a whole series of questions asked in direct examination that will go unchallenged for a different reason. They simply have no significance to the cross-examiner’s theory of the case. The tendency in all direct examinations, both civil and criminal, is to “tell a story.” As a result, direct examinations tend to cover much more material than is truly useful or at issue in the case. The skillful cross-examiner will let most of these facts go without comment, as most of these facts assist neither side. But the cross-examiner should still listen for “spontaneous loops” and theme phrases (see chapter 2, Developing a Theory of the Case and chapter 26, Loops, Double Loops, and Spontaneous Loops).

Modern cross-examination uses the chapter method to both attack the opponent’s theory of the case and to support the advocate’s theory of the case. Too much of the literature of the field has focused on cross-examination as a destructive device whose only purpose is primarily to attack the direct examination testimony. This is an old-fashioned and overly defensive view of cross-examination. Indeed there are chapters of cross-examinations solely destructive in nature. They are intended to harm the credibility of the opponent’s case. It is entirely appropriate to build chapters that expose inconsistencies. As always, this is a selective process. The cross-examiner does not invite open-ended testimony of the witness, but requires the witness to admit or discuss particular facts that are selected by the cross-examiner.

§9.7 A Chief Advantage of the Chapter Method: Better Use of the Available Facts (Book page 9-6)

There are distinct advantages to adopting the chapter method of cross-examination. Chief among them is that the chapter method encourages a disciplined approach to the understanding and use of facts. It is a system of organization and presentation that will work in every type of case, every type of personality, and in every trial venue whether it is a jury trial, a court trial, or arbitration. The chapter method encourages the lawyer to conduct more exhaustive analyses of the available facts. There is a difference between knowledge of the facts and an analysis of the facts. A lawyer can know the facts without ever having completed an analysis of the facts. An analysis suggests that the facts have been compared one to the other, have been reorganized, and have been grouped in logical packages, so that different or stronger conclusions may be drawn from those same, otherwise innocuous, facts.
A more systematic analysis of the available facts will permit the lawyer to sort the facts in support of a particular proposition into bundles or groupings of related facts. These bundles of related facts (chapters) permit the jury to enjoy a real-time understanding of the significance of facts to the cross-examiner’s theory of the case. As a bonus, the chapter method of cross-examination gives counsel the freedom to quickly and easily order and reorder the sequences of the cross-examination (see chapter 11, Sequences of Cross-Examination). The chapter method gives topical and emotional control over the cross-examination to the cross-examining party, rather than to the witness. It permits a lawyer to engage in cross-examining hostile witnesses in areas (chapters) of the lawyer’s choosing, while avoiding and eliminating opportunities for the witness to maneuver the cross-examination into areas (chapters) of the witness’s choosing.

§9.8 Purpose of a Chapter (Book page 9-6)

The purpose of drafting a chapter is to use the best available admissible evidence to push a jury toward the recognition of a well-defined, fact-specific goal. A chapter is performed to establish one goal or complete one picture. In the process of establishing the goal, the lawyer often establishes many subsidiary points. The cross-examiner is trying to communicate an image. A series of leading questions puts before the jury many facts, each one contributing to the intended image or goal. While seeking to establish a goal or paint a picture of an event, the advocate may simultaneously affect the credibility of a witness. For example the process of impeachment by inconsistent statement establishes the goal of demonstrating that the prior statement of the witness was more believable. Simultaneously by establishing that the witness has previously testified in a manner inconsistent with their current testimony, the advocate has scored a subsidiary goal of diminishing the credibility of the witness.

A chapter is composed of a logical sequence of questions designed to reduce the lawyer’s risk while increasing the comprehension and impact of the evidence. A logical sequence of leading questions within a chapter requires that the lawyer move the jury and the witness through a progression of related facts. It is the job of the cross-examiner to compile the facts that relate to each other so that the jury is not burdened with the responsibility of assembling the facts established by the cross-examination chapter. The goal fact is not necessarily the culmination of all the supporting facts but simply the last fact in the logical sequence of facts on a point. The important concept is that each chapter is an organized sequence of leading questions designed to put into a context the significance of the goal of that chapter. The facts of a chapter are its context. They are the details that flesh out the desired picture.

§9.9 Breaking Cases into Understandable Parts (Book page 9-7)

“Divide each problem into as many parts as possible; that each part being more easily conceived, the whole may be more intelligible.”

Descartes, Discourse on Method (1637).

An entire case contains an enormous amount of information. No judge or jury can learn the entire case at once. Even a simple case is made out of an enormous number of separate parts, which have come together to create the issues and events in dispute. The chapter method allows the trial lawyer to divide even the most complex case into individual parts such that the jury can understand those smaller parts and thereby gain an understanding of the entirety of the case.
§9.10 The Development of Chapters: The Process (Book page 9-9)

After the lawyer has broken down the major components of a case into smaller parts, the lawyer should be in a position to recognize facts, groups of facts, and parts that may be suitable for examination. These will need to be studied at their chapter level. A quick method of recognizing potential chapters is to use a part process.

1. Divide the case into its important scenarios. A single scenario may be composed of many events.

2. Divide the important scenarios into their component events. A single good event may contain many good issues.

3. Analyze the component events for issues of assistance. A single good issue may require more than one chapter.

§9.11 The Most Important Topics Ordinarily Deserve the Most Detailed Presentations (Book page 9-10)

The cross-examiner will soon find that the most important topics or areas within a case ordinarily require more than one chapter in order to create the several pictures or establish the several goals within that topic or area. Within each chapter are the leading questions, which minutely form the picture or establish the goal. The most important topics will ordinarily require the most detailed factual presentations.

This may seem like it will take a long time to accomplish, but a chapter could be less than a dozen facts. The facts are put into leading questions so the process of establishing a single chapter may only amount to a minute or two of courtroom time. The pictures created by such a detailed presentation in areas important to the theory of the case are truly quite stunning. Too often the backhanded compliment to a good cross-examiner is: “Sure it went well. You had great facts.” In reality the compliment should be: “Sure it went well. You made excellent use of the facts you had.”

§9.13 Possible Chapters of Cross-Examination Deserve Preparation, Even Though They May Later be Dropped (Book page 9-11)

After the lawyer begins developing her potential chapters of cross-examination, she will often reserve judgment on some chapters initially thought to be useful. Perhaps the potential chapters do not bear directly enough on the theory of the case or perhaps they are too tangential to be of assistance. Perhaps further investigation needs to be done to discover facts that, if added to the area under study, would make the chapters in this area useful in cross-examination.

As the lawyer begins a deeper study of the facts, she will inevitably find topics that she originally passed over that she now recognizes as useful. Fear not, as nothing that has been done so far in cross-examination preparation is permanent. The addition or deletion of areas of cross-examination is still easily accomplished.
§9.14 Events or Areas Versus Chapters (Book page 9-12)

Bear in mind that identifying the events of a case is not the equivalent of identifying the chapters of cross-examination. Creating a list of the events of a case does not create the chapter for cross-examination, as this broad breakdown is still far too large to be studied carefully. A list of the events of a case may well suggest possible areas for cross-examination but the lawyer must find within these events the chapters that require detailed exploration before the jury.

In surveying the events of a case, the lawyer is looking for facts that can be used to build her theory of the case. Simultaneously the lawyer is looking for weaknesses or in the opponent’s theory of the case, i.e., any suggestion that further inquiry is merited. Such weaknesses represent overall concepts of cross-examination and are not in themselves a cross-examination. For instance, on first reading the narrative of Barbie and Ken, the lawyer may well recognize the implausibility of the central feature of Barbie’s story: Because her child was starving, she decided to turn to prostitution. Yet the mother has family in the city and knows people who live in the multi-unit apartment building. The explanation causes the lawyer to realize she needs to cross-examine in this general area, although the exact form of chapters of the cross-examination is undetermined.

§9.19 Chapter Size (Book page 9-16)

How big is a chapter? A chapter is only as big as the number of good facts available to accomplish a single goal. Cross-examiners must train themselves to think in greater detail. In court the lawyer can always back up to a more general presentation, but it is very difficult to start with only a very skeletal notion of a chapter and develop the appropriate leading detailed questions at the podium. Within an event there is often more than one point of importance. When there is more than one goal that can be obtained through discussion of an event or topic, it is likely that there is more than one chapter that needs to be considered for cross-examination. It is impossible to decide how far to break down a part or topic of the case until the lawyer understands how many favorable facts are contained in that part. In addition, it is impossible to decide how far to break down a topic of the case until she understands the importance of that topic to the competing theories of the case.

§9.20 Draft Chapters Backwards (Book page 9-17)

A helpful way to approach the development of chapters is to engage in a four-step process designed to efficiently move the advocate from chapter concept to chapter completion. It is easy to think of the process in this way: draft chapters backwards. Below is a diagram of the process followed by a description of the four steps:
One: Identify any one single factual goal to be achieved in the course of the cross-examination that is congruent with the theory of the case.

Two: Review cross-examination preparation materials for all facts that lead toward acceptance of that single factual goal.

Three: Draft a single chapter that covers those facts, leading to the factual goal as set out.

Four: If, while in the course of drafting a chapter an additional worthwhile goal is identified, separate that goal and its supporting material into its own chapter.

§9.21 The Building of a Chapter, Step One: Select a Specific Factual Goal (Book page 9-19)

Select a single factual goal to be achieved in the course of the cross-examination that is within the theory of the line of questioning.

Central to the concept of the chapter method of cross-examination is the recognition that each individual factual goal must be proven separately, even though it may have a very close relationship to similar goals. For instance, if it is important to show the robber had no facial scars, then that individual topic has its own chapter and is written up separately from all other chapters dealing with other aspects of the robber's description. In a non-chapter system, the lawyer would be tempted to approach the podium with a piece of paper or note card that says something like:

*Description*
blue jeans
facial scars
height
body build

Working from such a poorly organized and abbreviated set of notes, the lawyer is likely to cross-examine on these issues generally, but the lawyer would do so with decreased opportunity to clearly establish her goals. Lack of chapter preparation increases the risk that the trial lawyer will not recall all of the preliminary facts that make the goal less
objectionable, more persuasive, and more believable. When the lawyer minimally asks the preliminary questions required to set up the goal, she increases the risk that she will fail to include all the useful information available or that the witness will give an unanticipated or unfocused answer that she is unprepared to impeach immediately.

§9.26 Give Each Chapter a Title (Book page 9-27)

Each chapter concerns itself with one factual goal. The materials collected for chapters are not miscellaneous, but facts related to each other. The chapter stands for a logical proposition. That proposition is the title of that chapter. Chapter titles create a very organized method of preparing not only cross-examination, but opening statements and closing arguments as well. Because the cross-examiner has identified all of the chapters that are favorable to her theory of the case, she can use the same topics in closing argument. Chapter headings also assist the cross-examiner in jury voir dire.

§9.27 The Building of a Chapter, Step Two (Book page 9-27)

Review cross-examination preparation materials for all facts that lead toward acceptance of the single factual goal of each chapter.

This stage is dependent upon material discussed in chapters 5, 6, 7, and 8—all of which discuss preparation systems. This may seem to pose a chicken and egg dilemma. Can discovery material be sorted into useful categories before goals of cross-examination have been decided upon or are goals to be determined after preparation materials have been surveyed? The answer is that the first reading of discovery, coupled with a client interview, yields a generalized theory of the case. This initial concept of a theory of the case suggests the most obvious goals and these goals in turn generate the initial search for cross-examination preparation materials. Then, as the attorney begins to sort the discovery into factual groupings in support of identified goals, more potential goals will be recognized. This in turn generates additional groupings of preparation materials.

§9.30 The Building of a Chapter, Step Three: Accumulating the Facts in Support of the Goal (Book page 9-29)

The most efficient way to construct a chapter is to envision the single factual goal or the picture the cross-examiner is to paint and gather the facts to support that goal. In the chapter method of cross-examination, the cross-examiner needs to draft a single chapter that covers those facts leading to each individual factual goal.

Chapter: Publications

Q: You placed everything you published in your resume?

Q: You are particularly proud of your articles?

Q: Publishing an article shows where your interests lie?

Q: Doing research in that area helps develop your expertise in that area?

Q: From 1996 to 2004, you have published nine articles?
Q: Every one of your articles was about hospital administration?

Q: In fact, all of your articles were about hospital administration in a tax-supported institution?

Q: Your articles are all about this single narrow administrative issue?

Q: None of your articles addressed psychiatric diagnosis?

§9.32 Chapters are about Facts not about Conclusions (Book page 9-32)

If the cross-examiner wishes the witness to establish a fact, it is not sufficient just to ask the witness for the goal in the form of a conclusion. If the cross-examiner wishes to show that the defendant owed a fiduciary duty to the plaintiff, it is largely ineffective to merely ask the hostile witness, “Isn’t it true that you owed a fiduciary duty to my client?” Asking conclusions is a poor substitute for proving facts. If a fiduciary duty exists, it exists because factually the elements of a fiduciary duty can be proved through chapters of cross-examination. The proof of fiduciary duty would require a chapter bundle, each chapter designed to factually support one of the legal elements of fiduciary duty. It may be that the witness on the stand can only testify to two of the five elements. That witness would then only be taken through those two chapters. The other chapters designed to factually prove the elements of a fiduciary duty would be reserved for other witnesses who are in a position to respond to those leading questions.

§9.33 One Question is Never a Chapter (Book page 9-32)

Facts must be established in sufficient context so that a jury will accept the goal-fact as having been proved. A single leading question can never fully create a dependable context. A group of facts can create context. A group of facts can create a believable picture.

It is never enough just to receive a favorable answer to a goal fact question. The goal must be supported with the strongest available factual details. The factual details that support the proposition give the jurors the strongest basis to accept the inference suggested by a chapter (see chapter 10, Page Preparation of Cross-Examination).

§9.34 Separate Chapter -- Separate Development (Book page 9-33)

In the course of negating, highlighting, or creating a goal-fact, the lawyer must almost always first establish many subsidiary or supporting facts. For instance, a simple goal of establishing that a witness saw a blue car requires not simply the question, “You saw the blue car?” Example:

Q: You were standing on the street corner?

A: Yes.

Q: It was daylight?

A: Yes.
Q: You saw a car?
A: Yes.

Q: It caught your attention at that moment?
A: Yes.

Q: The car was blue?
A: Yes.

This group of leading questions requires the witness to admit all four facts so as to more firmly establish the goal-fact that the witness saw a blue car. This method of questioning is discussed at length in chapter 8, *The Only Three Rules of Cross-Examination*. The short introductory questions are designed to flesh out the context for the goal fact. Having introduced the supporting material, the lawyer has more firmly established the accuracy of the fact that the car was indeed blue.

§9.36 The Building of a Chapter, Step Four: If, while Drafting a Chapter, an Additional Goal is Identified, Separate that Goal and Its Supporting Material into Its Own Chapter (Book page 9-35)

By reading the foregoing material, it is obvious that chapters are developed by breaking events or issues into smaller goals that become identified as chapters. When is any subject sufficiently broken down? The answer is mathematical, but the mathematical equation is an expression of the theory of the case.

**Trial Mathematics**

- Each fact has a value
- To recognize the value, consider how much the fact helps your theory of the case or how it undermines opponent’s theory
- Spend more time developing the most helpful facts

An example of the application of this formula will undoubtedly assist. In an earlier example the cross-examiner needed to establish that the opposing party was in deep financial trouble in the spring of 2001. If the establishment of that financial crisis would have a great impact on the competing theories of the case, then the available material demonstrating that financial crisis is deserving of a multi-chapter presentation. That portion of the cross-examination is deserving of great time and attention. A bank loan requiring periodic payments would get its own chapter. A missed payment in that time frame would deserve its own chapter. The forced sale of the witness’s assets at distress prices would deserve its own chapter. If there are more individual items or events that can assist the cross-examiner in proving or portraying the financial crisis in the spring of 2001, then the cross-examiner needs to develop more chapters that use those facts.
If a bank loan entered into by the witness years before has some bearing on the financial plight of the witness in 2001, then that bank loan deserves a chapter of cross-examination as well. But if a bank loan entered into years before has no bearing on the financial plight of the witness, then that loan deserves no mention. Even if that loan was defaulted on ten years ago, if that fact or event has no relevance to an issue in this case, then it is undeserving of time on cross-examination. If, on the other hand, the witness were to testify on direct examination or on cross-examination that he had excellent credit and had never defaulted on a loan, then a “default” chapter would suddenly be of relevance.

§9.38 How to Avoid Spending Time on Unproductive Chapters (Book page 9-36)

Can the lawyer break the evidence down too far and into too much detailed information? Yes the breakdown can become too small. What is deserving of the greatest attention is the evidence that has the greatest impact on the theory of the case. A chapter having no bearing on the opposing theories of the case has no business being done at all. If an event happened on Wednesday, or it happened on December 9, but the day or date have nothing to do with the contrasting theories of the case, there is no reason to discuss those facts and certainly no reason to develop a chapter concerning the day or date.
SYNOPSIS (Sections in Bold are included in the handout in whole or part)

§26.01  Loops as a Flag-Planting Device
§26.02  Three Looping Techniques
§26.03  The Problems with Merely Repeating an Answer
§26.04  Advantages of the Looping Technique

§26.05  Simple Loop Formula
§26.06  Analysis of the Formula
§26.07  Simple Loop Example
§26.08  Looping Emotional Words
§26.09  Looping is a Learned Skill – Adjectives are Easiest
§26.10  Multiple Simple Loops
§26.11  Simple Loops for the Purpose of Labeling

§26.12  The Technique of Looping to Label

§26.13  Loops to Label Exhibits
§26.14  Loops to Label Events
§26.15  Loops of Undisputed Facts Critical to Theory
§26.16  Using Loops in the Cross-Examination of Experts
§26.17  Looping to Lock in a Disputed Subjective Fact
§26.18  Looping Subjective Emotional States
§26.19  Chain of Loops
§26.20  Saving Impeaching Facts

§26.21  Double Loops Technique

§26.22  Double Loop Formula

§26.23  Double Loop for Contrast
§26.24  Building the Double Loop

§26.25  Use of the Double Loop to Juxtapose Inconsistent Facts

§26.26  The Cross-Examiner Chooses which Fact to Validate and which Fact to Discredit
§26.27  Use of the Double Loop to Highlight Contrasting Theories
§26.28  Use of Double Loops in Combinations
§26.29  Expert Witnesses and Double Loops
§26.30  Creating the Double Loop for Use against the Expert
§26.31  The Double Loop Technique Increases the Overall Value of the Good Facts upon which It Is Built

§26.32  Spontaneous Loops
§26.33 Word Selection and Simple Loops Lead to Spontaneous Loop Opportunities
§26.34 Why Spontaneous Loops Happen?
§26.35 Definition of Spontaneous Loop Technique
§26.36 Examples of Spontaneous Loops
§26.37 Spontaneous Loop Opportunities Come from Witnesses Who Are Unresponsive
§26.38 Spontaneous Loops to Silence the Witness
§26.39 Spontaneous Loops – Selecting Power Words
§26.40 Spontaneous Looping of Theme Phrases
§26.41 Delayed Spontaneous Loops from Direct Examination and Discovery
§26.42 Relationship to Other Techniques
§26.01 Loops as a Flag-Planting Device (Book page 26-2)

The cross-examiner needs a variety of techniques that ethically and appropriately enable the advocate to call the jury’s attention to a particular fact. While it is hoped that jurors will hear all the answers, the reality is that some answers matter more than others. There are those facts of such importance that they deserve highlighting. In essence, the lawyer wishes to “plant a flag” on that fact. Any trial technique designed to highlight a particular fact, whether the technique involves voice, movement, demonstrative aid, or oratorical device, is a flag-planting device. The techniques of looping, in all its various forms, are flag-planting techniques designed to call additional attention to a fact of importance.

§26.05 Simple Loop Formula (Book page 26-3)

Definition:

1) Through a leading question establish the desired fact or phrase;

2) Use the fact or phrase established within the body of the next question, but without re-asking the fact; and

3) Connect the looped fact or phrase with a question that contains an undisputed fact. Attach the looped fact to a safe fact in the second question.

§26.12 The Technique of Looping to Label (Book page 26-8)

The technique of looping to label is a simple and natural way of assisting people’s memory in the courtroom environment. Looping labels can be used in any case, in any cross-examination, and in any questioning. Looping assists the memory anytime there is a need to label a fact, a witness, or a particular exhibit. The technique is simple: Find a descriptive but fair label that is consistent with the cross-examiner’s theory. Use that label in place of the name of the witness, or the number of the exhibit, or the date of the event. Use the label consistently throughout trial so that both jurors and witnesses can easily equate the label with the person, event, or exhibit. In a self-defense case:
Trials have become more complicated. It seems every trial has hundreds of exhibits. Particularly in commercial litigation, the exhibits frequently number in the hundreds and often in the thousands. The most conscientious judge or jury cannot keep the exhibits straight. The lawyers who have dealt with the case for months and years before trial have a most difficult time keeping up with exhibits. Why is there a reasonable expectation that judges or juries could possibly do so?

Looping helps to label exhibits and eliminates the necessity of the judge or jury to memorize the exhibit number. Everyone begins to refer to the exhibit by the label loop. It is chosen to be consistent with the cross-examiner’s theory.

**§26.21 Double Loops Technique (Book page 26-15)**

Simple loops can be quickly mastered. Once they are, it takes only minimal additional effort to learn the double loop technique. Double looping is a technique that can be used for two distinct purposes. The first, and the most frequently employed purpose, is its use to juxtapose two inconsistent concepts (see chapter 24, Juxtaposition). That is, contrasting two dissimilar or inconsistent facts in a single question to promote a desired jury reaction. Two facts are pushed together to show the lack of logic inherent in a witness trying to verify both facts.

The second common purpose of the double loop technique is to use two or more looped facts in combinations to heighten an image and produce a result that will be much more memorable and more closely linked than the two facts alone.

**§26.22 Double Loop Formula (Book page 26-16)**

1) Establish first desired significant fact.
2) Establish second desired significant fact.
3) Loop both facts together in a third question and later questions.
4) Always tie the double loop to a “safe” undisputed fact.
§26.23 Double Loop for Contrast (Book page 26-16)

Double Loops can Highlight Difference

Step 1: Establish Fact 1:
• Eddie is 6’ 1”.
Step 2: Establish Fact 2:
• George is 5’ 7”.
Step 3: Loop both facts:
• 6’ 1” Eddie was hitting 5’ 7” George.

§26.25 Use of the Double Loop to Juxtapose Inconsistent Facts (Book page 26-17)

In an impeaching cross-examination, assume the witness has said something that is accepted as true. However, if examined in juxtaposition to other facts, the story casts doubt upon the original assertion. The witness has told a story or fact, often in direct examination, which in isolation appears reasonable, but when examined in context with other testimony of the witness, appears to be untruthful and illogical. In such cases, it is helpful to permit the witness to establish the first fact and later in cross-examination to perform a double loop that juxtaposes the first assertion and shows it to be implausible.

The double loop technique to juxtapose inconsistent facts is at the heart of the following example from a commercial case:

Q: You have told us that you were unaware of any facts that caused you any concerns about the financial health of this company?

Q: You knew the company had twice been downgraded by the rating services?

Q: You knew the company had lost money for three consecutive years?

Q: This double downgraded, money-losing company caused you no concern?

§26.32 Spontaneous Loops (Book page 26-23)

All of the loops shown thus far have been written and executed according to the cross-examiner’s script. They were prepared pre-trial. There is nothing spontaneous about them, although simple and double loops sound spontaneous to the witness and the jury. These loops were planned; the lawyer carefully selected the words.

However, one of the most enjoyable and effective uses of looping occurs when a witness gives an unexpected answer, which has in it a wonderfully helpful fact that substantially advances the lawyer’s theory of the case. The critical difference between spontaneous loops and simple or double loops is that the witness chooses the words.
In a pure spontaneous loop, it is the witness who has made that word choice in front of this jury and judge. The witness will never be able to disclaim that word choice, no matter how ill-conceived or regrettable that word choice is. The spontaneous loop is based on the phrase that has escaped the lips of the witness. Forever in this trial, the witness will be charged with the responsibility of uttering it.

§26.35 Definition of Spontaneous Loop Technique (Book page 26-24)

1) Listen. Any answer other than a “yes” or “no” may offer an opportunity for the cross-examiner. Listen with the cross-examiner’s theory of the case in mind.

2) Lift. Extract any useful word or phrase from the answer.

3) Loop. Use the helpful factor phrase in the body of the next question.

4) Tie the spontaneous loop to a safe, undisputed fact.

Compare the definition for spontaneous loop with the definition of a simple loop. There is but one difference. The cross-examiner must listen for the spontaneous loop. All other steps to the spontaneous loop are identical to the simple loop.

§26.38 Spontaneous Loops to Silence the Witness (Book page 26-25)

Spontaneous loops silence the unresponsive or out of control witness (see chapter 19, Controlling the Runaway Witness). Spontaneous loops eventually threaten the witness so much that the witness will refuse to volunteer in any matter. Through spontaneous loops, the cross-examiner exercises control over the witness by punishing the non-responsive answer.

§26.39 Spontaneous Loops -- Selecting Power Words (Book page 26-26)

Spontaneous loops of helpful facts volunteered by the witness, or facts that can be turned to the advantage of the cross-examiner, should always be utilized.

Do not loop power words that are detrimental to the cross-examiner’s theory of the case, themes, or theme phrases. As seemingly obvious as this may appear, in the heat of the battle, the cross-examiner must instantaneously differentiate between helpful and unhelpful power words in light of her theory. The cross-examiner cannot simply listen for a power word and then spontaneously loop it. It is extremely important to listen to the witness carefully in order to effectively employ the spontaneous loop technique. It is even more important to analyze the power words heard in light of the cross-examiner’s theory of the case.
### Spontaneous Loop

<table>
<thead>
<tr>
<th>Q</th>
<th>A</th>
</tr>
</thead>
<tbody>
<tr>
<td>When Ed came through the door, he was silent?</td>
<td>Yes, he just came <strong>barreling through the door and drilled</strong> the guy.</td>
</tr>
<tr>
<td>The guy he <strong>drilled</strong> was Brian?</td>
<td>Yeah.</td>
</tr>
<tr>
<td>When Ed <strong>barreled through the door and drilled</strong> Brian, Brian hadn’t said a word?</td>
<td>Not that I heard.</td>
</tr>
</tbody>
</table>

### Spontaneous Loop

<table>
<thead>
<tr>
<th>Q</th>
<th>A</th>
</tr>
</thead>
<tbody>
<tr>
<td>You smashed into Tony on his motorcycle?</td>
<td>I didn’t know what I hit – I just heard a <strong>thud</strong> and the sound of metal smashing metal.</td>
</tr>
<tr>
<td><strong>The sound of metal smashing metal</strong> was you crashing into something?</td>
<td>Well, yes.</td>
</tr>
</tbody>
</table>

### Spontaneous Loop

<table>
<thead>
<tr>
<th>Q</th>
<th>A</th>
</tr>
</thead>
<tbody>
<tr>
<td>What you crashed into was a man?</td>
<td>I thought so.</td>
</tr>
<tr>
<td>A man who now lay in the street?</td>
<td>Yes, <strong>apparently</strong> so.</td>
</tr>
<tr>
<td>It was apparent because you saw the man spread out in the street?</td>
<td>Yes.</td>
</tr>
<tr>
<td>It was apparent because . . .</td>
<td></td>
</tr>
</tbody>
</table>
CONTROLLING THE RUNAWAY WITNESS*  
Larry S. Pozner and Roger J. Dodd
Adapted from their book Cross-Examination: Science and Techniques 2nd Edition  
Seminar Handout & PowerPoint Presentation Copyrighted 2011© All rights reserved.  
These materials are provided for the sole benefit of persons in attendance at this seminar.  
No right of reproduction in whole or in part is granted. © Larry S. Pozner & Roger J. Dodd

SYNOPSIS (Sections in Bold are included in the handout in whole or part)

§19.01 The Fear
§19.02 Definition of the Runaway Witness
§19.03 Establishing Control
§19.04 The Techniques Create Drama in the Courtroom so the Lawyer does not Have to Speak or Act Loudly
§19.05 Relationship of Techniques to the Only Three Rules of Cross-Examination
§19.06 Behavior is Molded by Consequences
§19.07 Trials Provide a Difficult Environment in Which to Work
§19.08 Techniques that don't Work
  [1] “Just Answer ‘Yes’ or ‘No’”
  [2] Asking the Judge for Help
    [a] Court-Offered Help
    [b] “The Deal”
§19.09 A General Technique that Assists all Other Techniques: Keep Eye Contact
§19.10 Body Movement and Active Listening
§19.11 Where and When to use These Techniques
§19.12 Depositions and Other Pre-trial Opportunities
§19.13 Pre-trial Motion In Limine
§19.14 Non-Jury Settings
§19.15 Opportunities Created for the Cross-Examiner from Unresponsive Answers
§19.16 Ask, Repeat, Repeat
§19.17 Reversal, or Ask, Repeat, Reverse
§19.18 An Obvious and Indisputable Truth
§19.19 Medical Malpractice Usage
§19.20 Full Formal Name
§19.21 Embarrassment or Humiliation
  [1] Use of Formal Names
    [a] Application to Expert Witnesses
    [b] Child Witness
§19.22 “Sir” or “Ma’am”
  [1] Use
    [a] Younger Witnesses
    [b] Evolution of Politeness

*To Order Book, Video Tapes, Audio Tapes or CDs, contact: LexisNexis; Charlottesville, Virginia 1-800-446-3410
§19.23  Shorten the Question
§19.24  Physical Interruption
§19.25  Ethical Note for Use of Techniques that Interrupt
§19.26  Polite Interruption
§19.27  Pre-trial Use of Technique Particularly with Experts
§19.28  The Hand
§19.29  The Shaken Finger: Child Witnesses
§19.30  Head Shake: Expert Witnesses and Child Witnesses
§19.31  The Seat
§19.32  The Whole Body
§19.33  Use at Depositions -- the Body and the Modified Seat
§19.34  Objection: Non-Responsive Answer
§19.35  The Court Reporter
§19.36  Use at Depositions
§19.37  Use of a Blackboard
§19.38  The Long Term Effect of Using the Blackboard Technique
§19.39  Use of a Poster
§19.40  “That Didn’t Answer My Question, Did It?”
§19.41  “My Question Was . . .”
§19.42  “Then Your Answer Is Yes”
§19.43  If the Truthful Answer Is “Yes,” Will You Say “Yes?”
§19.44  Story Times Three
§19.45  Elimination: Use of This Technique at Trial
§19.46  Spontaneous Loops
§19.47  Combinations of Techniques
[1]  The Relationship of “Ask, Repeat, Repeat” to “Ask, Repeat, Reverse”
[2]  The Relationship of Full Formal Name to “Sir” or “Ma’am”
[4]  The Relationship of Court Reporter to the Blackboard or Poster
[7]  The Relationship of “Then Your Answer Is Yes” to “Ask, Repeat, Repeat”
[8]  The Relationship of the Hand to the Finger and the Head Shake
§19.48  Summary
SELECTED AND EDITED PORTIONS OF CHAPTER 19 –
“CONTROLLING THE RUNAWAY WITNESS”

§19.01 The Fear (Book page 19-3)

The question calls for a yes or no answer. The witness is entitled to give either answer. Instead, the witness responds with a narrative. The answer may be long or short. The answer may contain words that amount to “yes” or “no,” or the answer may entirely evade the question being asked. In all of these events, the cross-examiner is confronted with a “runaway witness.”

The chief problem of a “runaway witness” is his effect on the ability of the cross-examiner to paint the precise picture in each chapter goal. The more wordy the answer, the more the picture may be distorted or muddied by the inclusion of unnecessary information. The runaway witness is attempting to take over, if even for a moment, as the guide to the facts. The cross-examiner will ordinarily want to extinguish this behavior as it is the cross-examiner who is best able to communicate the most important facts to the jury.

The runaway witness ranks as one of the greatest fears of the cross-examiner. However, one of the greatest opportunities to the cross-examiner is when the witness is unresponsive. An unresponsive or runaway witness often appears without notice, and sometimes when least expected. That is part of the fear. The fear expands because once the runaway witness surfaces the lawyer is enmeshed in a battle to retain control of the cross-examination. Thoughts of opportunity are not present as the unprepared cross-examiner struggles to regain control.

§19.02 Definition of the Runaway Witness (Book page 19-3)

A runaway witness is any witness who is unresponsive to the question put on cross-examination. This unresponsiveness may take many forms. The witness can answer the question on cross, but in such a way as to make the answer unintelligible. The witness can refuse to answer the question put on cross and answer a different question. The witness can answer generally the question on cross, but include many other answers to questions not asked. The witness can volunteer prejudicial information to dramatic effect. The witness (particularly the expert or professional witness) can object to the question posed and in some instances rule on his own objection, without ever answering the question.

Example:

Q: Professor, you never measured the circumference of the aluminum alloy tube?

A: I didn’t consider it to be relevant. In fact, I don’t consider it relevant now. I am sure that it is not relevant. What I did was . . .
These Techniques Create Drama in the Courtroom so the Lawyer Does not Have to Speak or Act Loudly (Book page 19-5)

None of the techniques for controlling a runaway witness require or encourage the use of loud, argumentative, or offensive language. Grandiose gestures are discouraged. These techniques are designed to eliminate the feeling that such conduct is necessary.

Though some of these techniques allow for a voice that is different than the tone used in previous questions, each of the techniques can be delivered in any conversational voice. The techniques may be accompanied by a change of position in the courtroom, or a gesture, but such physical components of a particular technique rely less on confrontational body language and movement, and more on the change of tone or posture itself. All these techniques can be accomplished with a slower rather than faster rhythm in the questioning, though again, there may be occasions when the cross-examiner will change the rhythm as a method of enhancing a particular technique. The important thing to remember is this: The techniques so solidly confront the unresponsive witness, that the cross-examiner need not raise her voice, move with aggressive or confrontational gestures, or speak faster.

Behavior is Molded by Consequences (Book page 19-7)

Remember Psychology 101 from college? Remember the maze that the little white rats were placed in? The rats learned that if they performed well they were rewarded with a food pellet, but if they performed poorly they received no reward or worse, negative feedback. This was the concept of the Skinner box introduced by psychologist B.F. Skinner. The concept remains true for all thinking organisms.

What is an acceptable means of rewarding the short, direct answer to a leading question? When the witness is responding with simple direct answers (preferably yes), rewards include a gentle encouraging nod of the head, a pleasant teaching voice and most important, efficient movement to the next question, the next subject matter, and the next chapter. Do not create an impediment to the “yes” answer. If the witness has agreed with the fact suggested by the cross-examiner, the witness has earned a reward. A change to a harsher tone of voice, a negative gesture, or a follow-up question that suggests that “yes” is a foolish, illogical, or undesirable answer, all serve to sanction the witness for agreeing with the cross-examiner. The cross-examiner would not punish her coworkers, her children, or her pets for doing what she wanted them to do. For the same reason she cannot afford to punish a witness for answering “yes.”

On the other hand, when the witness becomes a runaway witness by using unresponsive answers, volunteering information, or by a myriad of other evasive devices, sanctions must be applied. The techniques that are discussed in this chapter apply those sanctions. Some of the sanctions are severe by courtroom standards. Some are more gentle and encouraging. With this said, let there be no misunderstanding: They are all negative stimuli. The techniques for controlling the runaway witness all employ negative feedback as a means of extinguishing unwanted behavior.
§19.08 Techniques that Don’t Work (Book page 19-8)

[1] “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. They will inform the witness that they may explain their answer, even at length, if necessary.

More importantly, a lawyer’s resort to using oratorical blunt force signals to 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 straitjacket the witness. To them it appears that the lawyer is attempting to “put words in the witness’ mouth.” A lawyer resorting to this method lowers both her personal credibility and the credibility of the leading question as an appropriate teaching device.

[2] Asking the Judge for Help

[a] Court-Offered Help

In frustration, some cross-examiners will ask the judge to order the witness to “just answer ‘yes’ or ‘no.’” Asking the judge to help in this way is an 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?

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 credibility, which tells the jury that this lawyer is being fair in her questioning. Permit the court to volunteer; do not seek its assistance. The best way to accept the help of the power of the bench is to remain silent (see chapter 21, Creation and Uses of Silence). Do not restate the question unless prompted by the judge to do so, or the witness must admit that he does not know the question by asking for the question again. If the witness has to admit that he does not know the question, the witness admits to all (judge, jury, opposing counsel, and to the cross-examiner) that the witness was not listening to the question and was going to answer whatever question the witness chose to answer.
“The Deal”

The Deal originates when the cross-examiner, early in the examination, suggesting to the witness that the cross-examiner will ask fair questions that need only a “yes” or “no” answer. In exchange for this type of questioning the cross-examiner advises the witness that yes or no answers will prove sufficient. “I am going to ask you a series of questions, each of which can be answered with a yes or no answer. If I do that, will you please provide me with a yes or no answer?”

The Deal is not a suggested method of controlling the witness. It is offered up by a lawyer who fears that somewhere down the road she 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. Most importantly, the signal is sent to the witness that the lawyer fears this kind of conduct. If the witness is not friendly to the cross-examiner’s cause, wouldn’t the witness cause as much difficulty as possible by using this request against the lawyer?

§19.09 A General Technique that Assists All Other Techniques: Keep Eye Contact
(Book page 19-11)

When cross-examining a difficult witness, always maintain eye contact. Avoiding eye contact is interpreted as weakness. Life experiences verify this both in and out of the courtroom. People who will not make eye contact are uncomfortable and less than forthright. People who will not make eye contact are often afraid. If the cross-examining lawyer suspects the witness will become non-responsive or runaway in their answers, the lawyer must keep her eyes fixed on the witness when asking questions and when receiving answers. By directing the lawyer’s full attention to the witness’s eyes, she serves nonverbal notice that she will not put up with any nonsense or permit deviation from the question-and-answer approach she has been following. Control the runaway witness’s eyes until the witness is off the stand.

Of course, the trial lawyer must sometimes divert her eyes from the witness to look at notes and observe exhibits, charts, overheads, or other demonstrative aids. These techniques enable the cross-examiner to divert her attention while maintaining psychological control of the witness. The cross-examiner may take her eyes off of the witness after the answer has been given and before the next question is asked, or, in limited circumstances, even while the next question is being asked. In other words, the cross-examiner may put a question to the witness, receive an answer to that question, and then divert attention to a new task such as putting up an exhibit, or consulting notes. Because there is no question pending, there is no permission for the witness to speak. Eye contact should be maintained from the conclusion of the cross-examiner’s question through the entire answer of the witness. When there is an interruption of eye contact between questions, cross-examiner should reestablish eye contact before posing the next question.
§19.13 Pre-trial Motion In Limine (Book page 19-13)

There are witnesses (particularly expert and professional witnesses) who become so schooled in trial work that every answer is unresponsive. Every unresponsive answer is intentional and malicious. The ability to evade, and to insert harmful material is one of the reasons opposing counsel has hired them.

After confronting this type of witness at a deposition (and preferably a videotaped deposition), trial counsel may file a pre-trial motion in limine requesting the court to rule prior to trial that the witness shall be responsive to questions on cross-examination and not volunteer non-responsive information. This motion is best made using specific excerpts from transcripts and excerpts from videotaped depositions to illustrate the misconduct.

§19.16 Ask, Repeat, Repeat (Book page 19-15)

The lawyer has asked a fair, clear question, in its simplest form, using commonly-understood words. 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 her eyes from the witness, the lawyer simply asks the question again, in exactly the same words and tone of voice and articulating each word. The pace of the question is slightly slower. If the witness is foolish as to again ignore the obvious “yes,” the trial lawyer can slowly lean slightly forward without taking her eyes off the witness. The next step is to repeat the identical brief, simply constructed question, but even more slowly.

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. Even the most evasive witness has great difficulty in evading the third posing of the question.

§19.17 Reversal, or Ask, Repeat, Reverse (Book page 19-16)

This technique of repeat and reverse is a variant of the first technique. The lawyer asks the question. She then asks the identical question, but slightly slower and leaning forward. This gives the witness two opportunities to tell the truth before the lawyer reverses the question in the third asking.

The technique of ask, repeat, reverse, is one of the most effective methods of controlling an expert witness. This is particularly true when the expert has reports, operative notes, letters, or any other type of documents. Because the document or fact, whatever it may be, will not go away, this technique is particularly effective.

§19.20 Full Formal Name (Book page 19-18)

A previously compliant witness has for the first time run away with an answer. This witness has thus far appeared to be trying to answer fairly. Jurors can sense the witness’s apparent candor, so the lawyer has to rein in the witness without incurring the jury’s hostility. Anything that changes the customary tone of questioning serves as a mild
rebuke to the witness. The cross-examiner need not use a harsh tone or angry gesture to remind a witness of their obligation to answer the question. The use of the witness’s full formal name represents a change in the style of the questioning and thereby provides a sanction.

§19.22 “Sir” or “Ma’am” (Book page 19-20)

Once the formal name has been used, it is seldom necessary to use it again, even if the examination is a quite lengthy one. Simply starting the question with “sir” or “ma’am,” as the case may be, will immediately bring back in line the unresponsive, but non-malicious witness. Just as there is no down side risk for using the “full formal name” technique, there is no down side risk of objection or proper interruption to this technique. What would the objection be? “Objection, the cross-examiner is being polite.” Use the “sir” or ma’am” at the beginning of the question for maximum effect.

§19.23 Shorten the Question (Book page 19-20)

Even when the cross-examiner is properly implementing the three rules of cross-examination (see chapter 8, The Only Three Rules of Cross-Examination), questions can be shortened to highlight the malicious non-responsive nature of the witness. The cross-examiner is using a leading question. She only has one fact in the question and the question is in logical order. Nonetheless, the witness refuses to responsively answer the question. In this circumstance, continue to eliminate words from the question until the witness is left with only the key word of the question.

§19.26 Polite Interruption (Book page 19-21)

The question is put to the witness. The witness becomes unresponsive. The witness’s unresponsive answer would lead to a mistrial.

While ordinarily the cross-examiner should never verbally interrupt a witness, this is the exception to the rule. The cross-examiner must weigh the damage of a possible mistrial against an objection by the opponent.

Once the cross-examiner has decided that a polite interruption must be made, the interruption must be made quickly and before the harm that would result in a mistrial can be accomplished by the witness. The cross-examiner would then immediately address the court (preferably before the objection is even made) and ask to approach the bench with opposing counsel to explain the reason for the interruption.

§19.28 The Hand (Book page 19-22)

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.)
§19.29 The Shaken Finger: Child Witnesses (Book page 19-23)

When the witness begins to answer the question unresponsively and at length, the lawyer simply slowly shakes her index finger back and forth as she would at a naughty child. That simple gesture, with other appropriate body language to support it, makes the witness feel guilty. This technique works most appropriately 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.

§19.34 Objection: Non-Responsive Answer (Book page 19-25)

The cross-examining lawyer has only one legal objection that can be used as a technique to control the runaway witness. The objection is stated as follows: “Objection, non-responsive answer.” The objection that the witness is being non-responsive in her answer calls upon the court to become involved in enforcing the rules of witness examination.

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

There are two substantial risks to this technique. First, once invited to participate in the cross-examination, the court may continue to be actively involved in the cross-examination. This is never a good thing. Too often the judge may see this objection as an invitation to referee the cross-examination on a question-by-question basis. The risk is that all continuity will be lost. This risk is substantial and must be weighed heavily by the cross-examiner when considering using this technique.

The second downside risk that the trial lawyer must weigh before using this technique is the likely response by the court. For this technique to work, the judge: (a) must be listening; (b) must know the rule of evidence; (c) must know that the objection belongs to the cross-examiner; and, (d) must be willing to enforce the rule. Weigh these factors carefully before the use of this technique.

§19.35 The Court Reporter (Book page 19-26)

While the judge is certainly the highest-ranking member of the courtroom staff, the jury views all court personnel as holding power. 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. It is significant when it is perceived by the jury that they are using their power to aid one side or the other.

The technique: Having asked the witness a leading question and having received a rambling monologue, the lawyer may turn to the court reporter and ask, “Please may I have my question read back to the witness?” All action in the courtroom will halt as the reporter slowly articulates each word of the stenographic record.
§19.37 Use of a Blackboard (Book page 19-27)

Quite often the courtroom is equipped with a blackboard, white board, or other large writing surface. 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 (see chapter 8, *The Only Three Rules of Cross-Examination*), the cross-examiner may simply write the question on the board during or after hearing the unresponsive answer. When faced with the written question, the witness often will stop the unresponsive answer. Even if the witness does not stop the unresponsive answer, he will recognize that he must eventually respond to the question.

§19.39 Use of a Poster (Book page 19-28)

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

Trial counsel knows the heart of her 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. This is particularly true when dealing with expert witnesses. If the big question can be predicted, and the non-responsive answer is 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. The critical leading question is already written on the poster in the identical language. This becomes a written form of the repeat technique.

§19.40 “That Didn’t Answer My Question, Did It?” (Book page 19-29)

This technique is confrontational. It is best reserved for use against an expert or professional witness. The jury must sanction this confrontation before it is used. The witness must have repeatedly refused, deliberately and maliciously, to answer straightforward questions.

Under any of the scenarios, the witness is taught to respond to the precise question asked.

§19.41 “My Question Was . . .” (Book page 19-29)

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

The jury is reminded that the 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. If analyzed, this technique is the “repeat” technique with a point on it. It is not as aggressive as “that does not answer my question, does it?” technique, but more aggressive than the simple “repeat” technique.
An additional benefit of this technique is that it points out to the jury the precise question that the witness is evading. Because of this, it is best to use this technique in situations where the cross-examiner is to draw additional attention to the factual assertion contained within the question. The jury receives a better understanding of the importance of the fact at issue, while the witness is sanctioned for the non-responsive or runaway answer.

§19.42 “Then Your Answer Is Yes” (Book page 19-30)

This technique is 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 can be adjusted depending on the circumstances. At the heart of this technique is the cross-examiner’s ability to hear what amounts to “yes” hidden within a longer answer.

This is best delivered after a long 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.

§19.43 If the Truthful Answer Is “Yes,” Will You Say “Yes?” (Book page 19-31)

This is a variation of the technique just described. It should be reserved for the obstinate witness, particularly one being discredited. This technique should be employed when non-responsive answers are repeatedly given to very short, simple questions to which no witness contests that the fair answer is “yes.” After a series of long, non-responsive answers, the cross-examiner can ask, “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.”

§19.44 Story Times Three (Book page 19-32)

Some witnesses seem unstoppable. They have been coached to tell a story, and they are going to tell their stories – usually dramatic and harmful stories calculated to destroy the advocate’s case. This sort of witness will tell this story as often as possible and seems to have the uncanny ability to recognize the worst possible moments. Only in these dire circumstances is the following technique appropriate. Try multiple techniques first before reverting to this technique, because this is a technique of last resort at trial.

This technique is best used at deposition. There is no jury to be poisoned. No judge to interrupt. By requesting repeated recitations of the “story,” all the emotion of the witness and the “story” is drained away. Control for individual questions that follow become much better.

§19.45 Elimination: Use of this Technique at Trial (Book page 19-33)

This technique is particularly valuable to teach the witness before trial that it is painful, embarrassing, and even humiliating to be a runaway witness. It signals the axiom: “We can do this the easy way or the hard way, but we will do it.” The technique comes in two forms. When used at a deposition the technique of elimination is longer and more time-
consuming. When used in trial, the technique requires questioning that is more to the point. After experiencing the form at a deposition, few witnesses look forward to the trial form.

The question is asked, and the witness gives a non-responsive answer. The cross-examiner begins eliminating other possible factual variations. At some point during the process, the witness will offer to give the “yes” that was warranted by the original question asked. Do not let the witness off the hook. Continue with this technique until the witness insists on giving the response that you first requested.

Deposition Training

This is an excellent technique to train the witness in depositions (where objections do not stop the technique) not to be unresponsive. With the latitude given at depositions, the painful technique of elimination can be used to its full extent, and the witness recognizes that it is an unpleasant experience to be avoided in front of twelve perfect strangers at a jury trial.

§19.46 Spontaneous Loops (Book page 19-35)

A loop is the repetition of a key phrase (see chapter 26, Loops, Double Loops, and Spontaneous Loops). A spontaneous loop is a repetition of all or part of an unexpectedly good but unresponsive answer. This type of loop is called spontaneous because it happened without the trial lawyer expecting it. More often than not the cross-examiner will use a simple word or phrase from a long answer that the witness has volunteered (see chapter 26, Loops, Double Loops, and Spontaneous Loops).

Whether the witness is a college professor with a doctorate in microbiology or a ruthless government informant trained in the art of lying, her non-responsive answer is likely to include words or phrases that the cross-examiner can use to discredit her. This is why the cross-examiner must listen to the entire answer carefully. Within it are often nuggets of golden opportunities.