

Let me ask you this ...

Leading questions, plain words and control are vital in cross-examination

By James A. Johnson, Esq.

Dean Wigmore stated that cross-examination is beyond doubt "the greatest legal engine ever invented for the discovery of the truth." But, truth is rarely what a skillful trial lawyer seeks to accomplish on cross-examination.

Cross-examination is not only a truth-seeking process. It also is an opportunity to persuade the fact finder to your position in the case.

For the consummate trial lawyer, persuasion is an art practiced in its most subtle form on cross-examination.

Sometimes, the best cross is no cross at all. But when you *should* ask questions, two major components must be considered: the method of questioning, and the purpose in the questioning.

The purpose is either to further your case or to point out weaknesses in the opponent's case, while the method relates to the manner in which the questions are put to the witness.

First, ask leading questions. A leading question is one that suggests the desired answer to the witness:

Q. You work at the Renaissance Center?
A. Yes.

Q. On Jefferson Avenue?

A. Yes.

Q. At approximately 5:10 p.m., you were leaving the RenCen?

A. Yes.

Q. You were waiting for a cab?

A. Yes.

Q. You saw two cars collide?

A. Yes.

Second, get one fact at a time, using short questions and plain words asking for facts — not information or evaluations. The form of the question can give the jury the impression that the witness is free to answer the question as he chooses, yet still limit the witness:

Q. Did you see one of the cars hit the curb after the collision?

A. Yes, I saw that.

Q. Did you see the policeman investigate the collision?

A. Yes, I saw that, too.

Third, control of both content and direction is the key to successful cross-examination. Again, cross-examination is not for the witness, it is for *you*. It is your opportunity to present your side of the witness's story.

The object is to get the answer you want and not one word more. But, what do you do when you get an evasive or un-

responsive answer? For example:

Q. You are married, aren't you?

A. I guess you could say that.

Don't ask the judge to instruct the witness to answer the question. You control the witness by simply repeating the question:

Q. Are you married?

A. Yes.

Or, better still, tell the witness you are repeating the question:

Q. Dr. Smith, my question was, you examined the plaintiff only once?

A. Yes, that's correct.

Traps

You must have a purpose when you cross-examine a witness. Cross-examination that does not attain a specific purpose is a waste of time and a trap. You can damage your case.

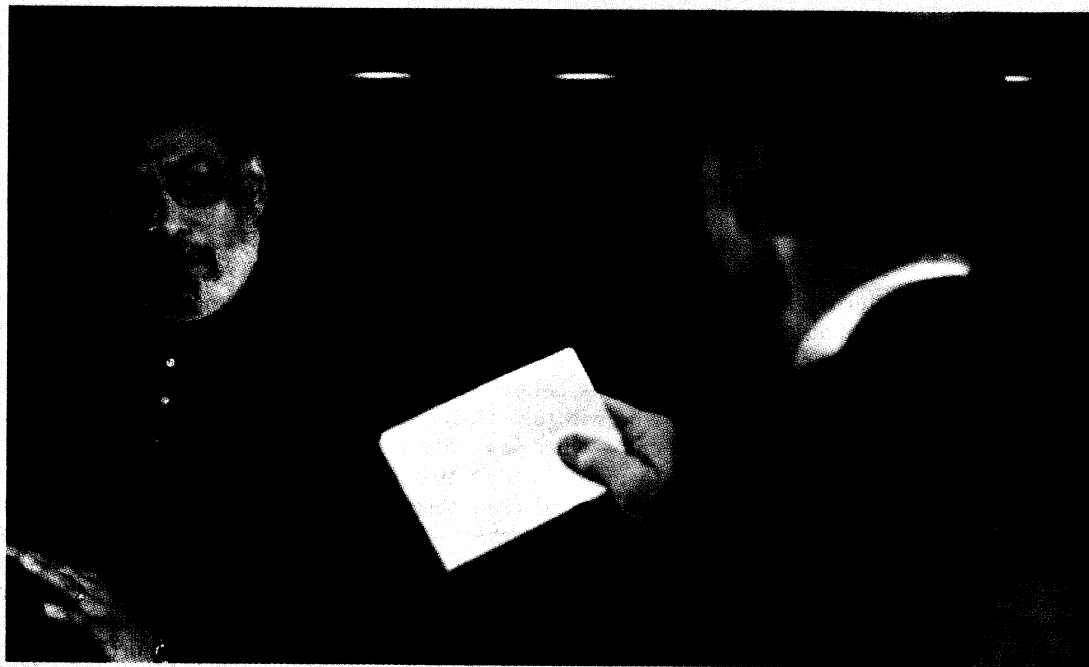
If no harm has been done to your case and there is nothing to be gained, half-rise in your seat and say, "No questions, your honor." The mark of the masterful cross-examiner is to be able to make these decisions quickly by listening to the answers.

And what about the responses? You should already know the answers, keep-

Sometimes, the best cross is no cross at all. But when you should ask questions, two major components must be considered: the method of questioning, and the purpose in the questioning.

ing in mind to never ask a question without first knowing the answer, a cardinal rule adhered to by seasoned trial lawyers.

Listen closely to the response, because sometimes you will get a spectacularly favorable answer. And when you do, *stop*. Don't ask the witness to repeat it or explain it. Save it for summation. Leave the jury in suspense, unsatisfied or a little curious — and then you satisfy them on summation.



Cross

Continued from page 3

Remember, one of the purposes of cross-examination is to secure the information you need to support your theory of the case.

Probing

Even with formal and informal discovery and meticulous preparation, you cannot know all the answers. Moreover, you may face a surprise witness, or new testimony may come up in areas that were overlooked.

The deft advocate develops the art of probing, a tool of advocacy that should be

in every trial lawyer's kit. Probing involves testing the witness's knowledge, with care.

Just like a professional boxer who uses his left-hand jab to set up his thundering right hand, the boxer is looking for an opening, and so are you.

How do you probe in the courtroom? By listening carefully to the witness's answers. And you may have to ask an open-ended question — but, just like the boxer, you must ask very carefully.

This technique requires immediate mental gymnastics. Like every phase of advocacy, it's a learned skill that comes with practice. Probing involves asking an open-ended question on collateral matters, to test the witness's knowledge, gen-

tly, by using short questions to get the information you need to make your point. And, it is enough that the answers to your probing questions are vague, hesitant or uninformed responses.

The most effective cross is strategically planned in advance. Focus on topics that, by their nature, allow for control of the witness.

Now counsel can easily depart from the conventional guidelines for cross-examination. By using a mix of open and leading questions, it permits the witness to provide a reasonable explanation of his answers uninhibited and in his own words. The trick is that counsel gets to pick the topic for the witness' testimony on key trial themes that will cause jurors

to decide the case in your favor.

Your ability to effectively cross-examine is the product of thorough preparation and experience. How does the lawyer get experience? One way is to take the advice of the proverbial cobbler wrapped around a street light post: responded to an inquiry by a well-dressed young gentleman carrying a briefcase.

"How do I get to Carnegie Hall?"
"Practice! Practice! Practice!"

James A. Johnson, of James A. Johnson, Southfield, is a trial lawyer and an active member of the Michigan, Massachusetts, Texas and U.S. Supreme Court bars. Contact him at 351-4808 or visit www.jamesajohnson.com