Mercer Law Review

Volume 42
Number 2 *Lead Articles I*

Article 6

3-1991

Cross-Examination

David L. Lewis

Cross-Examination

by David L. Lewis*

Cross-examination is a force of nature, an unswept intangible force of the universe harnessed in a small space for a very short time at best. It is akin to a newly created element seeking a place on the periodic table. Cross-examination is also the hunger of the wolf and the thirst for justice. It does not admit to being tied to a theory but only to being capable of absorbing life's breath. Good cross-examination begins with the very breath of life, complete with passion and righteousness. It is a terrible, swift sword.

Good cross-examination is the successful and unseen closing of all available escape routes. Like war, it has a strategy and like all battle, it has a theory. In war, however, the first casualty of battle is often the theory. It is possible to have a theory of cross-examination, but sticking to it may be impossible once the actual cross-examination starts. The famous ten commandments of cross-examination are a stumbling block to good cross-examination. Slavish attention to a body of rules inhibits the creation of further refinement. Cross-examination is susceptible to theoreticians but not to a single unified theory. Cross-examination is the exposure of character against the background of human nature. No unified theory governs human behavior and none can govern cross-examination in its search to expose successfully such behavior.

Some people insist that proper cross-examination consists of a rolling ball of butcher knives directed toward and upon the witness. Some people believe that the butcher knife strategy is always appropriate. Others would ask the padre about adultery just in case. One lawyer inexplicably began a cross-examination by asking whether the cooperating witness had a hairpiece, and if so, whether he was allowed to wear it in jail (he was not). Some lawyers prove that cross-examination is, in fact, more often suicidal than homicidal.

---

* Partner in the firm of Lewis & Fiore, New York, New York. Faculty Member, National Criminal Defense College, Mercer University, Macon, Georgia. New York University (B.A., 1976); Fordham University (J.D., 1979). Member, State Bar of New York.

A criminal trial is extremely serious. A client might be put to death by execution or rot in jail as a result of inartful cross-examination. A criminal trial is not the place to audition new material or ask questions because the examiner always wanted to know the answer. It is war in that sense, and an especially awful war, because the mistakes of the soldier result in the killing of the civilian sitting next to him. The soldier still has to fight on. Skip the rolling butcher knife theory.

Some people still believe that a killer will confess on the witness stand. Those who are more reasonable believe a killer will step forward out of the audience. The rest of us are tired of waiting and know that waiting for the "surprise" confession can be dangerous.

Summation and opening statements are skills. There are certain pitfalls; but these are solo acts. On the other hand, cross-examination is not a solo act, but instead is a duet with one side trying to force lyrics on the opponent. There is no control over the situation, and worse, it is live theater. A witness can say virtually whatever he wishes without fear of real punishment. There is, however, one civilizing rule: the witness must answer the exact question asked by the examiner. By judicious use of this rule, an examiner can actually control the situation by the exact and painstaking method of controlling the witness, thereby shifting the locus of power to the examiner.

The nature of the locus of power reveals itself in the cross-examination. The psychology of cross-examination is that of control over the environment, of which the witness is just one element. As an abstract concept, the nature of control of the environment is simple: beware of the judge. This is a prudent guideline and is extremely useful when a defendant is subjected to cross-examination. Every criminal defense lawyer knows the rules are different when the play shifts to the defense. Again, beware of the judge.

Assume the witness has completed direct examination. If the examiner did not observe and listen to the witness on direct examination, then he has missed the best opportunity to tune into the witness as a person. Through their behavior, attorneys and witnesses reveal clues that suggest they are lying or stretching the truth. For example, one prosecutor always licked his upper lip before lying to the court. Except for the total sociopath, every person who knowingly does something deceitful reveals clues suggesting his deceit. Call it body language, as did Julius Fast in his popular best seller,[1] or call it kinesthetic, as did Birdwhistell in his academic work.[2] The witness gives himself away. The examiner should recognize

---

1. J. FAST, BODY LANGUAGE (1972).

2. R. BIRDWHISTELL, KINESICS & CONTEXT: ESSAYS ON BODY MOTION COMMUNICATION (1970).

the type of behavior that indicates deceit. The examiner cannot wait until the examination is over to figure out the witness's behavior. Factoring in a differential on the basis that the witness will react differently knowing he is to be cross-examined as opposed to just examined, the questioner must be aware of the physical and psychological clues indicating deceit. The examiner who does not observe the witness loses the singular tactical advantage of examining after direct examination has done its damage. The examiner who watches and listens can "flick the scab" and definitely draw blood. More conventionally, the examiner is able to see points of vulnerability by examining the witness's face and physical movements.

What then does the on-deck examiner watch? One should examine the face and the muscles in the jaw and around the eyes. The hands and their movements are also important. Are the hands concealed or revealed? Can you hear the witness shuffle his feet? Does the voice go through a series of changes as the throat of the witness constricts? Does the witness take off his glasses or fiddle with things? Is the witness looking at the examiner, the jury, the defendant, or the judge, and do the looks signify anything? What is this witness showing us and what emotions are we watching? On cross-examination, ask the witness whether he hates the defendant if it is apparent he does. The verbal denial will conflict with the physical reality in such a way that the jury cannot miss it.

The observing examiner should also listen to voice quality and timbre. These are tell-tale signs of lying. A witness's hesitation might be a search for the direct examiner's approval. That search for approval can be magnified by calling attention to it during cross-examination. It is vital that the examiner observe where the witness looks, how the witness speaks, and all other physical manifestations of the witness. Such observations can be fertile ground for exploitation by the examiner who proceeds with care and not with a club.

Cross-examination is not about clubbing the witness to death. The jury believes and expects the wily and vicious defense lawyer to club any and all comers. The clubbing is expected, but the jury will hold it against the examiner and his client. It is believed that those who are well paid and highly educated can make people say the opposite of what is true. But the reality is that few witnesses are willing to change their story even if caught in an untruth. The witness's desire to maintain his self-esteem will all but force him to maintain the untruth rather than to recant and admit he was lying. So the witness adheres to his story, and the examiner clubs away at the witness. Everyone in their right mind knows this is not the proper way to obtain the truth. But because it has all been let out, it is a way to insure that the examiner does not go home, beat the children, and abuse the spouse. It is not, however, the way to try a lawsuit effectively and responsibly.

Trials are won by cross-examination and cross-examination is won on points, not on knockouts. One has to be ready, willing, and able to go the full fifteen rounds. The examiner who swings wildly at every witness will do more damage to himself than to the opposition. The greatest gift a cross-examiner can possess is tenacity. The second greatest gift is the skill to ask the same questions in different ways until the witness answers the question correctly. The examiner must work for the long haul. The ability to get a correct answer without wildly knocking oneself unconscious is easily developed by asking only one new fact with each new question. The single-new-fact rule allows the examiner to build slowly a logical progression of questions and one-word answers of agreement or denial. The questions and answers become an ever-growing wall of logic that resists the prosecution's objections, and if necessary, judicial interference. If one perceives cross-examination as analogous to the desire to build the world's tallest building, then the questions are not floors or rooms, but are in fact millions of individual bricks with which a structure is created.

The skill of cross-examination is a subtle one. It is designed to reveal the witness's character. Cross-examination designed to batter the witness reveals the character of the attorney and his client. Remember that the jury is an audience, and the audience is not always kind. The lawyer cannot batter the witness and proceed to win his case unless and until the lawyer has earned, in front of the jury, the right to treat the witness abominably. Often this is seen when the witness behaves so ghastly as to incite the jury's desire for blood. One example is the witness who tells the jury one thing and, when caught in a lie, tells the examiner and the jury that what they heard moments ago was not said. On a smaller scale, the lawyer earns the right to punish the witness when the witness clearly does not answer the question asked and tries to hurt the lawyer. In that instance, the jury usually approves of the lawyer punishing a smart-ass because the jury cannot themselves punish the witness. In each of these situations, the examiner can be a beast to the witness only because the examiner is functioning with the tacit approval of the jury as their avenger. The jury begins to see the examiner, rather than the prosecutor, as their champion, and one's preconceptions about the system are turned upside down. How does the examiner know the moment has arrived to punish the witness? It is simple. The examiner's internal voice has to say to him, "How dare he talk to these people that way?" If the voice says "How dare he talk to me this way?" the examiner has not yet earned the right to punish the witness. The outrage has to be shared by everyone in the courtroom. The advocate who is outraged at the witness, but alone in this outrage, is truly alone.

Witnesses are not all negative. Sometimes the witness who has to be demolished has favorable facts that he can present. While it would appear

philosophically impossible, skillful cross-examination requires the examiner to create a cross-examination that convinces the jury to believe the witness on one fact but disbelieve the witness on another. It is unethical to instruct the jury that a witness who lies about one fact may lie about others during his testimony. It is easy to elicit the favorable facts, and this skill, if satisfactorily learned, may result in destructive cross-examination. The art of cross-examination, however, lies in the ability to construct and safely traverse the span between the favorable facts and the destructive cross-examination.

The examiner must first determine whether he may get those favorable facts from another witness without creating ambiguity in the minds of the jury. If there is another method of eliciting those facts, then skip the nonsense and go after the witness. But suppose there are no options. Then the examiner must elicit the favorable facts, build the bridge, and then attack. The bridge is best built by the "discovery" of discrepancies that are sufficiently noticeable. The alternative method is to develop an examination revealing a bias against the defendant that explains why the witness testified against the defendant. The idea is to show the jury that the witness never realized his favorable answers helped the defense. The bridge questions cannot serve to strengthen the credibility of the witness. Another bridge method useful in the cross-examination of police or other law enforcement officers is questioning designed to elicit the answer "I don't know." The more times a witness is forced to answer "I don't know," the more uncomfortable he feels. The physical reaction of the witness coupled with the admission of lack of knowledge is a successful transition from a helpful fact to one worthy of demolition.

Once the transition is made, or upon first getting up to cross-examine, the examiner must look at and look over the witness. The silence allows the tension to build. The examiner should conclude the silence with a deep breath to center himself after having used the time to create anxiety in everyone. The examiner should look at the witness while questioning and never take his eyes off the witness when either of them is speaking. The examiner should follow the witness's eyes and look away only after a slight interval of silence. During cross-examination of a witness, silence by an attorney, which is otherwise intolerable, can be one of the lawyer's greatest allies. It is obvious that when the witness begins a new tale, he is doing so to avoid cross-examination on certain areas. In response to the new story, the examiner might ask, "And now *that* is your story?" and remain silent even if there is an objection, all the while looking the witness right in the eyes.

Looking the witness in the eyes while examining him forces the witness to look at the examiner. It forces a physical confrontation in the sense that the examiner cannot be avoided and the witness's sense of isolation and solitude is complete. Most witnesses will not break eye contact be-

cause they unconsciously see the struggle as one for dominance. The lawyer can break eye contact in order to get a document, for instance, but this option is not available to the witness, whose only job is to answer the examiner's questions.

Cross-examination requires a method of proceeding that does not hurt the client or the client's cause, and at the same time allows the lawyer to look good. One such method is known as Theory Z. Theory Z is a mechanism designed to avoid surprises. The examiner selects the areas in which he is going to examine and writes down on a piece of paper the actual answer that the examiner wants.

Every lawyer wants to cross-examine with the brilliance of the television lawyer. Every lawyer wishes he were able to exercise the great turns of cross-examination that marked the work of the legends of the bar. Theory Z makes it possible.

Theory Z requires the examiner to decide in advance what specific points he wants to make. The examiner decides that he must prove a certain proposition, and then he must be willing to ask an infinite number of questions in order to prove that proposition. One proceeds strategically by working backwards. The examiner should write each point on the top of the page and create a downward tree, writing step by logical step in reverse. The examiner will then work backwards, following all the pathways away from the proposition back to the first question. This initial trip that the examiner takes alone will enable him to take the same trip with the witness at a later point in court, closing the doors of opportunity that the witness is wildly seeking. In high school, we all learned to do geometry theorems and to proceed logically forward to a particular point. We began with a stated proposition and were given the conclusion. In reality, we were following a logical tree forward step by step. And in so doing, we "proved" a theorem. Theory Z is no different. Starting at the beginning, however, will result in the creation of millions of little trees that have no discernible end or beginning. Therefore, in order to limit the number of issues and answers, Theory Z requires the examiner to work backwards from the item to be proven toward the given. However, the given is usually "Mr. Witness, I am John Q. Lawyer," and sometimes not even that is the given.

For example, the examiner may convey his depth of distaste for the witness by the rejection of certain social norms (namely, by not introducing himself to the witness). In the case in which there is an identification issue, the examiner may not wish to divulge the fact that the defendant is in fact the perpetrator. In the case in which a witness is inventive, the examiner can hurt the witness by not telling the witness whose lawyer is damaging him; therefore, the witness does not know against whom to strike back. In each of these cases, the given is the starting point. Some-

times the given must shift: "You tell us, sir, that you have been in jail?" "And you do not want to go back to jail, do you?"

These two questions might be the beginning of the cross-examination. There is an indication of the examiner's disdain for the felon because there is no exchange of names. The direct reference to being in jail notifies the jury that the social distancing that would otherwise be rude is appropriate and also guides the jury in some measure to such a social distance.

In the case of the informant, Theory Z, in its most basic form, is designed to show the jury that the witness is exchanging the innocent defendant's freedom for his own ill-deserved freedom. The next level of interrogation is to show the jury the reason for the trade. Theory Z shows the witness's attempt to buy freedom and that the defendant is the currency used in the purchase.

Theory Z is the erection of a bridge between the snitch's attempt to buy his freedom and the initial question, "You tell us, sir, you have been in jail?" The result is that in the space between those two points lies the cross-examination on the issue. If we begin with the man being in jail, then we will quickly approach and overcome our objective in a set of questions that are perfectly linear. The success, however, is predicated on a fallacy. The fallacy is that the witness will deliver an answer that advances the inquiry in the direction the examiner wishes, even when that answer is detrimental to the witness. This is not only a fallacy, but it is also fantasy.

Even the most prepared, favorable, and professional witness may fail to deliver the right answer, thereby preventing the creation and delivery of the perfect, clean, and economical cross-examination. An informant is usually the *most* hostile type of witness. The examiner desires that the cross-examination reconstruct reality. Ultimately, what the defense attorney has in his arsenal is the entire range of human emotion. The examiner should plumb the depths of that emotion. The means to expose emotion is the reconstruction of the reality that occasioned the expression of the emotion. Cross-examination allows the examiner to place the witness back into the horror of the moment by evoking the sensory elements related to the experience. Put simply, good cross-examination can occasion a flashback or an extended regression in time.

In the case of an eyewitness, if the facts and circumstances surrounding the identification are doubtful, there is no reason why the examiner cannot use the witness to reconstruct the reality and flashback to the event and recreate the areas of doubt. For example, once the usual cross-examination is done concerning the opportunity to observe time, light, distance, and the other usual elements of observation, the examiner can proceed to recreate the reality of the incident, utilizing what the witness has stated in direct examination. From the direct examination, the examiner ex-

tracts the details relating to the action of the event. The examiner needs to see these details as image packages. A man is attacked and robbed from behind; he sees nothing, but his daughter testifies that she saw the robbery and unmistakably identifies the defendant. She states that she had just been to the fish store. After the classic cross-examination, we want to show that she is not a passive observer, but in fact, acted to save her father. It is inconceivable that the witness would not say that she tried to save the person attacked. It is inconsistent with human nature for one to say that she stood by idly and let someone beat her father, mother, or child. So she will clearly say that she tried to help her father. Add to the pot that the client has told you that he was hit with the fish. The only items with which the girl could have saved her father or attacked the assailant were her hands or what was in her hands, the fish. The cross-examiner should lead the witness to state that she loved her father, that she would not hurt him, that she would not let anyone else hurt him, that she tried to protect him, that she did protect him as best as she could, that she fought with the assailant for her own safety, and that she believed she was in danger. Now she is no longer the passive eyewitness. The examiner has begun the process of airing the emotions of the witness. The value of airing the witness's emotions lies in the fact that the very presence of the emotions interferes with the witness's ability to perceive, retain, and recollect information. The point is made, not by the dry recital of facts, but by the reconstruction of reality in a means favorable to the client, in a manner providing reconstructed reality more clearly and more vividly than any other competing reality.

The means of making the incident vivid and clear is through questioning that draws out selected details and puts them together. The examiner should focus only on the issue of the weapon in the hands of the girl defending her father. She used the fish as a weapon. She took it and swung it; she swung it like a baseball bat, and she repeatedly kept swinging it at the robber. Ask her about the fish: "You swung the fish, and you swung it to hit the robber." "You hit the robber with the fish, and you kept hitting him." "You wanted to hit him, and you wanted to hit him with all your might." "You kept hitting him." "You could feel how heavy the fish was yet you swung it in all directions." "You looked at the fish when you swung it at the robber because you wanted to hit him." "You looked at the target when you swung the fish because you wanted to hurt the robber." "You thought about the ways you could hurt him." "You did the things that you could to hurt him, and you kept doing it until the robber ran away." The jury will then get a clear image of the witness looking at many other things besides the robber. The verbal recitation of the acts is such that the witness's actual ability to observe is significantly reduced.

There are other avenues of cross-examination here as well. What other events act to lessen the witness's attention to the robber? If her father fell to the ground during the robbery, the examiner must force her to tell the jury that she was worried about him, that she tried to make sure during her struggle with the robber that her father was not hurt, and that his condition was a further distraction. The examiner must show the witness and the jury the powerful emotions tied to seeing a parent hurt, how frightening that emotion is, and the vulnerability such an event causes. The result is that a tidal wave of emotions is created, built up by little steps leading to a win on points rather than a knockout. The evocation of the emotions surrounding the event, when properly handled, shows that the last thing on the witness's mind was to procure a description for the purpose of accurate reproduction in a courtroom. In summation, the jury can be told that the witness says she will never forget that face, but the evidence showed quite clearly that she never had an opportunity to see it.

While some might say that reconstruction of reality is functional with a witness who is mistaken, it is not possible with a witness hellbent on lying, such as an informant. In a sense this is true. Cross-examination will expose character, but it will not force Perry Mason-type confessions out of the witness. With an informant, the defense lawyer must undertake reconstruction of reality on pure impeachment issues, not on the facts. Cross-examination becomes a crucial tool with which the defense lawyer forces the informant to agree to tight, singular elements of detail construed to create the pieces of a larger image until the images themselves pile up with the vividness of life. In the case of the informant, the images can be about the kind of life the informant is trying to avoid by telling his story. The informant comes forward because he does not want to go to jail. Either the informant has been in jail for a time, is in jail until this deal is actually made, or has heard about jail and does not want to be there at all. Asking the witness about whether he made the deal to avoid jail is easy and leaves no impression on anyone in the courtroom. Take the witness through the real experience of jail. Imagine it in your own mind and then ask the witness what that experience is like. Draw out the details of what it is like when you are told when to wake up and when to go to bed. Ask the witness what it is like not to be able to have whatever he wants to eat. Imagine it in your own mind and then ask what it is like. Draw out the details of what it is like to live in a cell, in a cage. Ask the witness what it is like to live in that cage with a stranger. Then ask him if he is afraid and if he wants to get out of jail. Ask him what it is like not to be able to see his mother, his lady, his child, unless it is visiting day. Ask him what it is like not to be able to touch the people that he loves. Imagine what it is like and draw out the details of a strip search, and what it is like to have a stranger poke around inside your body. Ask the witness if he wants to get out of jail, and then tell the witness and the

jury that this testimony is the way out. Then ask the witness if he would give up any opportunity to get out of jail.

These are examples of reconstructing emotional reality. But what happens when the defense is that the client did nothing wrong? Suppose your client is claiming that he did not know what was going on at the time the crime occurred. He was in the shower. The agent has testified on direct that certain events occurred, and that your client was there for some of them. First, establish that your client was not there for other events. Then establish that the agent was a trained observer, that his security in part depended on knowing where every suspect was at all times, that he took security precautions, that in fact he had control over the situation, and that he had made an agent-like judgment that the defendant, your client, was not a danger to the agent. The first key is to build up the agent's prowess and then lead him to the inevitable conclusion that this defendant was not a danger or a threat. Then work on how the agent came to that conclusion. Obviously, he heard something or saw something. The client did not leave the building or room because the agent would not just let him go. The client must have gone somewhere else. Establish that the agent heard the sound of something like running water, similar to a shower, and that this sound indicated to the agent that he was not in any danger from the defendant. Then draw out from the agent exactly how the shower sounded. Paint a picture of the defendant in the shower. If it is unclear how to accomplish this, tape record someone in the shower from another room. Listen to the tape, describe in words what you hear, and then use those descriptions to frame the questions.

The next requirement of cross-examination is experience. The tape-recorded shower is one example. If you try murder cases and have never been to an autopsy, how can you know what the internal elements of the human body look like? If you are going to try a case involving a particular weapon, you should handle the weapon, feeling its weight and surface. You need to put yourself in the position of the killer. Walk around and around the crime scene, and look at everything over and over again. Get the feel of it all. Experience makes one a better examiner.

What has happened to Theory Z? We have been using it to work backwards from our conclusion to define the important details and ask questions. Theory Z forces the examiner to explore each and every possible pathway as well as all the places to which a witness might drag the unknowing and ill-prepared examiner. The examiner, while preparing for the cross-examination, should travel each and every possible path, trying to anticipate any direction in which the witness might seek to hide. Subsequently, there can be no loss of control and no surprise to the examiner, because under Theory Z the examiner has already seen the avenue of escape and constructed the cross-examination in such a fashion that it

turns an avenue of escape into a cul-de-sac that the witness discovers is a trap.

The result in the courtroom is that the witness looks like he is frantically trying to find a way out while the examiner merely proceeds inexorably forward. Because of the witness's mental flight toward some avenue of escape, the jury sees that the witness is rattled and will assume that a rattled witness is not a truthful witness. This sociological conclusion emerges from the physiological clues transmitted to the jury. All the while the examiner looks totally professional, moving forward to a decision on points and not concerned about a knockout. Does this always work? Yes. However, problems can occur. Suppose the witness against the defendant is a Roman Catholic priest, and the defendant is charged with burglarizing the rectory. In a pretrial context, the priest has remarked that the black defendant wore sneakers because they all do. The priest's answer was careless and foolish, but to just elicit the answer in a straight forward way would diminish the impact on the jurors. It is easy enough to get the priest to say the offending words again, but it denies the examiner the opportunity to help the defendant by milking the moment. Therefore, the defense lawyer should ask the priest to describe each item of clothing the robber wore, beginning with the hat, and to articulate physical features and other items. The result of this examination would create almost unbearable tension in the witness so that when the question finally came, the priest, unaware of his racially offensive answer, would blurt out the offending remark as if it were a relief. There is nothing special about getting a witness to repeat a consistent answer. There is something special about creating the tension in the witness. It is part of the psychology of the cross-examination. Theory Z is designed to regulate the cross-examination and to insure control over the witness. It does nothing for the area of imagination.

The heart of great cross-examination is imagination and flexibility. The reconstruction of reality requires a talent for imagination. Cross-examination is limited only by the examiner's own limitations. The skill at issue is agility of the mind. Agility of mind comes from experience, wisdom, and application of all five senses in observing the witness in the courtroom. In a murder case, when a witness comes forward to testify that she saw the defendant exit the building on the night that the deceased was presumably killed, most examiners are doing something other than watching the witness walk in. Every witness walks in and looks around. With all eyes focused on the witness, the witness is at her maximum discomfiture at the beginning of the direct. The witness is preparing her demeanor for the trial at this time. The most important event before the direct is the look that the witness gives or does not give the defendant. If you miss that as the examiner then you miss the first and key clue to cross-examination. After a devastating look by the witness to the defendant in a murder case,

the first question a defense lawyer should ask is "You don't like Anthony do you?" If the witness answers "No, no I don't" in an emphatic voice, this indicates the witness cannot be objective. The printed page cannot convey the personal venom behind the answer heard by the jury. The jury hears it only because an agile and alert examiner observed the witness before the witness was prepared to face the court.

What other types of agility of mind are needed? The examiner should have a sense of human nature gleaned from a wide range of reading materials. For example, if one is to understand adultery, it would be worthwhile to read *The Scarlet Letter* by Nathaniel Hawthorne and Gustave Flaubert's *Madame Bovary*. They are classic because of their depth of human understanding. It is essential that the examiner be in touch with the pulse of the world. The wise examiner will ride in trains, planes, and buses in order to listen to the type of people that show up on a jury and will keep up with the iconography of the age: television. The wisest examiner is out in the world watching and listening. Every conversation or period of silence is preparation for some cross-examination. Criminal law is about the relationship between people gone bad. By watching, reading, and listening, the examiner can get a refresher course on how things go bad. If the goal is to expose character, the examiner must be a student of character and the many ways it is concealed behind the thin veneer of civilization, which is easily cracked and chipped away.

The examiner should also be agile in the pursuit and punishment of witnesses. Very often a witness who wishes to test the examiner or the concept of control will attempt to get away with something by fudging an answer or feigning ignorance. It is at this point that the examiner has earned the right to punish the witness. And the way to do that is to pursue the witness's incorrect answer and "stick it to him." The best punishment is to take the witness down the road following the logical extension of the answer in order to show him that the penalty of not answering correctly is looking very stupid. For example:

Q: Did you follow him in your car?
A: Yes, and he was going at an excessive rate of speed.
Q: So the answer was Yes, you did follow him in your car?
A: Yes, and he was going very, very fast.
Q: Did you put in your surveillance report that he was going very fast?
A: No.
Q: How many miles an hour was he going?
A: Oh, I don't know.
Q: But you were following him?
A: Yes.
Q: Keeping up with him?
A: Yes.
Q: How fast was he going?

A: Very fast.
Q: In miles?
A: I don't know.
Q: You were in your car?
A: Of course.
Q: Does your car have a dashboard?
A: Yes.
Q: Does your dashboard have a speedometer?
A: Yes.
Q: Does the speedometer have a needle?
A: Yes.
Q: What did it say?
A: I don't know.

The agent was punished for volunteering information. In the same trial a different agent might answer "Well I guess—," and the following exchange might occur:

Q: You're a trained FBI agent?
A: Yes.
Q: You know you are trained not to guess?
A: Yes.
Q: And you know you should not guess?
A: Yes.

The idea is that the witness should know early on that it is better to answer correctly; otherwise he will be made to look like a fool. No witness wants to look like a fool. The examiner will turn the witness into a fool because he volunteered something that was not required. Generally, the jury wants to get to the important part of the story, they want the story to come to an end, and they want answers to the questions asked. The witness who blocks that process has forfeited the jury's protection and is then vulnerable; he can be made into a fool as punishment for not playing by the rules.

Every theory about cross-examination includes something about the judge. As a rule, judges are not friends of the defense lawyer. They have already decided that the defendant is guilty. They have also decided that the lawyer for the defendant is getting in the way of the process. Most judges are unable to set aside their own opinions. This is human nature in ordinary cases; but in the case of a judge, the combination of the raised platform and the black robe leads to a certain ill-deserved sense of infallibility. The bottom line is that the judge is usually no help to the defense. Defense lawyers who look to the judge for help are usually embarrassed by the court's disinclination to help. To the jury, the judge's denial of a motion to strike reduces the lawyer's credibility. It also seems that the emerging trend is that the judge no longer wishes the defendant to have full cross-examination. While the prosecutor can ask and re-ask the same

questions over and over again, repetition in cross-examination is now a mortal sin. Defense lawyers just beginning the examination process are told to move along or finish up. Time limits are now the rage, and even though fifteen minutes of cross might save someone fifteen years, judges are not interested in hearing it. Interested juries are often cowed by the robes and the raised platform.

Dealing with this type of judge is the defense lawyer's lot in life. It is important to stand up to these bullies in black; object for the record and in letters and correspondence. Tell the judge you are not finished and that there is other examination. Ask the judge if he is giving an order: "Are you ordering me to move on? If I don't move on, are you going to hold me in contempt?" Finally, ask the judge "Are you going to lock me up?" Tell the judge that the time limit is unacceptable and remind him of the penalties that the client faces. Explain that you would have asked more questions if allowed and that the failure to allow such questioning deprived the defendant of his right of confrontation and the right to counsel. If you are in state court, cite both the state and federal constitutions. Eventually, the judge will let you inquire, because he would not want an appellate court to reverse him on the basis that he is a schmuck.

Another area in which examiners get stuck is the unimportant point. There is a lot of impeachment cross-examination that is unimportant and makes the examiner look like a hypertechnical, pompous fool. It is easy to mistake the ability to impeach technically with successfully impeaching before the jury. The former is a lawyer's exercise, bloodless and worthless; the latter is the stuff that exposes the human condition and is itself valued. Not everything that persuades is impeachment. The examiner must select impeachment that matters. For example, proving that the witness had an illegitimate child who he cared for and accepted into his home is not really impeachment. Why would an examiner want to show that there is an illegitimate child? First, so what? Second, once the evidence shows that the parent loves the child, the impeachment ends up being a positive element of the witness's character that would otherwise be inadmissible. This example comes directly from a recent trial. The examiner thought the fact of illegitimacy was so heinous that nothing else said would overcome that out-of-wedlock act. The judgment of the lawyer in that case was impaired or skewed by the lawyer's belief that his morality was in fact the jury's morality, and that they would mirror or share his outrage. Actually, there is no reason to believe that a jury will follow the lawyer's belief. The better practice is to stay attuned to the jurors' beliefs and reflect those beliefs rather than impose the morality of a white, upper-class, educated, religious person on the jury. While it is preferable to be oneself in the courtroom, that is different from creating cross-examination to reflect the views of the lawyer without any sense of the community

point of view. One cannot cross-examine the same way in the city as one does in the country.

Theory Z protects against the imposition of the wrong values on cross-examination. There is no sensible pathway that, taken in reverse, will lead to an examination about children's legitimacy. It is only when the examiner deviates from Theory Z that he engages in the wild stabs of impeachment that invariably lead to self-inflicted wounds.

Theory Z cross-examination allows another pro-defense phenomenon to emerge. There is a great deal of cross-examination that need not be slashing, biting, or vicious, but that can still be effective. It is called judo cross, and it allows an examiner to be very kind to the witness and still cross-examine him in a fashion that proves the defense's point. The witness's ego, his need to conform, or his sense of his position in the world will act as a counterweight to pull the witness over to the defendant's side. The idea is that the examiner travels backwards again, via Theory Z, and creates an examination in which the witness must agree in order to be consistent with his own self-image and with what people expect of him. The examiner designs questions that eventually force the witness to agree with the inevitable conclusion, no matter how distasteful that conclusion may be.

The classic situation is the police officer who files a report and leaves out the most incriminating statement that he claims was said by the defendant but never appeared in his report. The examiner must show that this would be an amazing oversight, with no possible explanation; therefore, the defendant must not have made the alleged incriminating statement. To start the process one has to be gentle with the police officer. Ask him about his vast experience and the importance of statements by those in custody, and build up these issues, all the while forcing him to agree. Then ask him about his training. Establish that he was trained to write reports and that he in fact writes reports all the time. Then shift to how important it is to write reports. Show that the purpose of writing reports is to catch the guilty, protect the innocent, inform other police officers, including superior officers, and insure that in case anything happened to the officer, the report would serve the function of preserving the facts. Establish that the officer was trained not to rely on his memory but to write reports, and that reports are in part the basis for promotion and recognition in the department and are part of standard police procedure. Show that the officer wanted to follow standard police procedure, that he failed to do just that, and that he knows better. Theory Z works here because the examiner thought of all the reasons why an officer would file a report and turns those reasons into questions. And during the entire examination, no one yells, screams, or confronts. What the examiner accomplishes is the inexorable mounting of details that make the cop's story unbelievable.

This Article dissents from the common wisdom that one never can ask questions to which one does not know the answer. All rules are made to be broken in the appropriate situation. One change in the rule might be to never ask a question to which the witness knows you do not know the answer. Put more simply, one has to examine in order to take a chance. The examiner relies on a combination of luck and the ability to command and control the courtroom to keep his improvising from being obvious to the witness or the jury. When moving into uncharted territory, go very slowly and carefully. One has to examine with a very light probe. For example, suppose there was information that the witness stabbed her upstairs neighbor. The examiner did not trust this information. The first question the examiner should ask is not whether the witness stabbed Mrs. X or anyone else; the first question should be "Did you ever pull a knife on someone?" The advantage is that if the witness said "No," then there is no harm to the credibility of the examiner or the examination. If there is a specific act charged and the examiner is slightly incorrect, the witness can answer in the negative, although this is not the truth. By starting with the pulling of a knife, it is more likely than not that in the violent culture in which we live, there was a knife pulled. In the end, the information is about a person with the same name, but not the same person. The witness, however, responded by asking the examiner, "Who me?" the equivalent of "Gun, what gun?" The examiner told the witness that indeed the question was to her and to take her time and think about it, hoping that anything might trigger an affirmative answer. The response was in the affirmative, and the examiner, by asking if she knew the answer, elicited that the witness pulled a knife on her brother and would have killed him if he took another step in her direction. The examiner broke the cardinal rule and survived because the inquiry began at the most general level and slowly funnelled into the areas that were specific. Positive assertiveness about general areas leads the witness to believe that the examiner knows the specifics and allows an examiner to ask a question to which he does not know the answer.

So is this the philosophy to which an examiner should subscribe? Perhaps at this juncture it is a plea for better and more responsible advocacy on the part of us all. Is there a theory of cross-examination? Maybe the theory is to ignore all the commandments and the rules. Start with the most generalized singular fact and slowly move toward a demolition of the witness, after having worked it all out backwards with Theory Z. Cross-examination is itself a paradox; it elicits lies to get to the truth and asks questions that are really the answers. The examiner moves forward only after he has proceeded backward. The only real rule is that when you are in trouble, go back to the most general idea available and work back up to where you were. It is an elusive art and an exacting science; it is a skill of tradecraft.