

Leading questions in cross-examination

By: F. Dennis Saylor IV and Daniel I. Small August 31, 2017

Nowhere is the contrast between direct and cross as clear as in the use of leading questions. In cross-examination, just about every question should be leading. (Sometimes, the right non-leading question can be devastatingly effective, but we'll discuss that in a later column.)

But just because you're allowed to lead doesn't mean you should ask long or convoluted questions. To the contrary: Your questions should generally be as short as possible.

A short question is almost always clearer than a long question. A long question poses obvious risks of confusion and a waste of time. A somewhat less-obvious risk is that a long question is taxing to listen to. If jury members have to strain to follow the questions, they'll get tired of it and simply stop listening.

A long question also tends to give the witness some wiggle room. For example, if a question has four parts ("Aren't W, X, Y and Z true?"), the witness can disagree with one of the parts and answer accordingly ("No."). That leads to a loss of control and, all too often, some petty squabbling between the lawyer and witness.

A simple question ("Isn't X true?") is more likely to result in the answer you want. Better yet, the simpler the question, the more obvious it will be when the witness is evading the question.

There are two typical ways in which questions are unnecessarily long.

1. Too many topics.

Sometimes lawyers cram too many points into a single question:

So you flew to Boston on March 17, and then rented a car at the airport and drove to Worcester and met with John Smith at the Holiday Inn on Main Street to discuss the proposed deal, correct?

Instead, break it down into multiple short questions:

You flew to Boston?

That was on March 17?

You rented a car?

Then drove out to Worcester?

You met there with John Smith?

The meeting was at the Holiday Inn on Main Street?

And at that meeting you discussed the proposed deal?

Be patient. If the point is worth making, take your time and do it right. This may be particularly important if you are emphasizing a series of related points:

You had time to do X, Y and Z before the police arrived, right?

That almost always works better as a litany:

You had time to do X before the police arrived?

You had time to do Y?

You had time to do Z?

2. Too many extraneous words and phrases.

Sometimes lawyers stuff their questions full of unnecessary words:

Now, there came a time, did there not, when you had occasion to travel to Worcester, Massachusetts, in order to engage in a series of meetings and discussions regarding a possible business transaction?

This is just “noise” that detracts from the question and causes jurors to time out. Strip all of that out:

You went to Worcester to discuss a possible deal?

There are lots of different styles of leading questions, all of which suggest the answer to the witness. But nearly all of the time the core of the question ought to be a single and relatively simple statement of fact.

Sometimes lawyers add “tags” to such statements, making clear that they’re asking a question (“*Isn’t it true that Nantucket is an island?*” “*Augusta is the capital of Maine, right?*”). But the simple statement of fact is often enough, with voice inflection indicating that you’re asking a question. Sometimes, even a single word will suffice.

For example, suppose an eyewitness’s ability to see is a critical issue, and it was foggy on the day in question. Of course, don’t ask an open-ended question (“*What was the weather that day?*”). You could ask the obvious leading question (“*Was it foggy that day?*”), but the unadorned statement (“*It was foggy that day*”) is more likely to be effective.

Q: It was foggy that day?

A: Yes.

Q: Drizzling?

A: Yes.

Q: Cold?

A: Yes.

Normally, on cross-examination the witness ought to answer “yes” or “no” to just about all your questions. Many lawyers say that the range of answers should be even narrower than that. Because the lawyer wants the witness to validate all of the factual statements, they say that you should frame all of your questions so that the witness only says “yes.”

That’s good advice most of the time. There is, however, some danger that your presentation may feel unduly rushed or clipped, or monochromatic, if every question ends in the same answer.

For that matter, the same is true if every question is asked in exactly the same format. It’s particularly monotonous if every question begins or ends with the same tag phrase. So don’t be afraid to mix things up a bit, especially on matters that are relatively less significant.

Cross-examination is an art, and a subtle one at that. But some things about it are nonetheless true: A short question is almost always better than a long question, and a simple question is better than a complex one.

Previous installments of Tried & True can be found here. Judge F. Dennis Saylor IV sits on the U.S. District Court in Boston. Prior to his appointment to the bench, he was a federal prosecutor and an attorney in private practice. Daniel I. Small is a partner in the Boston and Miami offices of Holland & Knight. He is a former federal prosecutor and teaches CLE programs across the country.