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LITIGATION A Special Report

'Your Witness'

The best way to cross-examine is to exercise *selective* control.

BY MITCH ZAMOFF

Lead the witness. Get in and get out. Do not ask a question to which you do not already know the answer. Keep asking the question until you get an answer. Do not ask an open-ended question.

The time-honored rules for successful cross-examination share a common goal: control. Control over the questions. Control over the answers. Control over the witness. The experts generally agree that the less a witness talks during cross-examination, the better. The perfect cross, it follows, is one where the cross-examiner exercises total control over the witness, eliciting a string of helpful one-word affirmative answers to a string of leading questions.

But I submit that the experts who insist on total control during cross-examination are at least partially wrong. The perfect cross-examination is not about *total*, but *selective*, control. The seasoned litigator, who presumably has mastered the art of witness control, can maximize the impact of cross-examination by carefully considering not only when to exercise total control over the witness, but also, perhaps even more importantly, when to strategically relinquish that control.

The rewards of this strategy can be enormous. There is no better way to discredit a witness than to have him, in his own words, expound upon thoroughly unbelievable answers. While a string of yes or no questions may reveal that a witness has a lame explanation for certain conduct, it is exponentially more effective to make the witness offer that explanation himself, and to probe—and draw more attention to—that explanation through a series of carefully tailored, nonleading questions.

A total-control approach also can have the unintended effect of *helping* an unlikable adverse witness. Rather than elicit a series of one-word answers that do not give the fact-finder a particularly good sense of the witness, the skilled cross-examiner must look for opportunities to expose the witness's less appealing personality traits and viewpoints in open court. For maximum effect, this often requires a strategic relinquishment of control.

TULIA TESTIMONY

This strategy was successfully employed in a widely publicized habeas corpus proceeding earlier this year in Tulia, Texas. In a contested evidentiary hearing in March, habeas petitioners who had been arrested in an undercover narcotics "sting" conducted by Thomas Coleman—a deputy sheriff with a history of dishonesty, unreliability, and racism—challenged their convictions on the grounds that the state failed to disclose impeachment information about Coleman and that Coleman's dishonesty tainted the integrity of his purported investigation. The petitioners were jointly represented, on a pro bono basis, by Hogan & Hartson (of whose team I was part), Wilmer Cutler & Pickering, the NAACP Legal Defense Fund, and Texas criminal defense attorney Jeff Blackburn. Before examining Coleman at the hearing, I reviewed his reports and prior testimony and determined that it was critical to strategically relinquish control in questioning him.

While there is always some risk in asking any witness—especially a shifty witness like Coleman—an open-ended question, that risk can be minimized, if not altogether eliminated, by being thoroughly prepared. It is certainly a risk that the skilled cross-examiner should be willing to take in view of the potential benefits of selective control.

Now, there certainly are cross-examinations that call for a total-control approach. But there are many witnesses whom the skilled cross-examiner could more effectively question through the use of selective control: witnesses who have implausible explanations for acts or omissions that are at issue in the case; witnesses who have made prior inconsistent statements about the same subject; witnesses who have difficulty admitting that they have made a mistake; witnesses whose personalities are likely to provoke a negative response.

Indeed, so long as the cross-examiner selectively relinquishes control only in areas where the witness cannot score points, I suggest that a total-control approach would result in lost opportunities in most cross-examinations.

During the middle of the cross-examination of Coleman, special prosecutors for the state of Texas made the incredible admission that Coleman's oath-bound testimony was so untrustworthy that the convictions of 38 defendants convicted on Coleman's say-so should be

overturned. While a total-control examination would have revealed that Coleman made prior inconsistent statements and that his police work was sloppy, it was Coleman's own words—his implausible explanation for why he waived arraignment on theft charges he supposedly did not know about, his detailed explanation of the importance of the police procedures he violated, and his shocking discussion of why he believed the "N-word" was no longer racially derogatory—that led the state to the inescapable conclusion that it could no longer stand behind Coleman.

The Keys to Selective Control

There are at least five keys to the development of a successful strategy of selective control.

1. Study the witness. This involves more than reading a deposition transcript for possible impeachment material. The cross-examiner should try to develop a feel for the witness's tendencies. Read as much transcript and watch as much video as possible on the witness. Observe the witness in nonjudicial settings, such as speeches and interviews, if possible. We studied two uncut television interviews with Coleman, in addition to reviewing several trial transcripts and a deposition transcript, before determining exactly how and when to relinquish control over him at the hearing.

2. Identify "safe" areas. The cross-examiner can relinquish control over the witness only in safe areas of testimony. These areas may be of little consequence to the ultimate issues in the case, or they may be of critical importance where the witness is sufficiently tied to a dubious story or opinion that he can do you no harm. For example, Coleman had been caught using the "N-word" and other racial slurs during his investigation of the Tulia defendants. Since there was no possible justification for that language, Coleman's attempt to justify it under oath was a safe area. In fact, as usual, it was far more devastating for Coleman to implausibly explain, in his own words, why he used that language than it would have been for him to answer leading questions about that issue.

3. Listen carefully. Do not tie yourself to a script or think ahead to your next question while the witness is testifying. Listen to the witness. The rambling witness will often make statements that are inconsistent with statements he has previously made. He may even surprise you and make two statements during the same cross-examination (if it is long enough) that are inconsistent with one another. It makes no sense to relinquish control if you are not in a position to capitalize on the nuggets that the witness furnishes you when he is not being controlled.

4. Savor the true impeachment moments. Too often, cross-examiners rush to a moment of true impeachment and then leave the area too quickly, presumably fearful that the witness will somehow find a way to reconcile the inconsistent statements. This is almost always a mistake. The skilled cross-examiner should know ahead of time whether the inconsistent statements are capable of being reconciled. If so, it is not a "true" impeachment moment. If not, the cross-examiner should relinquish control to set up the impeachment.

In Coleman's case, I did this by asking him a series of open-ended questions about why it is important for police officers to be detailed and accurate in writing police reports, forthright with their superior officers and the courts, and totally unbiased in their enforcement of the laws.

5. Know when to reassert control. Selective control is, in reality, the ultimate form of control. The cross-examiner must develop a sense for when to shut down the witness and take back total control. This sense of control will flow naturally from a well-crafted cross-examination road map. Too many open-ended questions may cause the exam to lose structure and give the fact-finder the impression that you are not in charge. The cross-examiner should ensure that the exam is structured in a way that each period of relinquishment is closely followed by a total-control hammer. The fact-finder must always believe that the cross-examiner is in control, even when you strategically loosen the reins to allow a witness to harm himself.

After listening to a day of Coleman's testimony, the judge who presided over the Tulia habeas hearing found that Coleman's testimony was "absolutely riddled with perjury and purposefully evasive answers" and that Coleman was "the most devious, nonresponsive law enforcement witness this Court has witnessed in 25 years on the bench in Texas." In fact, the month after the hearing, Coleman was indicted by a Texas grand jury on three counts of aggravated perjury based on his testimony at the hearing. It would not have been possible for either the court or the grand jury to reach such powerful conclusions had Coleman been totally—rather than strategically—controlled on the witness stand.

Though control is undoubtedly the linchpin of successful cross-examination, total control is not always the answer. Only by considering when to selectively relinquish control will a trial lawyer maximize the tools available during cross-examination.

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