CROSS-EXAMINATION IN INTERNATIONAL ARBITRATION

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Need Abstract

Law and Order's Jack McCoy conducts lousy cross-examinations. I marvel how McCoy's defendants cooperate in his long, windy speeches that pass as questions. I marvel again at lawyers in international arbitration hearings who imitate his style. They learn an unpleasant lesson: long, windy questions invite long, windy answers that damage the examiner's case.

Every question to a hostile witness can bring rewards; an admission from an opponent can be more convincing than the combined testimony of several friendly witnesses. But every question carries risks; the examiner can unintentionally advance his opponent's case. Commenting on one futile cross-examination, the U.S. Supreme Court once observed:

> [W]e think it may be said that the complainants commanded every available resource and all the ability and knowledge, both scientific, legal and common, in this work that could by any possibility be put into an attempt to break a witness by cross-examination.
>
> *A careful reading of this testimony, it seems to us, is convincing of itself and by itself of the truth of the story.*

The IBA Rules on the Taking of Evidence in International Commercial Arbitration (IBA Rules) have given cross-examination skills new importance.

Cross-examination is often a methodical interrogation. "Under the pressure of a strong cross-examination, the truth oozed out of this witness, drop by drop" is how another Supreme Court opinion described a successful cross-examination. For small drops to accumulate into the intended impression, counsel must have patience, a well thought out plan, and the skills to control an adverse witness.

The IBA Rules on the Taking of Evidence in International Commercial Arbitration (IBA Rules) have given cross-examination skills new importance. These rules represent a compromise between the civil code and common law systems, with a healthy dose of practicality thrown in. Direct evidence is presented in advance of the hearing through written witness statements-a concession to practicality. Witnesses are then required to appear at the hearing and subject themselves to their opponent's questions. The IBA's inclusion of cross-examination reflects the strong bias of common law lawyers-found in Professor Wigmore's frequently quoted testament-cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth."

Litigation vs. Arbitration

In international arbitration, the engine is still in development. While the IBA Rules allow cross-examination, they do not adopt procedural rules to regulate the process. Cross-examination rules have evolved over several hundred years, but they still vary from jurisdiction to jurisdiction. The English rules, for instance, have more constraints than those in the United States. n England, the respondent's counsel is required to "put his case" in questioning of the claimant's witness, but the witness's answers can only be impeached with specific pieces of conflicting documents or testimony. There is no similar rule in U.S. jurisdictions where I have practiced. In most U.S. jurisdictions, the questions can be wide ranging and relatively unregulated as long as they cover relevant subjects. Counsel moving among jurisdictions have the challenge of adjusting to these varying rules.

The challenges multiply when there are no defined rules. What rules will apply in an arbitration proceeding is at the discretion of the arbitrator who chairs the tribunal (the tribunal chair), (changed to avoid sexual stereotypes) who may or may not come from a common law tradition. The tribunal chair's rules may be hard to anticipate and thus hard to prepare for. Counsel may be freed from restrictions found in litigation on the form of questions, use of documents, eliciting

hearsay, or more constrained by the sense of congeniality that generally surrounds arbitration. For instance, that more congenial atmosphere may cause a tribunal chair to interfere with an aggressive cross-examination that would be permitted in court. I did it myself when I chaired a recent arbitration between Japanese and Peruvian companies.

Savvy counsel also can use the absence of rules to engage in gamesmanship. (I donlt care for this alliteration; I would prefer "practice gamesmanship") For example(just to change the phrasing), in one commercial arbitration arising from the 1987 Stock Market Crash, Bear Stearns was seeking to recover from a market-maker who had lost $50 million and allegedly had a deficiency at the end of the day. The market-maker claimed Bear Stearns had stolen his positions and profited from them. Bear Stearns's lawyers took advantage of the lack of a hearsay rule to present a witness who had not participated in the events and, therefore, could not be effectively cross-examined. My cross-examination had to do what a simple objection would have done in litigation: create doubt about the worth of the testimony.

The less formal setting in arbitration also works against strong cross-examinations. The formality of the courtroom setting has been intentionally created to make witnesses uncomfortable and impress them with the seriousness of purpose. A judge in robes, witnesses segregated and then exposed on the witness stand, and examiners for the plaintiff and the defense free to use position and movement to their advantage, are all absent in arbitration. Business people are comfortable in conference rooms where most arbitration proceedings take place. The setting is less formal and the positioning of witness vis a vis the examiner can be awkward, which hampers the examination.

Even with these differences, effective cross-examination is possible when the examiner understands it purposes and techniques.

Testing Credibility

The best known purpose for cross-examination is testing credibility. Cross-examination can also provide a more complete story than the edited one presented on direct, explore weakness in the logic of the opponent's case, repeat case themes, and/or gain concessions about important facts, thereby making those facts largely irrefutable. Why "or" couldn't these be cumulative?

A witness's credibility can be judged simply by observation. In the words of the U.S. Supreme Court, triers of fact can "obtain the elusive and incommunicable evidence of a witness's deportment while testifying." Under the pressure of cross-examination, the witness's posture, demeanor, and chosen words help the tribunal form an opinion about the truth and usefulness of the testimony.

A witness can also be impeached in many ways. Questions probing the witness's bias, confusion, or interest in the outcome, or the witness's bad character or prior bad acts (such as commission of a felony) are common cross-examination subjects. A witness's prior inconsistent statements are always a fruitful avenue to explore. The illogic of the testimony can impeach a witness as quickly as a sweaty brow or shifty eyes.

My examination of Nelson Bunker Hunt, the Texas oil billionaire, about his famous silver manipulation demonstrates how a "drop-by-drop" cross-examination can overwhelm implausible testimony. In 1979-80, the Hunt Brothers, with several co-conspirators and the aid of major financial institutions, purchased large quantities of silver futures contracts and took delivery of silver bullion on the commodities exchanges in New York, Chicago and London. This trading constricted supply, which drove silver prices from $6 per ounce to $50 in four months. Minpeco S.A., a major silver dealer, lost $80 million in several weeks from its short futures positions.

In the ensuing lawsuit, Bunker Hunt testified on direct that he made independent trading decisions and did not conspire with other alleged conspirators, including his brother Herbert. We planned to confront Bunker with a pattern of common trading with Herbert to rebut this testimony. Patience, however, is important in cross-examination. Just like an ambush sprung too quickly, a witness can slip away or the significance of an answer lost if the climax is reached too quickly.

We did not go directly to the common trading pattern. We started with the surrounding details which might have seemed mundane but were important. We had Bunker admit to the physical layout of the offices with Herbert: same building, same floor, adjoining offices. Once we established that he and his brother were regularly in close proximity, we sought to cement his direct testimony so he could not slip away from the cross-examination. We asked him about his discussions with his brother:

Q: Did you discuss strategy with Herbert Hunt generally when you and he were both in the office?

A: No. He did pretty much what he wanted - he did what he wanted to do, and I did what I wanted to do.

* *

Q: At any time during the period of 1974 through 1980, did you and Herbert Hunt agree in advance on a particular day you would buy silver?

A: I don't recall that ever occurring.

We then offered Mr. Hunt the logical conclusion of his position: his common trades with his brother must have been a "coincidence" and he accepted our invitation.

Q: On occasion in the period of 1974 through 1980, when you and Herbert Hunt held the same amount of silver and the same contract, either a futures contract or a forward contract, would you say that was a coincidence?

A: I don't recall that ever occurring but if it did occur, it would have been a coincidence.

As soon as he spoke these words, we dropped two feet of files on the table-for their visual impact-and began asking him about common transactions. An example of the questioning went as follows:

Q. Mr. Hunt, I'm going to mark for identification as Plaintiff's Exhibit 1973, which appears to be a memo from James L. Parker to N.B. Hunt, dated January 7, 1980. I'm also going to mark Plaintiff's Exhibit 1974, which appears to be a memo from James Parker to W.H. Hunt, dated January 7, 1980. Just take a minute and review those.

A. (Witness reviews document)

Q. Mr. Hunt, was it just a coincidence that both you and your brother in November of 1979 contracted to purchase from Swiss Bank Corporation 750,000 ounces of silver on a forward contract basis as indicated in these two memos?

A. No. In this particular case, this Swiss Bank deal, as separate from the commodity exchanges, I think I did make this purchase, and I was going to make a future purchase for myself and I asked my brother if he wanted to make one. And in this case as I recall he said he did, and in the case - I think the contracts were made about the same time. I don't know whether it's exactly the same time. The documents will show.

Q. So you had a conversation in November of 1979 with your brother Herbert where you and he decided to buy Zurich forward contracts, 750,000 ounces each?

A. Apparently so. That's what the documents would seem to indicate.

* * * *

Q: These charts indicate that both you and your brother Herbert as of January 1, 1980, held London forward contracts with prompt dates of March 11, 1980, for 600,000 ounces each. Was it a coincidence that you both held the exact same positions in those contracts as of January 1, 1980?

A: I don't recall why I bought those. Someone else would have to determine whether it was a coincidence or whatnot. I just don't recall.

Q: You're the only one who can authorize trades on your behalf, is that true?

A: I think that's correct.

Q: So you placed the trades that are indicated under your name ...?

A: I believe so. ...

* * * *

Q: Mr. Hunt between early May of 1979 and mid-July 1979, both you and your brother Herbert established substantial bull spread positions on the CBT and COMEX with the long legs in February, March and May futures contracts. Was that a coincidence?

A: No, I don't recall that. I don't know whether it was a coincidence. I wouldn't say it was.

Q: You would?

A: I don't know. It might have been some trad-

A classic technique is to construct a series of questions where the witness should only answer "yes" or "no." The examiner thus tells the story using the witness as a foil. If the witness strays from the desired answer, the examiner can bring him back to the script with a contradiction from a prior statement or document.

ing theory. I don't recall if that was done for any particular reason.

The examination went on for almost an hour in this same manner. Once the pattern of questions was established, Mr. Hunt's answers became almost irrelevant. The questions identifying identical transactions were the focus of attention.

This case is one that may not have been provable in arbitration. It required worldwide discovery for three years. Our team traced the conspirators' movements and silver trading on a daily basis over a six-month period to show their contacts and opportunity to coordinate their trading, and we obtained records from the Hunts' Swiss bank accounts showing transactions among the conspirators. In arbitration, pre-hearing discovery is often limited and the legal basis for obtaining evidence from third parties is uncertain in many jurisdictions.

The quoted portion of Bunker Hunt's cross-examination, however, could have taken place in arbitration. It only required standard trading records that should be available in any arbitration arising out of disputed trading activity. The key was anticipating Hunt's position, thorough preparation and the bright idea of one of my colleague (now chief counsel to the Senate Foreign Relations Committee) to use the Hunt trading files to make an impression on the factfinder. OK? You need to state the bright idea

Despite our $197 million verdict, he still complains that I did not ask questions from all the files he had assembled. In my view, the point had been made. Our debate tells you something else about cross-examination; when to examine and when to sit down is more easily seen in retrospect than at the moment. Lawyers attempt feats they cannot accomplish. Or they ask one question too many and muddle otherwise helpful testimony. Or they allow the adverse witness to explain away a damaging answer. Someone once wrote there are more suicides than homicides in cross-examination.

Presenting Evidence

Cross-examination is not always intended to impeach a witness; its focus can be to present information through the opponent. And cross-examination is not always hostile, like the aggressive assault on Bunker Hunt. The first choice is to have the witness's cooperation. Focusing first on presenting uncontested facts and then moving to more difficult subjects is a common strategy. However, I prefer to examine first on a point made on direct examination that I can impeach and then move to a more logical series of questions. By impeaching quickly, I establish authority with the witness and the fact-finder - whether a jury or arbitrator. The approach is a matter of personal style and tactics.

I conducted a cooperative examination of the chief economist of the Commodity Futures Trading Commission in a case in which the Commission accused a registered commodity broker of manipulating the feeder cattle futures market. As its first witness, the Commission called its chief economist to explain the operation of the cattle markets. To no one's surprise, he gave a partial explanation that favored the Commission's case. The purpose of my cross-examination was to fill in the remainder of the story by gaining admissions that cattle prices were moving up quickly over a longer period than the few days of the alleged manipulation due to unusual but natural supply and demand conditions, not artificial manipulation. My firm prepared a visual aid depicting this trend-chart showing cattle prices rising rapidly for several months before the alleged manipulation, which I could point to when asking about alternatives to manipulation that might have caused the up-tick in the several days at issue. My cross examination went like this.

Q: Futures prices don't normally go up that quickly over that period of time; isn't that correct?

A: Not typically, no.

Q: October, 2000 through the period May to October 2003 was an unusual time in the cattle futures markets in general, wasn't it?

A: Sure. Yes.

Q: The finding of mad cow disease in a steer in Canada was one of the causes of that; right?

A: Yeah, that occurred in May of that year.

Q: And the United States Department of Agriculture closed the border of cattle between Canada and the United States in May of 2003, is that correct?

A: May 22nd, I believe.

Q: So there was less supply of cattle ... available for sale in the United States between May and October of 2003; correct?

A: I'd say that was a fair statement.

Q: And there was also more demand in that time period from things like the Atkins Diet; isn't that correct?

A: I think that was our assessment, yes.

Q: So the price of cattle was going up very quick-

ly in that time period; correct?

A: Certainly the futures price was. And I believe cash value would have been - wouldn't be the same as this but would also be going up.

Having obtained these admissions from the Commission's own chief economist, we did not need another witness to establish the unusual nature of the market at the time. Moreover, these admissions made if more difficult for the Commission to meet its burden of proving that the defendant's five transactions caused the market to rise, rather than market conditions.

When I say the examination was "cooperative," do not mistake that for friendly. The examination was cooperative in the sense that it covered points the witness could not contest because he knew the Commission's own reports would impeach him if he strayed.

Never say, "Isn't that correct?" which makes the answer ambiguous. With "isn't," you do not know whether "yes" means the statement is correct, or yes, it isn't correct.

But the last question, by referring to "price" and not "futures price," shows the danger of dealing with an adverse witness. When I was imprecise, the witness was able to insert an unhelpful point about the differing movement of prices between sales of cash cattle and futures prices. That was not the only example; as the examination progressed, he fought me on every point, and quite a struggle ensued.

Controlling the Witness

So what's wrong with McCoy's long-winded questions? The key to a successful cross-examination is maintaining control over the witness. Long, rambling questions allow the witness to pick and choose among several themes in the answer. The witness is free to give long damaging speeches in response while the examiner impatiently waits for his turn to talk.

The first step to gaining control is to ask short, direct questions. Short questions focus the witness and the tribunal on a single question and leave the witness very little room to maneuver. A witness who avoids properly framed questions quickly loses credibility and frustrates the tribunal. Examiners who ask long-winded, confusing questions lose the patience of the tribunal even more quickly.

Suppose an examiner wants to ask the representative of Company B whether Company A entered into a contract with his company on May 31, 2006, to secure a regular supply of components to its factory. The proper approach would be to ask five questions:

Q: Did Company B enter into a contract with Company A?

Q: It was executed on May 31, 2006?

Q: It was a contract to sell components?

Q: Company A needed the components to operate its factory?

Q: The contract was to assure Company A had a sufficient supply to run its factory?

The questions are short and assertive; they do not need to be in the form of a question, except in the inflection of the voice. If necessary for clarity, the phrase "Is that correct?" or "Is that your testimony?" can be added at the end. Never say, "Isn't that correct?" which makes the answer ambiguous. With "isn't," you do not know whether "yes" means the statement is correct, or yes, it isn't correct.

With properly framed questions, documents and prior testimony become essential to witness control. In planning the questions, an examiner usually chooses from among the available known information. Cross-examination is not the time to discover information.

A classic technique is to construct a series of questions where the witness should only answer "yes" or "no." The examiner thus tells the story using the witness as a foil. If the witness strays from the desired answer, the examiner can bring him back to the script with a contradiction from a prior statement or document.

I used this technique in a lawsuit brought by a hedge fund suing the Republic of Peru for $60 million on defaulted promissory notes. We were defending $10 billion in lawsuits in five countries from major financial institutions suing on similar promissory notes. The defaults were about to be cured through an exchange of long-term bonds for old short-term promissory notes. The hedge fund, however, was not willing to accept the 50% discount in the exchange offer. It had bought old debt at a substantial discount and demanded full payment, which threatened the entire exchange offer because other creditors would not then take

less. Thus, we, had to be resourceful to block the hedge fund's claim. Relying on a 19th century New York State law that enacted the ancient doctrine of champerty, we set out to prove that the fund had purchased the debt for the sole purpose of filing a lawsuit to collect, which as we interpreted New York law, was unlawful.

In cross-examining the fund manager, I intended to demonstrate that the fund had hired an investment advisor (Mr. Newman) and a lawyer (Mr. Straus), as we had earlier proved that these men both had a long history of suing defaulting sovereigns; the fund had purchased the debt at a substantial discount after Peru had announced the terms of the exchange offer, and it had planned to insist upon full payment, which could only be accomplished by suing. The testimony went, in part, as follows:

Q: Did Jay Newman approach you in 1995?

A: Yes.

Q: When he approached you, he said he was an expert in emerging market debt?

A: Yes. ...

Q: And prior to that time, Elliott had not invested in emerging market debt, is that correct?

A: I believe that is correct....

Q: Then sometime after you hired Mr. Newman, he introduced you to Michael Strauss, is that correct?

A: Yes.

Q: Mr. Newman introduced Mr. Straus as a legal expert in emerging market debt, is that correct?

A: Yes.

Q: And you hired Mr. Straus as part of your investing program in emerging market debt, is that correct?

A: I don't know what that means.

Q: Did you hire Mr. Straus as part of your work in investing in emerging market debt?

A: I hired Mr. Straus as a lawyer whose expertise was in emerging market debt.

Q: And you hired him because you planned to invest in emerging market debt?

A: Either planned to or had already.

The examination then covered the fund's approach to distress sovereign debt after Messrs. Newman and Straus were hired: first, it purchased Panamanian debt; it was the sole opt-out from Panama's exchange offer; it filed suit and then settled at a large profit. Our point was to suggest a pattern of conduct of suing developing countries for the great profit potential.

We then turned to the point that was central to the lawsuit: the fund's intent in purchasing Peruvian debt. The witness's prior testimony became critical to controlling the examination.

Q: One possibility that you saw before you purchased Peruvian debt was that the debt would be paid in full to Elliott, is that correct?

A: Yes.

Q: And you believed that would come about either by Peru paying in full or you would sue Peru, is that correct?

A: Or a negotiation.

Q: If you look at page 193, line 4 [of your pretrial deposition], it says:

"Q: How did they anticipate it would come about that they would get paid in full?

"A: Peru would either pay people in full or pay us in full or be sued."

Q: Is that your testimony?

A: Yes.

* * * *

Q: At the time that Elliott was considering purchasing Peruvian debt, you were aware of Peru's Brady proposal, is that right?

A: Yes.

Q: Did Elliott calculate the size of the discount that the Brady terms were from the claimed value?

A: We probably did. I don't recall the exact calculations. I recall it was a sizeable discount.

Q: Would you look at page 133 of your deposition, line 17:

"Q: Did you calculate the size of the discount that the Brady terms were from the claimed value?

"A: Yes, at one point we did.

"Q: At what point in time did you make that calculation?

"A: As soon as we learned of the possibility of purchasing Peruvian debt and as soon as we learned about the Brady term sheet.

"Q: So you made that calculation before you made your first purchase of Peruvian debt?

"A: Yes, sir."

Q: Is that your testimony?

A: Yes.

The fund manager's answer that Peru would "pay us in full or be sued" was close to the ultimate fact that we had to prove. The witness recognized its importance and tried to suggest that the fund was willing to negotiate an alternative to the exchange offer. I confronted him with his earlier answer and left the significance for final argument. We won the trial but lost on appeal. But by then, Peru's exchange offer had closed and its economy has flourished ever since.

The Differences Discovery Make

U.S. discovery rules provide examiners in civil litigation with a wealth of documents and testimony to control witnesses. Once a witness has been deposed, cross-examination can be built around helpful admissions while unhelpful answers can be avoided.

This is not the case in arbitration. In arbitration, this techniqueWHICH?-and witness control in general-is often restricted by the fact that less evidence (whether documentary or otherwise) is available to impeach the witness. Thus, in many arbitrations, examiners knows less about what a witness will say and has less ability to control what the witness could say. Therefore, cross-examination is, more limited or more adventuresome, tending to separate the hearty from the fool-hearty. [Mark: Stronger when the "thus" or "therefore" is at the beginning. It gives the reader a clearer signal that you are stating a conclusion. Same is true with "however." When used at the beginning of a sentence, it gives an immediate clue to the reader that you will be saying something contradictory.]

Written witness statements provide some basis for preparing a cross-examination in arbitration. But the examiner's questions usually will not have been tested through depositions, making ugly surprises more likely and frequent. Written direct also denies the examiner an opportunity to observe the demeanor of the witness before having to plunge into the cross. This is a distinct disadvantage since many successful cross-examinations are shaped by the examiner's feel for what he can accomplish with a witness. But the absence of depositions and direct testimony in arbitration also averts unplanned surprises that come from spontaneous testimony under pressure. In my first trial as a young Justice Department lawyer, for instance, I asked an agency auditor whether he was a certified public accountant-a question to which he had answered "yes" when we prepared him for trial. But he said "no" once he was under oath on the witness stand. That took my breath away and provided my opponent with a few obvious cross-examination questions.

The cardinal cross-examination rule—do not ask a question to which you do not know the answer—is much harder to adhere to in arbitration. It helps to have a good feel for human nature.

To prevent a debacle, untested witnesses for the other side should be considered dangerous and approached carefully with indirect questions that can explore the witness's inclinations without committing to the directly relevant question.

The cardinal cross-examination rule—do not ask a question to which you do not know the answer—is much harder to adhere to in arbitration. It helps to have a good feel for human nature.

While the following example from the Hunt case is not directly analogous because the witness had enormous credibility and testified on direct, the witness was nonetheless dangerous.

The Hunts called Dr. Andrew Brimmer (a former member of the Federal Reserve Board who was on the COMEX Board of Governors during the silver manipulation) for testimony about the silver markets. On cross, we wanted to establish that one of the conspirators, Naji Nahas, had lied to the COMEX about his contacts with the Hunts. Dr. Brimmer was obviously a highly credible witness and, therefore, a dangerous one because whatever he said would be taken as true. But we did not know what he would say on this key point. Nobody likes to admit he has been deceived.

After establishing Mr. Nahas's representations to the COMEX regarding the Hunts, we asked Dr. Brimmer whether he relied on Mr. Nahas to be truthful, a proposition he could hardly deny. When he agreed with our rather obvious proposition, we were indirectly reminding the jury of

other evidence already presented of Nahas' contacts with Bunker Hunt.

However, in some situations, if you omit the direct question, you fail to prove an important element of your case. There is a good chance that the arbitral tribunal may understand the importance of the points being made, but it is difficult to know their reactions at the time. (Moved from paragraph below)

The Risk Quotient

When to stop is one of the hardest questions for a cross-examiner and raises the most difficult issues of assessing risk. My approach to Dr. Brimmer's testimony is one example, and the question asked after reading the fund manager's pre-trial deposition is another. By asking "Is that your testimony?" and moving on, the hedge manager was denied an opportunity to explain or contradict his testimony. But this approach does not serve to emphasize the importance of some answers. For this reason, some examiners use a more risk-taking approach and more often seek to press an advantage. For example, an alternative approach to cross-examining the fund manager might have involved asking a series of questions to emphasize the importance of the admission:

Q: You didn't mention negotiation as an option in your deposition, did you?

Q: You added negotiation as an option when you recognized the consequence of your answer?

Q: You already knew Peru would not negotiate, didn't you?

But these questions and others like them could have led to a struggle over whether negotiation was always an option and just omitted in error in the prior testimony. Who would win that struggle was uncertain, and in the end, the point was too important to risk losing or obscuring.

In some instances, important concessions can pass without notice if attention is not drawn to them. Being too conservative can lose cases too. I once saw an attorney in an arbitration with an ingenious technique for remedying this problem; he claimed he had not heard the answer and asked the stenographer to repeat it. That did not give the witness the opportunity to take back his answer but sought to direct attention to it. Later, the tribunal chairman assured the attorney that he had heard the admission and recognized its importance, so that repeating the answer was unnecessary.

The eternal question for an examiner is when to stop. On those choices, examiners lose sleep both before and after hearings.

Controlling the Non-Adverse Witness

Neutral witnesses are sometimes more of a challenge than adverse ones. If an adverse witness has a damaging point to make, the opponent can generally have the witness make the point on direct or re-direct examination. Cross-examination can undermine the point or reinforce it, but it will not bring out new evidence previously unavailable to either party. With a neutral witness, both sides may want to know the answer to a question, but neither side may dare to ask for fear of a damaging response. So a neutral witness should be approached cautiously and controlled as carefully as the adverse one.

Under traditional cross-examination rules, neutral witnesses cannot be asked leading questions. They are supposed to be asked questions that do not suggest the answer. The witness is supposed to do most of the talking, not counsel. Non-leading questions allow for less control over the witness's answer. The risks of the questions, thus, increase.

The differences can be seen in the testimony of Thomas McCormick, chairman of the Business Integrity Commission of the City of New York, in a case that decided whether the Fulton Fish Market, the World's second largest fish distribution center, would move from lower Manhattan to a new facility in the South Bronx. An "unloader" who delivers fish in 18-wheelers from the boats to the market had sued the cooperative of fish sellers and New York City to enjoin the move because the cooperative had obtained a license to do its own unloading at the new facility. Prior to the early 1990s, the market was notoriously the haunt of mobsters. A former deputy mayor from the Giuliani Administration, Randy Mastro, representing the unloader, was strangely arguing that his administration had not cleaned the Mafia out of the fish market as it had so proudly touted. Only by allowing the unloader to keep his monopoly, the deputy mayor argued, would the market remain honest.

The City called Commissioner McCormick to explain the proceedings that led to the fishmonger's license. My cross-examination was intended to demonstrate that the City had a strict regulatory scheme to protect the fish market. The difference between direct and leading questions can be seen in the first exchange. The original question suggested the answer and called for a one-word response. After the objection was sustained, my question had to be more open-ended, which brought a relatively lengthy answer. A sample of the question went as follows.

Q: The statute provides for ID's; is that correct?

Mr. Mastro: Objection to form. Leading question.

The Court: Sustained.

Q: How does the market manager and his staff know who is properly on the premises of the market?

A: There is a requirement that people working in the market display photo identification tags. And they obtain those cards by submitting an application to BIC, which does a sort of quick vetting of the application and decides whether someone can receive a market credential or not.

Q: Who has to wear those market ID's?

A: Everyone who works in the market.

Q: What happens if there is someone in the market who doesn't have an ID?

A: Well, he is approached by the inspectors who ask him where is his ID, and if he actually doesn't have one, then he is given a summons, which is returnable in the City's Environmental Control Board tribunal.

Direct questions usually ask who, what, where, when or why. The answers are fuller and less under the control of the examiner. But asking "why" is usually a bad idea. Why something happened often is not relevant and almost certain to bring a lengthy and uncontrolled response. It is a dangerous question.

As the McCormick testimony went on, I used a technique that, while non-leading still allows for more control over the witness. The following exchange took place:

Q: Other than the criminal background check, are the applications [between an unloader and wholesalers license] essentially the same?

MR. MASTRO: Objection. Do you want to testify for him?

THE COURT: Sustained.

Q: What, if any, differences exist in the applications for unloader and the wholesaler, other than the criminal background check?

A: That is the difference.

The use of "if any" technically makes the question non-leading, although, it allows for a more pointed question.

Documents used to refresh a neutral witness's recollection can help an examiner control the witness's testimony on cross. Unlike an adverse witness, prior testimony of a neutral witness cannot be quoted and submitted as evidence at trial. The proper way to refresh a witness's recollection is to allow the witness to read the statement, take it away, and ask whether his recollection is refreshed. If the answer is "yes," the witness can testify to his or her refreshed recollections. In some circumstances, if the document does not refresh the witness's recollection, it can be offered in evidence as past recollection recorded. The cumbersome procedure allows less control over the witness.

I also used this technique with Dr. Brimmer. The events were eight years old and his memory was fuzzy. The examination started poorly. Dr. Brimmer did not seem to recall fundamental facts about his committee's investigation that we thought he would recall. We considered stopping. But no real damage had yet been done, and we had documents we thought would help, so we pressed on.

In international arbitration, the examiner should be conscious of the culture of the witness and the tribunal. Since many cultures prefer to avoid direct confrontation, it could prove troublesome if an examiner did not know that the witness came from such a culture.

Q: Now, do you recall whether Mr. Nahas [one of the principal co-conspirators] made any statements as to whether he had a joint venture or had communicated with anyone in the Hunt Group?

A: I do not remember that.

Q: Let me direct your attention to the transcript of your deposition in the case of Friedman vs. Bache, March 24, 1983, page 93, and ask you to read lines 3 through 8.

A: I've read this.

Q: Does that refresh your recollection as to statements made by Mr. Nahas?

A: I remember this statement now that you have refreshed my recollection.

Q: What do you recall?

A: I remember he said he had not had any communications with the Hunt Group.

Q: When he made the statement that he had no communications with the Hunts, were you relying upon Mr. Nahas to be truthful?

A: Yes.

Q: And in analyzing the market, were you accepting Mr. Nahas' statements as truthful?

A: I did not make a distinction between his statements and other statements. I relied on the information presented by the staff to the committee.

Q: And you relied upon them as truthful statements?

A: Yes.

Of course, in arbitration, it is uncertain whether any of these technical rules on leading questions and the use of documents to refresh testimony will apply. Counsel may be able to lead non-adverse witnesses and use documents without the formality required in court proceedings. There will have to be a "feeling-out" period at the beginning of the arbitration to determine how formal the tribunal chair will be with cross-examination rules.

The Role of Emotions

What usually gets my teeth grinding while watching Jack McCoy is his hostile manner towards witnesses. Most experienced lawyers feel that a hostile manner will engender sympathy for the witness. Most observers-whether they are jurors, judges or arbitrators-dislike a hostile examiner unless the witness has already been shown to be resistant or untruthful. A polite manner can break down a witness at least as quickly as an antagonistic one.

Moreover, artificial histrionics by the examiner are not necessary or useful. There will be enough tension present without raised voices and a hostile manner. This is particularly true of international arbitration.

In international arbitration, the examiner should be conscious of the culture of the witness and the tribunal. Since many cultures prefer to avoid direct confrontation, it could prove troublesome if an examiner did not know that the witness came from such a culture.

If forced to generalize, for instance, I would say Latins tend to prefer more indirect communications than North Americans. It took me several years to understand that when my Peruvian wife said, "Don't you want ...?" she meant, "I want ...." (If you think misunderstandings are a problem in arbitration, imagine the trouble I got myself into at home.)

You do not want to be bewildered by a witness's response when others in the room understand it, and you do not want to be on the wrong side of a bad reaction to your style when an award is issued.

I do not mean to say that emotion has no role in cross-examination. Certainly examiners can modulate the use of emotion to build suspense and highlight important points. [But the examiner's reactions should be masked as often as they are displayed.][how can you generalize about this? I would leave it out.] Anger and sense of injustice should be communicated only in measured doses. Instead of showing anger, hurt [disappointment?] or a sense of urgency when a witness gives an unhelpful answer, a poker face may diminish the damage. Moving on quickly can be the best approach.

Nevertheless, displays of emotion are inevitable in conflict situations. Anger is a natural response to conflict. Gasps, tears and confessions tend to come unexpectedly without being forced by an examiner's sarcasm. On one occasion, I even witnessed two businessmen choke up during direct examination by their own counsel. I frankly did not know what to do when my client began tearing up in response to a rather straightforward question. I was relieved when my opponent, a prominent former U.S. Attorney, did not seem to know what to do when his client also broke down during his direct examination.

At one trial, an expert witness's wife shrieked from the audience when her husband was confronted by a PhD thesis that reached an opposite conclusion to his testimony. Not much more needed to be accomplished in that examination. Imagine the conversation over dinner that night.

Conclusion

Next time Jack McCoy asks one of his long, argumentative questions, do me a favor. Jump up and yell, "Objection!" In my house, my wife has banned speaking objections. All I can do is grumble under my breath, "That's not a question; it's a final argument." Of course, yelling at the TV is symptomatic of an experienced examiner.