Cross Examination

Chapter Five

The Army Criminal Court of Appeals (ACCA) sits at Fort Belvoir, Virginia, where it hears courts-martial appeals. Pictured are then Chief Judge and then Brigadier General Stuart Risch (background), currently Deputy Judge Advocate General, and Associate Judge Lieutenant Colonel Paulette Burton (foreground). Created as the Army Court of Military Review by the Military Justice Act of 1968, Congress enacted legislation changing its name to ACCA in 1994.

Imperial Japanese Army Lieutenant General Shizuo Yokoyama, the commander of the 8th Division, points to a chart showing positions held by the Japanese Navy prior to and during the battle for the city of Manila during WWII. Questioning him is Lieutenant Commander Samuel C. Bartlett. This photo was taken at a military commission held at the former residence of the High Commissioner in Manila, the Philippines, 17 November 1945.

CHAPTER 5—CROSS EXAMINATION

I. SKILL OVERVIEW:

A. **Goal:** The goal of this chapter is to develop the ability to use cross examination to strengthen your own case and to weaken the opponent's case.

B. **Cross Examination is Hard:** If you struggle with cross examination, you are not alone. Few attorneys are naturally gifted at cross examination. And cross examination is, by its very nature, an uphill battle: we are trying to force an adverse witness to give us information that will help our case. It is by definition a struggle.

C. **The Problem with Most Cross Examinations:** The problem with most cross examinations is that most attorneys are in the habit of winging them—conducting them with little or no preparation. We convince ourselves that there is no way to prepare for cross examination because we do not know what the witness will say until the witness testifies. This, of course, is a myth. Due to liberal discovery rules in military court, both sides know *most* of what *most* witnesses will say *most* of the time. So there is ample opportunity to prepare. But many of us choose to rely on adrenaline and killer instincts anyway. And this often results in failure.

D. **The Solution to the Problem:** The solution to the problem is simple: stop winging it and start preparing. Effective cross examination can be achieved by using a systematic approach—by having a plan and sticking to it. What follows is a number of basic principles that, if strictly followed, will give you a framework for structuring any cross examination. And these principles work.

E. **Two Basic Disciplines:** The instructional portion of this chapter is built on two time-tested cross examination techniques:

1. **Approach Point Cross Examination** is a discipline developed by the National College of District Attorneys and the National Institute of Trial Advocacy that emphasizes breaking cross examination up into discreet approach points—or topics—designed to support one's theory of the case; and

2. **Irving Younger's Ten Commandments of Cross Examination** are the work of a New York lawyer, former trial court judge, and respected law professor who wrote and lectured extensively on cross examination. The Ten Commandments focus on maintaining control of adverse witnesses.

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II. THE LAW:

A. The Order of your Case in Chief:

1. "The Military Judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence." MRE 611(a).

2. "Leading questions should not be used on direct except as necessary to develop the witness's testimony. Ordinarily, the military judge should allow leading questions on cross-examination and when a party calls a hostile witness or a witness identified with an adverse party." MRE 611(c).

III. ESSENTIAL RULES OF APPROACH POINT CROSS EXAMINATION:

A. **Planning and Preparation:** Planning and preparation are essential to good cross examination. So the first step in preparing is to figure out—from police reports, witness statements, investigative follow-ups, your own phone calls—what each witness will say on the stand. Very few witnesses will be a complete surprise, so work with whatever you have. And even if a witness takes the stand with absolutely no advance notice, take careful notes during direct examination and ask the military judge for a half-hour (or 15 minutes or 5 minutes) to prepare before you cross examine. However short a preparation period you are left with, use it wisely to craft a plan—even if it is a short one—for your cross examination. At a minimum, this means having a list of the topics you are going to cover: two bullet points are fine, but you have to list them and then stick to them.

B. **Four Reasons to Cross Examine:** There are only four reasons ever to cross examine a witness. Every question must fit into one of the following four categories or else it should not be asked:

1. **Obtain Favorable Facts** that support your theory of the case. Almost every witness will have something to say that helps you. Whatever concessions you can elicit on cross examination, they are worth twice as much coming from your opponents' witnesses. So figure out where the witness will agree with your theory of the case and obtain concessions;

2. **Support the Credibility** of your witnesses. Adverse witnesses will often wittingly or unwittingly—give testimony that supports what your witnesses either have said or will say later. Figure out where adverse witnesses will agree with your witnesses and obtain concessions;

3. **Impeach the Witness** with all the impeachment tools in your arsenal: prior inconsistent statements, criminal convictions, lack of ability to perceive; and

4. **Impeach Another Adverse Witness** by bringing out facts that contradict or detract from the credibility of another opponent's witness. Getting your opponents' witnesses to contradict each other repeatedly is a very effective way to weaken their case.

C. **Use Short, Single-fact Questions:** This can be harder than it sounds. "*He was wearing a blue suit, wasn't he?*" is not a single-fact question. "*He was wearing a suit? It was blue?*" are both single fact questions. If a question contains more than one fact, it gives the witness wiggle room to be evasive. If you ask, "*He was wearing a blue suit, wasn't he?*" and the witness answers. "*No.*" what does the answer mean? Does it mean he was not wearing a suit or that he was not wearing blue? So every question must be single-fact. Short questions help you maintain control of the witness by establishing and maintaining a rhythm of rapid-fire Q and A.

D. **Avoid Weasel Words (Value-laden or Conclusion Words):** Do not use words about whose meaning reasonable minds can differ. This will lead to quibbling and ultimately, a loss of control.

1. **Example:**

Q: That was important to you, wasn't it?

A: I don't know what you mean by important.

2. **Example:**

Q: You were close to her, isn't that correct?

A: What do you mean by close?

Instead of using weasel words, pin the witness down with objective facts that the witness must concede to demonstrate what you need to support your theory.

3. **Example:**

Q: You met her in 2001?

A: Yes.

Q: You live two houses apart?

A: That's right.

Q: You have lived two houses apart for 15 years?

A: ‘Bout that.

Q: Your children play with her children?

A: Sometimes.

Q: You have vacationed with her?

A: OK. Yes.

Q: Twice vacationed with her?

A: I think so.

Q: As recently as two months ago?

A: OK Yes.

Q: With her and her husband?

A; Correct.

Q: She threw you a birthday party?

A: Yes.

Q: Just last month?

A: Yes.

Q: At her house?

A: Yes.

With these questions, you have *shown* that she is close with her by using concessions based on objective facts. (Now you have to resist the temptation to ask, “*So you are close to her, aren’t you?*” See *Ten Commandments* section later in this chapter on how *not* to ask the ultimate question).

E. **Obtain Concessions First, Then Impeach:** With some witnesses, your cross examination plan will include both concessions and impeachment. Obviously, the concession-gathering phase is the friendlier of the two, and the witness will be more inclined to cooperate with you during this phase. Most witnesses will get ornery—and thus less cooperative—after you have begun the impeachment phase when you call into question their credibility or character. So common sense dictates that you should get all the concessions out of the witness first before launching into impeachment.

IV. IRVING YOUNGER'S TEN COMMANDMENTS OF CROSS EXAMINATION:

Introduction: Professor Younger developed his *Ten Commandments* after sitting for years as a trial judge in New York City, watching countless attorneys conduct unsuccessful cross examinations. He emphasized in his teaching that these commandments take time and practice to master. But generations of courtroom lawyers swear by them and follow them every day. We paraphrase them below.

A. **Commandments, Not Guidelines:** These are commandments, not just guidelines or suggestions. They must be strictly followed and they must become second nature to be effective.

B. **The Commandments:**

1. **Ask Only Leading Questions:** The rules of evidence allow the cross examiner the significant advantage of using leading questions. This means that—YES—you actually get to suggest the answer to the witness. You get to put words in the witness's mouth and just wait for the witness to agree. It seems so simple: if you can control the answers, you can control the evidence, and if you can control the evidence, you have a much better chance to control the outcome. So why would anyone NOT use leading questions when given the opportunity?

   a. **Tag Endings:** Some leading questions use tags to prompt the witness: *You know how to drive,* ***right?*** *You drive a car,* ***isn't that so?*** *It's a red car,* ***correct?*** These tags are fine, but can get distracting if overused.

   b. **Statements Disguised as Questions:** Consider establishing a rhythm with the witness using questions that have no tags—questions that are really statements disguised as questions. *You have a driver's license? You drive a car? A red car?* When using these statements disguised as questions, make sure your inflection drops at the end of each one so that it really comes off as a definite statement with which you are commanding the witness to agree. If your inflection goes up at the end, indicating uncertainty, it loses the desired effect of control over the witness.

c. **Setting the Desired Tone:** Leading questions also allow you to set the proper tone and score advocacy points. Compare the following examples:

Example 1:

Q: You didn't put that in your report, did you?

A: No.

Example 2:

Q: You wrote a report?

A: Yes.

Q: It is 27 pages?

A: Correct.

Q: It is single-spaced?

A: It is.

Q: In your 27-page, single-spaced report, you never mentioned any such thing, did you?[1]

A: No.

2. **Never Ask a Question to Which You Do Not Know the Answer:** This is a hard rule to follow. Lawyers tend to be curious people. As curious people, we are in the habit of asking questions when we do not know something. Additionally, because many attorneys do not prepare for cross examination, they often treat it as a creative and whimsical process. *Curiosity and whimsicality are the enemies of effective cross examination.*

   Remember that good cross is about *controlling* the witness. Asking a question to which you do not know the answer takes control away from you and gives it to the witness. Why would a rational person give control of the process to an adverse witness? Asking random questions thought up on the spot invariably results in testimony that damages your case. (Of course, you are now wistfully recalling that one time when you were fishing around aimlessly on cross examination and accidentally stumbled into something that helped you. You chalked it up to brilliant lawyering, didn't you? And perhaps it was. But these occasions are rare and it is simply not worth the risk to go on a fishing expedition on cross.)

[1] Larry Pozner and Roger Dodd, *Cross Examination: Science and Techniques*, Section 8.22, p. 215 (2009).

3. **Never Ask a Question the Answer to Which You Cannot Prove Up:** This is a corollary to Rule #2. When a witness gives you an unexpected answer, you should always be prepared to prove up the answer you expected. In other words, when a witness starts to go squirrely, you have to pin the witness down. Confront the witness with the deposition, pull out the handwritten report, have the tape recording queued up to the key statement. But do not rely on the good manners of the witness to render every answer you expect. And once you effectively pin down a straying witness by confronting him or her with irrefutable evidence, that witness will think twice before going squirrely on you again.

4. **Never Ask Why (Never Ask a Witness to Explain):** Asking an adverse witness to explain something takes control away from you and hands it over to the witness. If you ask a witness to explain something, the answer will invariably hurt you. Keep in mind that asking a witness why also violates Rule #1, Always Ask Leading Questions.

   Example (A true story): A prominent New York criminal defense attorney was representing an accused drug dealer. A co-conspirator had turned state's evidence. Defense counsel spent 90 minutes grilling the government's witness about the many lies he told during sworn debriefings with the government. After thoroughly destroying the witness's credibility using textbook cross examination technique—leading, single-fact questions, tight witness control, skilled use of the government's reports—he asked the witness the following question: "Can you explain to the jury why, after taking an oath, after swearing to God to tell the truth, why you lied repeatedly?"

   The answer was as follows: "In the beginning, I lied to keep my money. But as I began to know your client better, I began to lie to keep my life. I lied then because I realized he would kill me and he would kill my family, he would do anything to anybody if it would help him."

   With one question, defense counsel destroyed everything he had worked so hard for.[2] No doubt, the lawyer was thinking that there was no answer to his "why" question that could hurt him. He was wrong and paid the price.

5. **Never Argue with a Witness:** If you find yourself arguing with a witness, you have lost control. As a Judge Advocate, you are an officer of the court, and the courtroom is your workplace. You can *never* win an argument with a witness, because the argument itself boosts the status of the witness and lowers yours. And panel members will usually identify with the witness and hold all the quibbling against the lawyer.

[2] Larry Pozner and Roger Dodd, *Cross Examination: Science and Techniques*, Section 8.18, p. 214 (2009).

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In an effective cross examination, you are simply asking a series of leading questions and the witness is giving you a series of short answers. This is not a wrestling match; this is a dance and you are leading.

Of course, things sometimes get emotional in court, because good trial lawyers are passionate about their cases. And cross examination is by definition a struggle. But if you find yourself losing your temper with a witness, stop, take a deep breath, and go back to your plan.

6. **Do Not Ask One Question Too Many (Do Not Ask the Ultimate Question):** As a general rule, no adverse witness will do anything willingly to help you during cross examination. Nobody is going to admit on cross examination that his or her testimony cannot be believed, no matter how preposterous, outlandish, or transparently false that testimony is. So don't expect that to happen. Don't ask such questions as

   So, you are biased, aren't you?

   You lied when you stated X, didn't you?

   You really could not see what you claim to have seen that night, could you?

So instead of asking Ms. McGillicuddy, "So, Ms. McGillicuddy, you simply could not have seen my client through your window?" do the following:

a. **Demonstrate** using short, single-fact leading questions that she could not have seen your client;

b. **Avoid** asking the ultimate question during cross examination; and then

c. **Argue** the ultimate conclusion in your summation.

Example:

Q: Mrs. McGillicuddy, I want to ask you about what you claim to have seen that night, OK?

A: Yes.

Q: You were in your apartment that night?

A: Yes.

Q: It was 8 pm?

A: Yes.

Q: It was February?

A: Yes.

Q: So it was already dark?

A: Yes.

Q: You were looking through your window, right?

A: Yes.

Q: Your kitchen window?

A: Yes.

Q: Your kitchen window has curtains, doesn't it?

A: It does.

Q: On both sides?

A: Yes.

Q: And a pull down shade?

A: Yes.

Q: It is a see-through shade is it not?

A: Yes.

Q: Lace, correct?

A: Yes.

Q: And the shade was down on that particular night?

A: Yes.

Q: You were looking into the alley?

A: Yes.

Q: The alley is across your yard, isn't it?

A: Yes.

Q: Your yard is 200 feet wide at that point, right?

A: About that.

Q: There were cars in the alley, weren't there?

A: Yes, several.

Q: All the cars were dark in color?

A: I believe so.

Q: Some of those cars were parked?

A: Yes.

Q: Parked between you and the place where you said you saw these events?

A: Yes.

Q: There is a streetlight?

A: Yes.

Q: Above the alley?

A: Sure is.

Q: But the street light was not working that night, was it?

A: No it was not.

Q: Just before this, you had been in bed, hadn't you?

A: Yes.

Q: You got out of bed to go to the window?

A: That is correct.

Q: We notice you are wearing glasses today. You do not wear your glasses when you go to sleep, do you?

A: No.

Q: Thank you I have no further questions.

What do you think is likely to happen if you were to ask the ultimate question? *"Ma'am. You really couldn't see what was going on in the alley, could you?"* How likely is it that Ms. McGillicuddy will say, *"You know, you are right. I couldn't really see anything?"* That is NOT going to happen in the real world. It would be contrary to human nature. So do not ask that question. Leave it alone and argue the ultimate inference in closing:

"It was dark. She saw the events through a window, through a curtain, through a shade, 200 feet away, with several parked cars blocking her view. Ms. McGillicuddy seemed sweet and sincere but it would have been impossible for her to see what she claimed."

7. **Use Simple Every Day Language:** People in everyday life do not exit vehicles. They get out of cars. People in everyday life do not get contusions. They get bruises. And only lawyers seem to use the phrase "to wit." In any choice between a simple, one-syllable word and a longer, more complicated word, always go simple. Using fancy language, cop talk, or lawyer talk builds a wall between you and the panel and gives the witness a chance to interrupt your **cross examination with questions about what you mean.**

8. **Do Not Repeat the Direct:** Jurors remember best what they hear repeated most often and what they heard most recently. So going back over the direct examination with the opponents' witnesses is doing your opponents' job for them by repeating their evidence. It is also boring and pointless. It's as if the lawyer has said to herself, *"Well, I am expected to do a cross examination and I have no idea what to do, so I'll go back over what was just said on direct."*

Even where a witness has said something very helpful to your case on direct examination, resist the temptation to go back and reaffirm it on cross; the witness will often realize that their previous answer was accidentally helpful to you and revise it on cross examination to lessen its benefit to you.

9. **Listen:** You have a plan and you are going to stick to it. You know every answer to every question you are going to ask. But you still have to listen to every answer to make sure nothing gets by you. Don't let this happen to you in trial:

   Q: Sir, could you please tell us who you are?

   A: My name is John Smith and I am an electrical engineer.

   Q: And what do you do for a living?

   A: I am an electrical engineer.

   The benefit of listening is that, first, you'll avoid embarrassing yourself and, second, sometimes witnesses will say unexpected things that you have to deal with. That unexpected answer will either help you—in which case you want to mention in summation—or hurt you—in which case you have to strategize around it.

10. **Stop!** There are various times during the planning stage that you need to stop yourself:

   a. **Stop! Do I Need to Cross This Witness?** You will cross examine most witnesses—90% or 95% of all the witnesses called by your opponent. Because with most witnesses, you can find something—even if it is small—to advance your theory of the case, support one of your witnesses, discredit the witness, or discredit another opponent's witness.

      But where a witness is highly technical, such as a chain of custody witness, there may be no advantage to cross examination. Also, if there is no way to come up with any questions that fit the four categories for cross examination, you might forego cross. However, only forego cross examination after careful thought and balancing of benefits and risk. The panel expects cross examination and you can almost always derive some benefit from it.

   b. **Stop! Limit Your Points:** An effective cross examination need not make more than 2 or 3 points. In fact, if you plan to do more than this, you are probably overplanning; the panel will not remember everything you do if you do not limit your cross examination plan to 2 or 3 points. But make these points well. As Professor Younger put it, *"Cross examination is a commando raid, not the invasion of Europe."*

   c. **Stop! Do Not Ask One Question Too Many:** See Rule #6.

V. A WORD ON POSITIONING IN THE COURTROOM:

How you use the courtroom space during cross examination is different from how you use it during direct examination.

A. **Direct Examination—Focus on Witness:** During direct examination, the source of information is the witness; you want the panel to focus on and recall every word the witness utters.

Accordingly, during direct examination, you should position yourself away from the witness—preferably on the far side of the panel box from the witness stand—and you should never position yourself so as to block the panel's view of the witness. This keeps the focus on the testimony and away from you and on the witness.

B. **Cross Examination—Focus on You:** In contrast to direct examination, the **source** of information during cross examination is YOU. You are asking leading questions—actually making statements disguised as questions—that supply the evidence, while the witness is merely giving brief answers confirming or denying the information contained in your questions.

Accordingly, the focus should be on you. To the extent the military judge allows you to do so, you should stand directly in front of the panel during cross examination and use your body language and voice intonation to convey the tone of each of your questions. You should move with emphasis in the space in front of the panel as you change topics; this will keep the panel's attention on you.

REFERENCES

Lubet, Steven, *Modern Trial Advocacy: Analysis and Practice, Fifth Edition,* National Institute for Trial Advocacy (2015), pp. 79-136.

Mauet, Thomas A., *Trial Techniques and Trials, Ninth Edition,* Wolters Kluwer (2013), pp. 197-270.

McElhaney, James W., *McElhaney's Trial Notebook, Fourth Edition,* American Bar Association (2005), pp. 431-482.

McElhaney, James W., *McElhaney's Litigation,* American Bar Association (1995), pp. 117-186.

Packel, Leonard, Dolores B. Spina, *Trial Advocacy: A Systematic Approach,* American Law Institute/American Bar Association (1984), pp. 75-94.

Schwartz, Louis E., *Proof, Persuasion, and Cross Examination: A winning New Approach in the Courtroom,* Executive Reports Corporation (1973), chapters 16-22 generally.

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Stern, Herbert J., Stephen A. Saltzburg, *Trying Cases to Win,* ABA Publishing (2013), pp. 249-314.

Pozner, Larry S. and Dodd, Roger J. *Cross Examination: Science and Technique, 2d Edition,* LexisNexis (2009).

View Video Vignette #17, Cross Examination of Lay Witness, in *U.S. v. Anderson*, available on the digital version of *The 2018 Advocacy Trainer* or on JAGCNet.

CHAPTER 5—CROSS EXAMINATION

DRILLS

I. OVERVIEW

A. **Goal:** The drills in this chapter are designed to develop counsel's ability to

1. Exercise witness control through the use of single-fact leading questions; and

2. Conduct a well-planned and effective cross examination.

B. **Structure:** The drills in this chapter are divided into two parts:

1. **Form of the Question:** The first part focuses on the proper form of questioning in cross examination: using leading questions to elicit one fact at a time.

2. **Substance and Approach Points:** The second part focuses on gaining concessions to strengthen one's case and impeaching the witness to weaken the opponent's case.

C. **How to Conduct These Drills:**

1. **Instruction:** Participants should read the instructional portion of this chapter prior to class. The supervisor should prepare and deliver a 30-minute lecture on the form and substance of cross examination to reinforce the reading and introduce the drills.

2. **Role Play:** Counsel must really "loosen up" to obtain the full benefit from these drills.

3. **Execution:** These drills should be conducted in the courtroom, away from the office and the phones. The supervisor should demonstrate what she expects from counsel. After a demonstration, the supervisor then selects counsel to do the entire drill or has counsel collectively perform the drill, randomly selecting counsel to perform a part of the exercise.

4. **Repeat Often:** The following drills are repetitive drills: they can and should be done each time you meet with counsel. They can also be done with little or no preparation. And they are an excellent way of keeping counsel's interrogation skills sharp.

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PART 1: FORM OF THE QUESTION

Drill #1: Voice Inflection

A. **Statements Disguised as Questions—The Falling Inflection:** The supervisor explains how inflection dictates whether a question is leading or non-leading. For example, if a witness is asked, "You own a bat?" and the inflection (not volume) rises on the word "bat," the witness perceives that the questioner is uncertain of the answer and honestly inquisitive. This invites an explanation from the witness. On cross examination, we do not want explanations. The inflection must fall on "bat." The witness will then hear a proposition that strongly suggests an affirmative response. The falling inflection turns the tenor of the question into a declarative statement with which the witness will either agree or disagree. The falling inflection does not invite an explanation. With the falling inflection there is no doubt discernible in the questioner's voice.

B. **Inflection Using Tag Endings:** Mastering the falling inflection is sometimes made easier by starting first with "tags," i.e., "don't you?" "didn't you?," "haven't you?" Thus, "You hit Smith with a crowbar, didn't you?" Counsel should first say this statement with the inflection rising on the "didn't you?" Then make the statement with the inflection falling on the "didn't you." If the inflection rises, regardless of the accusatory, declarative choice of words, it is not leading. The inflection should fall to be truly leading.

C. **Practicing the Inflection:** Work around the room and have counsel ask the following questions with a falling (leading) inflection. Hearing the "fall" is an important part of perfecting the ability to use the falling inflection.

- You drive a red car, don't you?
- You never counseled the accused, did you?
- You've read the SOP?
- You had four margaritas at the bar?
- You took the ATM card from your roommate's wall-locker, didn't you?
- You tried to flush your system before the urinalysis, isn't that right?

Drill #2: Single-Fact Leading Questions:

A. **Preparation:** For this drill, the supervisor should have each participant write out a page or two about a recent event of his or her choosing; this could be where and when they ate breakfast, what they did for the weekend, or a recent vacation. Participants then pass the sheet to the person who is to perform. The performing participant then gets 10 minutes or so to prepare a cross examination on the event using single-fact, leading questions.

B. **Performance:** The participant should conduct a cross examination using proper questioning technique. For example, part of the cross might look something like this:

- You ate breakfast?
- You ate at 0800 hours?
- You ate breakfast at Shoney's?
- And you had pancakes didn't you?
- In fact, you ate alone, didn't you?
- And you spent $5.00?

Each counsel should be required to perform in this fashion.

C. **Option B—Direct and Cross:** Another option the supervisor might use is to have the same counsel conduct the direct exam and then immediately conduct the cross examination with the information learned on direct. This technique has a number of benefits: it contrasts the ability to ask the questions in the proper form with the proper inflection. It also places a premium on the ability to listen to the answers. This drill is also works with two counsel: one counsel conducts the direct examination of the witness, and then another counsel, selected at random, cross examines immediately thereafter.

Drill #3: Cross-Examination of an Inanimate Object:

A. **Purpose:** This drill forces counsel to state questions as propositions and to think from the general to the specific. The drill also demonstrates the power of descriptive questions such that counsel never need to ask the ultimate question.

B. **Preparation:** The supervisor should pair counsel off and have them sit in chairs facing one another. Give one counsel an object such as a staple remover, Magic Marker, 3-hole punch, wrist watch, or coin. The person holding the object will now speak as the object and answer only single-fact, leading questions. The other counsel will be the cross examiner.

C. **Conducting the Drill:** The cross examiner must ask single-fact leading questions to have the person holding the object describe the object as completely as possible. The supervisor will object to any questions that are either not leading or contain more than one fact.

Thus, if one counsel is holding a bar of soap, the questioning might go something like this:

- You are an inanimate object?
- You are a three-dimensional figure?
- You are rectangular in shape?
- You are approximately four inches long?
- You are approximately two and a half inches wide?
- You are approximately one and a half inches deep?
- You are white in color?
- Your edges are rounded?
- The word "Ivory" is pressed into you?

Note that the ultimate question, "You're a bar of soap?" is NOT asked. That should be saved for argument.

D. **Option B—Guess the Object:** Select a counsel to conduct the inanimate object drill described above. This time, however, have remaining counsel turn their chairs around and face away so that they cannot see the object in question. As the examination develops, the listening counsel will raise their hands, but not turn around, when they think they know the object being described. This technique conveys to counsel the importance of descriptively breaking down an object and reconstructing it with leading questions. To paint a recognizable picture, it must go from general to specific.

E. **Critique:** Critique will be based on counsel's ability to:

1. Use single-fact leading questions;

2. Control the flow of testimony;

3. Develop the narrative from the general to the specific; and

4. Elicit a complete picture of the object without asking about it by name.

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PART 2: SUBSTANCE AND APPROACH POINTS

Drill #4 Developing Approach Points

A. **Preparation:** Counsel will read the two brief fact scenarios set forth below. For each scenario, one person will be assigned to play the witness and all others should be prepared to conduct the cross examination. Counsel should be given 10-15 minutes to plan a cross examination that develops at least two approach points using proper questions.

B. **Conducting the Drill:** Counsel should conduct a cross examination for each witness that uses at least two approach points. Counsel may elicit concessions, impeach the witness, or both. The witness should answer questions in accordance with the facts in the scenario but should not be overly cooperative. The supervisor should object to improper questions.

Fact Scenario A

The witness is the accused. He is charged with burglary and arson. He was apprehended on the front steps of his former residence with a screwdriver in his hand. The window next to the door was broken. He lives 20 miles from the house. He drove to the house in his own car. He brought the screwdriver with him along with a hammer. The hammer was located in the car when he was arrested. He intended to break in when he was arrested. He broke the window to reach in and unlock the door. He spent over an hour in the home and was only apprehended on his way out. No one was home except the dog, which he killed. It was his ex-wife's dog. The house belonged to his ex-wife. He had recently lost the house in the divorce. He was going to set fire to the house but lost his nerve. So he just busted things up. He touched nothing in his daughter's room. When he was arrested, he told the police it was his house and they were his things inside. He also yelled that he hated his ex-wife.

Fact Scenario B

The accused is charged with murder by stabbing Jones in a bar fight. The witness on the stand claims the accused was with him the night of the stabbing. He has known the accused for 10 years and is his best friend. On the night of the stabbing, they were in the witness's apartment watching movies. They watched *Last Man Standing*. They were drinking beer together. They went to a bar together. The witness carried a switchblade with him. He told the police he carries it because, "it's a tough town." He knew the victim. He talked with the victim before the stabbing. They argued.

Drill #5—Developing Approach Points

A. **Preparation:** Counsel should review the fact scenarios in Chapter 4, *Direct Examination*, *U.S. v. Minderbender* and *U.S. v. Jones.* One participant should be assigned to play each witness, the PX cashier and PFC Smith. All other participants should prepare a cross examination. Counsel should then be given 15 minutes to prepare a cross examination of the witnesses.

1. **Bad Check Case:** For *U.S. v. Minderbender*, the cross examination should elicit testimony in support of a mistake of fact defense and any other areas that counsel may develop from the facts.

2. **Assault:** For *U.S. v. Jones*, the cross examination should develop a self-defense theory and any other theme that counsel may develop.

B. **Conducting the Drills:** Counsel should conduct a 5-10 minute cross examination of each witness.

C. **Critique:** Critique should focus on counsel's ability to

1. Use single-fact leading questions;

2. Control the witness;

3. Develop clear approach points without asking the ultimate question;

4. Avoid arguing; and

5. Limit the number of points made on cross examination.

SAMPLE SOLUTION: BAD CHECK CASE CROSS-EXAMINATION

CANNOT IDENTIFY THE ACCUSED

Q: Good afternoon, Mrs. Smith. You indicated that you have worked as a cashier for 15 years. On average, during those 15 years, you worked five days a week, didn't you?

Q: Eight hours a day?

Q: During those eight hours, you see a lot of Soldiers, correct?

Q: On any given day, you wait on over 25 customers?

Q: About half of those customers cash checks, isn't that true?

Q: So then, you cash about 12 or 15 checks a day, correct?

Q: And the amount of the checks is usually different?

Q: That means that in a week, you cash about 60-75 checks?

Q: There is no way you can remember all the people who cash checks, is there?

Q: Or the amount of the check?

Q: Sometimes you can remember a particular customer cashing a check, correct?

Q: Because of unusual clothing?

Q: Or because of the way he or she acts?

Q: In other words, if a person were acting shifty or strange, you would be more likely to remember them, correct?

Q: You do not remember LT Minderbender, do you?

Q: Specifically, you do not remember LT Minderbender cashing a check for $250.00 on 24 January 2017, do you?

STATE OF MIND

Q: The maximum amount of money a person can cash a check for is $400.00, correct?

Q: Right outside your window is a sign that states this, correct?

Q: It is a legible sign?

Q: Legible to the people in line?

Q: So, if LT Minderbender wanted to, he could have written the check for $400.00?

Q: And if the check were properly completed and he showed the appropriate identification, you would have cashed it?

MISTAKE WITH PROCEDURES

Q: Mrs. Smith, I want to ask you about the PX check cashing process. You are familiar with this process, correct?

Q: You have been cashing checks at the PX for over 15 years, isn't that true?

Q: You are required to follow the proper procedures when cashing a check, right?

Q: Every time a customer cashes a check, you follow the same procedures, don't you?

Q: The first step in the process is verifying the accuracy of the check, correct?

Q: During this step, you ensure the check is filled out properly?

Q: You make sure the amount is complete, don't you?

Q: And that the amount is written accurately?

Q: You make sure the check is accurately dated, correct?

Q: You also see if the customer signed the check, don't you?

Q: You compare his signature to that on an ID card?

Q: All this information must be accurate, correct?

Q: If it is not, then you will not accept the check, will you?

Q: In fact, your duties as a cashier require you to verify this information, don't they?

Q: Your initials on the check indicate that you verified this information, correct?

Q: And that the check is complete and accurate?

Q: Mrs. Smith, I am handing you Prosecution Exhibit 8, a check. Please look at the front of the check. You initialed the check, correct?

Q: So you found this check to be complete?

Q: Mrs. Smith, what date was this check written?

Q: You cannot tell, can you?

Q: Because there is no date on the check, is there?

Thank you. No further questions.

SAMPLE SOLUTION: ASSAULT CASE CROSS-EXAMINATION

ABILITY TO RECOLLECT

Q: Private Smith, before going to Private Jones's room on the evening of 1 February 2017, you were drinking beer, weren't you?

Q: You started drinking beer at 1800 that evening?

Q: You finished drinking beer at 2100?

Q: Within this three-hour period, you drank about eight beers, didn't you?

Q: During this period, you didn't eat anything, did you?

Q: You just drank beer and listened to music?

Q: After drinking eight beers in three hours you felt the effect of the alcohol, didn't you?

Q: And in fact, your blood alcohol content, one hour after the altercation, was .14?

Q: You would agree with me that alcohol impairs your ability to remember events?

THE VICTIM IS THE AGGRESSOR

Q: After drinking those eight beers you went to Private Jones's room?

Q: You knocked on his door?

Q: Private Jones opened the door?

Q: And you walked inside?

Q: The TV was on?

Q: It was clear to you that Private Jones had been watching TV?

Q: Now Private Jones wasn't drinking beer with you, was he?

Q: In fact, he had not been drinking at all?

Q: He was having a quiet evening in his room, watching TV?

Q: Shortly after Private Jones let you in his room, he asked you to leave, didn't he?

Q: He asked you more than once to leave, correct?

Q: He repeatedly asked you to leave, isn't that true?

Q: But you refused to leave?

Q: Each time he asked you to leave, you refused?

Q: You wanted to stay in his room, didn't you?

Q: You did not like Private Jones asking you to leave, did you?

Q: It upset you, didn't it?

Q: During this entire time, you were standing, weren't you?

Q: Initially, Private Jones was sitting?

Q: Then Private Jones stood up?

Q: Private Smith, how tall are you?

Q: That is about four inches taller than Private Jones, isn't it?

Q: How much do you weigh?

Q: You would agree that you outweigh Private Jones?

Q: When Private Jones stood up, you moved toward him, didn't you?

Q: When you moved toward Private Jones, he didn't have anything in his hand, did he?

Q: It was only after you moved toward him that Private Jones hit you, right?

Thank you. No further questions.