THE KEYS TO HIGH-LEVEL CROSS EXAMINATION:
How to Think, Structure, and Plan

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I. What is This Guide All About?

When done well, cross examination can look like magic. The examiner controls the witness and skillfully, step-by-step, leads the unwilling witness down a path that the witness doesn't want to take, and the jury watches as major pieces of the witness's story fall apart.

Part of the reason good cross looks like magic is because we have seen the alternative—the train wreck of a failed cross exam—and we do not fully understand why those cross examinations cratered. We have the traditional rules of cross examination, such as "ask leading questions," "ask a question only when you know the answer," etc. But these "rules" are not enough; first, because it makes sense to break all of them on occasion, and, second, because following rules designed to help you avoid major mistakes—and that is what these rules are designed to do—does not guarantee that your cross will be effective any more than following the rules of grammar will guarantee that your next novel will be a big hit. Indeed, often breaking one of these "rules" of cross is a symptom, not the cause, of the problem.

We have learn-by-doing programs like those held by the National Institute for Trial Advocacy in the United States (and similar programs using the Hampel method in much of the rest of the English-speaking world). These programs are extremely valuable, because you cannot learn cross examination without doing cross examination. I believe in the learn-by-doing programs and teach them often. But it is difficult and sometimes impossible to fix foundational problems in cross when all you have time for is a two-minute, one-issue critique.

And more experienced lawyers are often very little help. We too often fall back on powerless bromides like "you need to exercise judgment" or "that comes with experience." Judgment and experience help. But the foundation for successful cross examination can be taught.

This is not intended to be a one-stop, how-to guide. There is always more to learn, another technique or trick to master. But no advanced technique, no bell or whistle, will help if the cross examiner does not have a firm foundation. This is an effort to establish the foundation for high-level cross examination, the foundation from which everything else is possible. This is a guide for how to think about cross, an explanation of the components of a successful cross examination, and a map for how to plan for a successful examination.

This guide can push you in the right direction. It can help you to think of cross properly, which will help your preparation and help you avoid mistakes. But these ideas can only be learned through practice. So read this guide, think through the principles, and then practice them. It is the only way.

II. How to Think About Cross Examination

A cross examination is persuasive speech and should be thought of that way, a distant cousin to the politician's stump speech or an infomercial. As with any persuasive speech, the goal is to move your audience from where they are to a new location with the persuader as the guide. As with any other form of persuasive speech, the fundamentals of persuasion apply: the guide must have credibility, must meet the audience where they are, must give them a compelling reason to take the journey, must appeal to the whole person (the emotions as well as the intellect), and must give them the information they need to follow.

But cross examination is a particularly complex form of persuasive speech, because the examiner has to do much of her talking through an unwilling third party spokesperson (the adverse witness, of course). So while every form of persuasive speech is a journey from one destination to the other with the persuader as the guide, in cross examination, the guide is dragging along a hostage, one who is determined at all times to sabotage the operation or escape and flee.

So understood, the cross examiner's task becomes clear. The cross examiner must ask, of course, "To what new destination would I like to take my audience?" Only destinations that make a verdict in his favor more likely should even be considered. (And you might be surprised how often cross examiners spend time pursuing destinations that do not make a favorable verdict more likely.)

But identifying a favorable destination is not enough. The cross examiner must also ask what destinations are is possible when dragging, step-by-step, this particular unwilling hostage. Some destinations simply are not practical when you are forced to bring along a hostage who is determined to escape. And even as to the plausible destinations, the cross examiner must plan a path for the journey that takes into account—at each step of the process!—how she will ensure that the hostage is unable to escape at every step along the path. Some paths that are possible with a willing group working together to overcome obstacles simply are not possible when dragging along an unwilling participant. They may be too complex or too dangerous under the circumstances.

And leading your hostage and jurors on a failed journey can be disastrous.

It is the failure to think of cross in these terms that so often leads to trouble. Examiners ask the unwilling hostage to make a leap to their desired destination. Or they fail to anticipate obstacles along the path, obstacles which give the unwilling hostage an opportunity to escape into the woods. Or they simply hope that the unwilling hostage will, for some unknown reason, become a willing participant and aid the process. Spoiler alert: they won't.

This failure to understand the process and plan accordingly is why cross examinations so often fail. And why the advice we give to practitioners often makes so little sense. Almost every trial lawyer knows, for example, that open-ended questions are dangerous. They know that asking a question when you don't know the answer is dangerous. They know that you are not supposed to

argue with the witness. They know these things. They do not plan to do these things. But when the plan goes south and desperation sets in, they do them anyway.

This is why the advice we give is often useless. We tell practitioners that blew up their cross exam by asking a foolish, open-ended question, "Don't do that." But repeating this "rule" of cross does not address the underlying problem. The examiner used the open-ended question in desperation, because a poor cross examination plan or a misunderstanding of the foundational principles of cross put the examiner's entire journey in jeopardy, and they weren't sure how to salvage the operation. In panic, they started to do things they never intended to do.

As Mike Tyson once said, "everyone has a plan until they get punched in the mouth." Jumping off a 50-foot cliff into the mysterious pool of water below is generally a bad idea. Hikers should have a general policy against it. But if the hikers are surrounded by a hungry, angry group of grizzlies, the leap might seem like the best of the really bad options available. Cross examiners tend to jump into foolishness like dangerous, open-ended questions when their bad planning leads to their being surrounded by bears. At that point, telling them not to jump into a pool of water of indeterminate depth isn't very helpful. We need to help them avoid the bears in the first place. That is the purpose of this guide.

III. Don't Forget the Most Important Thing!

We are about to walk through the fundamentals of planning a high-level cross. But never lose sight of this point: cross examination is a conversation, and any good conversation requires that you *listen*.

An effective cross examiner is always a good listener. No matter what our plan, we must always listen to the witness and respond accordingly. Plans change as witnesses speak; they must, if we're doing our job correctly. And that means that sometimes we have to modify our cross in real-time while questioning the witness. Doing so isn't always easy, but it is the difference between mediocre and great cross examiners. Bad cross examiners don't have a plan that makes sense. Mediocre cross examiners often do but can't adjust on the fly and cannot take advantage of the gifts that the witness so often presents to them. Great cross-examiners listen, adjust, and accept and open the witness's gifts.

It can sometimes look like magic. It is not. The key reason great cross examiners can adjust on the fly is because they understand the process of planning a cross examination and have mastered the basic skills of cross examination, which allows them to plan and execute new components of a cross in real-time as the opportunity arises. (And because they are very well prepared.) The more adept we are at planning an effective cross-examination, the more likely it is that we can "plan" during a cross examination when the unexpected happens. So let us learn the theory. Let us learn the skills. But let us never forget that must not let our plan or our technique distract us from *listening*.

IV. Choosing the Right Destination

Cross is like any other journey; you cannot have a successful trip if you pick the wrong destination. If a destination is good, it should be clear to you; you should be able to express that destination in a one-sentence thesis. If you cannot state your destination in a one-sentence thesis, you don't yet have a proper destination for a cross examination.

A proper destination is one that moves the jury closer to a verdict for your client. That sounds obvious, but experience suggests otherwise. Lawyers often spend time on cross on issues that are not likely to advance the ball. (One common example is attacking a witness's credibility on issues that are irrelevant to the case.)

Far more common, examiners choose a destination that would advance the ball, but the destination is one that the examiner simply cannot reach on that cross examination. Remember, on cross you are pulling with you an adverse witness, an unwilling hostage who looks to sabotage your journey or escape at the first available opportunity. What we must do is select an end destination that we can reach under those circumstances. We cannot expect an unwilling witness to take a leap with us to a conclusion they are unwilling to concede. We cannot expect them to work with us to overcome obstacles. We must make sure that we can drag them along, step-by-step, even as they inevitably look for every available opportunity to run away.

Good cross therefore takes a thorough understanding of the case, both the facts that are likely in evidence or should be admitted, your theory, and your opponent's theory.

Good cross also takes a realistic appraisal of the situation. Too often, examiners assume that the two or three good facts they bring to an issue so obviously lead to their conclusion that the witness must do so. We expect the witness to leap from the established facts to our desired conclusion; but the witness has no desire to do this, and if any leap is required, we won't get where we're trying to go.

Good cross also takes prep time. For an important cross examination that may last only an hour or two, I may spend a full week thinking through and planning the examination. There simply is no substitute for putting in this work. We must know what parts of our story we should tell on cross with each adverse witness, and we must anticipate the obstacles to be overcome. That is, for each potential destination that we may want to pursue on cross, we must think carefully through each step of our journey and ask: "Can I force the witness to take that step?"

This does not mean that we must always have a statement from the witness in deposition or in a declaration. I do not encourage lawyers to pre-plan their cross so that every question is scripted in advance with an impeachment clip ready. An effective cross examiner cannot be so limited. But we must have some reason to believe that on every step of our journey the witness will give us the answer we're expecting—whether that be deposition testimony, an email, the opposing party's pleading, or even good, old-fashioned logic—or that they will pay a price for giving the wrong answer. We can only know this if we have thought through the journey carefully and are convinced that we can lead even a smart, unwilling witness all the way down our intended path.

Many a cross examiner has died horribly before her jury because she failed to do that analysis carefully or thoroughly enough.

Indeed, even the ability to adjust on the fly and take unexpected opportunities presented by the witness depends on thorough preparation. We can recognize and take advantages of unexpected opportunities only because we know our record, our case, and our witness so well. Unprepared examiners have to stick to the script.

There is another key concept to remember here. A good destination on cross does not necessarily mean that we take our unwilling hostage all the way to our ultimate conclusion. We might want the jury to conclude that the hostile witness was negligent in operating a piece of machinery. But that does not mean we need the witness to agree he was negligent. Indeed, one of the primary causes of disaster on cross examination is our insistence that we get the witness to agree to our conclusion. That is usually not our goal. Our goal is to move the jury closer to that conclusion. How close we try to move them depends on how far we can move our unwilling witness without running into an obstacle that will give the witness the chance to sabotage our journey or run away.

Indeed, it is the ever-present desire to chase after conclusions that often gets us into so much trouble. We do not chase conclusions. Our witness will seldom give us the conclusions we want, and surprisingly, a conclusion without the story that builds to it is often unsatisfying. Be careful about chasing after your conclusion.

Ultimately, the destinations we choose should fall into one of two categories. The first is a destination (which can be articulated with a clear thesis statement) that we are quite sure we can reach with our unwilling hostage, because we have through the path step-by-step and at all times we are comfortable that we can force the hostage to go there with us.

The second type of destination, which should be far less common than the first, is where we *must* cross a particular witness on a topic, even though we are not sure of the path, and here we choose our destination believing we can probably force our witness to go along. In this circumstance, we are not sure we can overcome every obstacle on our path, but we have thought through the obstacles and have a plan for overcoming them that will either work or will allow us to take a safe off-ramp if it does not. We will discuss both.

V. Telling A Compelling Story on Cross

Storytelling is the key tool for just about all forms of persuasion. This is not the venue to go into the social science literature on that topic. But the evidence is overwhelming that storytelling is the key to persuasion. Indeed, we know from the experts that our brains spend the vast majority of the time taking in information and crafting stories for us from the data points. Crafting stories is how we process information. It is how we think.

Your decision-maker—judge or jury, it doesn't matter—often cannot make sense of the facts without the necessary narrative context; or put another way, this is why the decision-maker constructs an entirely new (and sometimes shockingly inappropriate, from your perspective) narrative that is different from the one you intend. If you don't create a story they can latch onto, they will create one of their one. You may not like it.

Stories help your audience understand, make sense of, and remember facts. We remember stories, but most people will not remember random facts outside the narrative context. Stories even allow your audience to fill in the missing facts. Often, jurors will fill in missing facts if you tell a good enough story. Why? Because once our minds settle on a familiar pattern that makes sense of the data before us, it can create the missing data to finish the story, and we might not even know that we're doing it. Thus, once a judge or jurors understand and believe your story, they will often fill in the missing pieces themselves.

And stories appeal to the whole person. This is critical. People are not entirely rational creatures. Much of our decision-making has little to do with logic and much to do with our emotions or non-rational triggers. Stories access the non-logical side of a human being. Without stories, our efforts at persuasion often focus solely on logic, and that tends to be ineffective.

You don't need to know all that to be an effective cross examiner. Just remember, as social psychologist Jonathan Haidt has written, the human mind is a *story* processor, not a *logic* processor. So focus on storytelling. Even on cross.

Of course, we will seldom tell our entire story in a cross examination. Every witness on cross tells only a part of our overall story. And each part of our overall story that we tell on cross is a separate destination, which can be described in its own, clear thesis statement, and which will make up a chapter or module of our examination.

To do all this, to tell effective stories on cross, we must first build out our narrative. And, second, we must control the narrative.

A. Building Out Our Narrative

Let's start with the easy part. Almost every trial lawyer can identify one or more useful facts in the case, often in the paper trail. We all know these are often the critical building blocks for a cross examination.

But for too many advocates, this is the end of the process. I'm going to use this fact from document A, this fact from document B, and that fact from document C. That should get 'em.

But, if we're doing our jobs properly, we identify the helpful facts we have in the record and then *multiply* them. Remember, in stories, people go places, see things, do things, say things. We can't tell a story without facts. We can only chase a conclusion that we probably won't get.

And the facts of a lawsuit are like the pieces of a jigsaw puzzle. The more facts we have to support our story—the more puzzle pieces we have in place—the clearer the picture becomes, and the more complete and compelling the story we can tell. At some point, even without all of the pieces in place, you can see the picture.

But the fewer pieces we have, the more likely it is that the decision-maker—who (brain science tells us) is constantly taking in the facts and trying to create a coherent narrative based on the fact patterns already present in her brain—might come up with a wildly different narrative. The decision-maker might even ignore facts you think are crucial because, absent a narrative that can replace the one already in her brain, the decision maker has already started to adopt a different story, and your new facts may not fit the existing pattern. They simply get rejected, ignored.

But how is it possible to multiply facts? The same way we put together a jigsaw puzzle. We take the pieces we have and we find the additional, related facts like the connecting jigsaw pieces. Each fact is part of a much bigger picture, and each fact is connected to a whole series of related facts just like jigsaw pieces are related to other pieces. Because of the shape and color of a jigsaw puzzle piece, we can make informed inferences about the pieces that connect to it, and we can therefore look for them. That's how we identify the pieces we need and build the picture.

The same is true of trial facts. Taking the facts we know and logic, we can deduce that other, related facts must also be true. And, therefore, while they may not appear in the document we're using, for example, we can often have a firm conviction that they are true and that we can establish them, even through an adverse witness.

Let me provide a simple example. Imagine that a witness wrote a memo summarizing a meeting. We have the facts that appear inside the memo. But there are a whole range of useful, related facts that are almost certainly true. For example, this was a meeting that was important enough for the witness to take the time to summarize it. The writer cared to memorialize the meeting. The writer wanted to capture the most important things that were said or decided, etc. We can continue, but you probably already see the point. We can infer all kinds of additional facts here, and many of those will likely work their way into our eventual cross.

This process of building out the related facts is critical, because facts are social animals: they can thrive only in the company of other facts. A solitary fact is not memorable, important, or useful. That Jacob lives at 123 Main Street means nothing outside the context of the story, and the story depends upon a whole series of other facts. Our decision-maker can understand, remember, and use our facts only if he or she can put those facts into the context of a narrative. It is the narrative, the story, that makes those facts important. People — all people — only think in stories.

And that means we must stop thinking about cross examination as our opportunity to put a good fact or a few facts in front of our decision-maker. We must use our good fact—in conjunction with the other, related facts that necessarily exist — to build out a fuller narrative, and in this way, to tell a compelling story. That is the art of cross.

B. Controlling the Narrative

Because we are telling a part of our story through an uncooperative witness who seeks to harm us, we must be sure that we can control that witness. We must, that is, be able to force that unwilling hostage to come with us at every step of our destination. And just as we would bind our unwilling hostage to force him or her to come with us on the journey, we must bind our unwilling witness to keep them from running away.

The primary means of telling a story through the mouth of an adverse witness is simplicity: one simple fact at a time.

The more facts we include in a single question, the more targets a hostile witness has to shoot at. And the longer our question, the longer a witness's answer can be and still appear reasonable. That is, both the judge and jury will be more forgiving of a witness who runs off at the mouth if the question to the witness was long and complicated. And this is true even if the long, complicated question is one that we would deem a closed-ended question. In such cases, yelling at the witness to "answer yes or no" will not help us.

Also, adjectives and adverbs are almost always a source of debate. If we're having trouble controlling a witness, it's probably because we're including adjectives and adverbs. Adjectives and adverbs almost always lead to a fight. And while we will sometimes need to use them, we must develop the skill of telling a simple story with only facts.

Simple one-fact questions are not the only questions we will ask in an effective cross examination. But they are the heart of an effective cross. Unless and until an examiner has mastered the art of telling a story one fact at a time, she has no ability to control a hostile witness.

VI. Creating Our Blueprint

At this point, we have figured out what our destinations will be—that is, what portions of our story we hope to tell on cross, each of them amenable to a clear thesis statement. We have also identified and built out the facts we have to tell that part of our story. And we have decided that we have a pathway that will allow us safely to drag our unwilling hostage, step-by-step, to the destination.

Now we need to create a proper plan, or blueprint. And a proper plan requires all of the following:

- A thesis
- A target
- A context
- A plot, and
- A reveal.

We discuss each of these in the chapters to follow.

A. The Thesis

Let's start with the easy part. Almost every trial lawyer can identify one or more useful facts in the case, often in the paper trail.

1. *You Need a Thesis Statement*

We have already discussed that each chapter or module of our cross examination should have a clear thesis, which describes our destination for that chapter. Most trial lawyers would likely agree that if you can't articulate the point you're trying to prove, you haven't formed a viable plan for your cross.

Now things get controversial. I believe you need to state your thesis to the jury. Not a signpost, which just breaks the cross into chapters. Most cross-examinations have weak signposts. "Let's talk about the meeting on July 8" sets forth a topic. But it does not set forth what you intend to prove. It's boring, and it does not help the jury follow the persuasive argument to come.

You need a thesis statement. There are a number of different ways to do that, and you can be flexible to suit the needs of a particular cross. And, yes, there is an exception (or partial exception) to this rule. But the general rule holds: the jury needs to know your thesis.

This is true because a cross examination is a persuasive speech, the point of which is always to take your audience from where they are to a new destination. And to do that, your audience must know enough about where you are taking them to (1) be willing to go with you—you can't force that, and (2) be able to follow along.

One of the common pitfalls of trial work is the trial lawyer's assumption that what is obvious to him must be obvious to his audience. The only thing obvious about that is how untrue it is. The lawyer has lived with the case for months or years. The lawyer knows thoroughly (or should know thoroughly) all of the evidence that will come in and the things that won't. The lawyer has spent many hours reading about, writing about, and thinking about the case. The judge has not. The jurors have not. The factual admission that is obvious and critical to you is not nearly as obvious or obviously critical to the judge or jury. The thesis will help them follow why that fact is important and what point is helps to establish.

There are lawyers who say that the goal on cross examination is to get the useful facts admitted so they can be tied together in summation. That is wrong. I know there are some very good lawyers who say it. It is still wrong. The jury must be able to follow your cross. The thesis is almost always necessary to that. The jury must find your critical facts compelling—now, not a few weeks from now in summation, when you may already have lost some of your jurors—because once lost, you may not be able to get them back.

2. *What is a Proper Thesis Statement?*

At its most basic level, my thesis statement is the conclusion I want the jury to take from this chapter of my cross. One way to think about it is to remember the traditional advice against asking one question too many of the witness. If you ask the conclusion question—the one question too many—the witness will argue with you and undo much of what you have accomplished to that point. This is true. But that conclusion question is probably your thesis. If you don't know what your "one question too many" would be, you probably don't know your thesis.

And one way of stating the thesis is to state that conclusion question at the very beginning. It's not the only way. You can sometimes repeat the target that you intend to shoot down (more on that in the next chapter) and make clear through your tone that you find that target to be nonsense.

A more advanced method that I sometimes use involves setting the stage first with a vague question that gives the theme and piques the trier-of-fact's interest. If my thesis with an expert witness is that the expert relied on bad information, I might start the examination by asking, "Have you ever heard the phrase 'garbage in, garbage out'?" The witness may say yes, in which case I have them explain what the phrase means. Or they may say no, in which case I explain it and ask if they are familiar with the concept. At some point shortly thereafter, I will state my direct thesis. "Isn't it true, Dr. Anderson, that the information you relied upon in reaching your opinion was fundamentally flawed?" He'll say no, of course. But the jury now understands the battlefield. They know what we intend to prove; they know that the witness disagrees; and they can follow the confrontation that follows.

These aren't the only ways to state your thesis. There are any number of options. The key is that we do it.

3. *The Partial Exception to the Thesis Rule*

I have already conceded that not all experienced cross examiners agree with this approach. Some will argue that identifying the thesis clearly upfront will only highlight the issue for the witness and give the witness a better chance of fighting on that point. This is true, but if I have done my homework and know that I can lead that unwilling witness all the way to my destination, I don't care.

I do agree, however, that we should be careful about clearly stating our thesis if we are not sure we can win on a point but still must attempt a cross examination on it. If you're going to state a clear thesis statement, you better win the exchange. You cannot afford to tell the jury what you're going to prove and then fail to prove it. When you're not sure you can, you need to modify the thesis rule.

But sometimes you don't know whether you can win on a point. Generally speaking, that means you should stay away from that point on cross. But sometimes you can't. Sometimes the point is too critical, and you have to try to deal with that point with that specific witness, even though you are not sure of the terrain. This is never fun, but it does happen.

This is the only time I will do a module of a cross examination without a thesis statement. I will, instead, start to ask about the underlying facts I need in order to score my intended point, and I'll see what the witness has to say. If I start to get the facts I want, then and only then will I proceed to the desired conclusion. Depending on how the examination goes, I may at some point state my thesis *after* getting the foundational facts I wanted. But I still state my thesis.

Two points about these situations. First, a module like this will always come in the middle of your cross. You must start and end strong; you cannot start or end with a point that might fall flat.

Second, you must always have a jumping-off point. That is, you must have a new topic that you can immediately go to if the witness does not give you the foundational facts that you need. You must have this planned in advance so the jury does not think you failed. You simply take some factual admissions you know the witness must give you (even if they're not very important) and transition immediately into your next point. This transition should be planned in advance. You know what the foundational facts are that you need. You know what a "bad" answer will be from the witness on those foundational points. And you plan how you can immediately segue into the next topic if you get one of those "bad" answers. Your effort failed, but you escaped without getting injured.

B. The Target

The target is how it sounds: it is what we're trying to hit. The target can be negative—where we try to destroy a claim made or fact suggested by our opponent—or it can be positive, where we're establishing an affirmative point that aids our case, whether the opponent has weighed in on the subject or not.

The target is closely related to the thesis—so close that this concept is a recent inclusion to the framework discussed here. But there is a distinction that is important to understand. The thesis is the point I ultimately hope to prove in that module or chapter of my cross. The target is the specific fact or set of facts that proves my thesis.

And while I can just state my thesis, I often must support and build up my target before I can move forward in the examination. For example, let us assume that the point of our cross is that the defendant engaged in bookkeeping shenanigans. That might be our thesis. Our target might be a letter from the defendant's auditors pointing out the flaws in their accounting treatment. This is the fact that helps prove our thesis. But it is often not enough simply to state our target. We must build up our target first to strengthen our ultimate conclusion.

So in this hypothetical, we would want to give as much credibility and importance to that auditor as we can before we use the auditor's letter against the witness. How we do that depends on the case, but in this hypothetical it is easy to imagine facts such as a long tenure by the auditors, strong qualifications, previous positive appraisals of the auditor's work, etc. We want to get as many of these facts out as possible, preferably long before we have looked at the auditor's letter.

C. The Context

Remember that a cross examiner is a storyteller, but a storyteller that can only tell part of his story through the witness on the stand. That means we must give the jury all of the background information and explanation necessary to understand this part of the story. I call this context or setting.

Think about this the way a novelist or filmmaker would. At the beginning of a new chapter or scene, particularly in a story that jumps around a lot (as almost all trials do), an experienced storyteller would provide the facts needed to follow this portion of the story. That might be location or date. It might be the introduction of a new character. It can be any number of things. Just remember: stories at trial bounce around, even if we don't want them to. Witnesses are available when they're available, and some witnesses can only talk about the first, eight, and twelfth chapters of the story. Their examinations will inevitably bounce around locations, times, and people. Make sure you explain to the jury all of the facts they need to know to follow the part of the story you are about to tell. Once that setting is established, we can move forward.

D. The Plot

This means exactly as it sounds. Stories have plot. People go places, do things, say things. This is the part of the cross when we tell the story.

To understand why this is necessary, remember that the stories each side brings into the courtroom have substantial overlap. There are always common events, discussions, meetings. The dispute lies in those areas where the parties' stories diverge. And these points of divergence are, of necessity, the key areas for cross examination; this is where we show that the story must take a right turn, not a left turn as our opponents suggest.

But the points of divergence mean nothing without the part of the story that comes just before. We must give the jury the necessary lead up to the story by walking the witness through the story just prior to the divergence step-by-step. This makes the divergence understandable, and it makes the ultimate reveal that much more persuasive. And, we must always remember, the jury does not know this story as well as we do. If we jump straight to the divergence and try to prove our right turn rather than the opponent's left turn, the jury may simply not understand the importance of the event.

This is the heart of the cross examination. It is where we are walking the unwilling witness step-by-step towards our destination, often one fact at a time to make it harder for the witness to escape.

E. The Reveal

The Reveal is where we disclose why we're right, why we've hit the target, why our thesis statement was true all along. The Reveal could be a single fact or a more complex Reveal might involve a series of facts. Either way, the Reveal is the payoff. It is what we've been building towards.

And building towards the Reveal is critical. Without all that we've already talked about, the Reveal will fail. Many cross examinations fail even where the lawyer has a good fact but did not create the context and go through the narrative buildup before the knockout punch. The jury usually misses the point; they may not even be paying attention when it happens.

But if we do all of the precursors properly, we're now ready for The Reveal.

Understand, the Reveal should almost always have a twist or a surprise. If, for example, the problem with the witness's account is that it has a missing or incorrect fact or indefensible assumption, you should build up the importance of that fact or assumption. Make it clear that the fact or assumption is absolutely critical. Then, and only then, will you pull the rug out from under the witness.

We can be creative with how we finish a cross-examination module. The traditional method for The Reveal is to state the devastating fact(s) and have the witness agree with you. And if he or she does not, you impeach on that point. This is a solid approach.

Keep in mind that The Reveal does not have to be a single question. If you have a handful of related facts that establish the same point, ask all of them. You can marinate in The Reveal. Soak it in. Enjoy it. Don't rush. And never, ever let the witness off the hook. If the question is devastating to the witness, he or she will often hesitate before answering. Don't help the witness. Enjoy the moment. Be quiet. Don't say or do anything. Just wait. Let the tension build.

There is another alternative that I favor but I don't use it on every module because it will become repetitive and can feel like an acting performance if overused. Instead of affirmatively stating the fact that supports you, state the opposite. In other words, state the fact that should follow if

the witness's story is true, knowing that the witness cannot agree to that fact without getting impeached. And see what the witness does. Often the witness will be confused and won't be sure how to respond. This will only build suspense and heighten the eventual payoff.

So if the critical fact is that the witness ran a red light, don't immediately ask once you've gotten to The Reveal, "And the light was red?" Instead, ask "And the light was green?" as if you're just allowing the witness to continue with her story. And then let her decide whether to say yes and be impeached or say no and provide The Reveal herself. And if she doesn't know what to say – which is often the case – just wait and enjoy the moment. And if necessary, then and only then do you ask the question "The light was red, wasn't it?"

One final point on this issue. Sometimes in the Reveal we will ask questions without regard to what the witness will say; these questions are simply the examiner's speech to the jury, tying things up in a bow. They are a speech, and the witness is now a bystander. This doesn't happen in every Reveal, and it is a strategy that can be used only when you have established the factual points that lead to the desired conclusion and you believe the witness's denial of the obvious conclusion will only injure the witness's credibility, not undermine all of the preceding good work.

VII. Some Additional Thoughts on Structure

We have walked through the theory that underlies and the components that make up each chapter or module of a cross examination. Some simple cross exams may have only a single module. Others may have quite a few.

Where a single cross examination has many chapters, each with its own conclusion, you will need to put some thought into the order of the examination.

There are no unbreakable rules on this topic, but a few suggestions are in order. First, as always with persuasive rhetoric, start and end strong. Bury the other stuff in the middle. Second, you sometimes need to lock down facts early so you can use later; there is information you can get from a witness only when the witness does not know why it is important. Plan accordingly. Third, if you can do it consistently with the above, give your chapters in chronological order. This isn't a rule, and you must bounce around at times. But it's easier to follow a story told in chronological order, and easier for the jury tends to be better.

VIII. Conclusion

This is the end—literally and figuratively. This is the end of this guide, because this guide was only designed to teach how to think about cross and how to structure it effectively.

There are any number of other tricks of the trade that an effective cross examiner must learn and add to her toolbox. But these bells and whistles will not work unless we understand the purpose of cross and how to plan effectively. Nor will the rules of cross examination—don't ask leading questions!—help us if we don't understand these foundational points. Indeed, if we understand the foundational points, we will know when we can break the "rules" and ask a leading question or a question to which we don't know the answer. Without understanding the foundational principles of cross, we will violate the "rules" unintentionally, and we will pay the inevitable price.

Many of these principles will become clear only as you attempt to practice them. They are a guide to point the examiner in the right direction. The examiner must now experiment with these principles in practice, as practice is the only way to learn how to cross effectively.