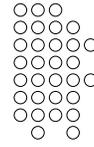


# EXAMINATION OF WITNESSES



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**JOSEPH V. KAPLAN**

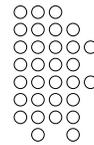
PASSMAN & KAPLAN, PC

**EEOC EXCEL JULY 2009**

© Joseph V. Kaplan

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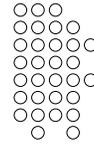
## OBJECTIVES OF TODAY'S PRESENTATION



- Discussion of Various “Types” of Questions
- Goals of Direct Examination
- Goals of Cross Examination
- Structuring / Ordering the Testimony
- Do's and Don'ts



## PREPARATION

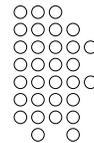


The Key to good examination of a witness, whether on “direct” or “cross” is ***preparation*** --

- Know the facts
- Know the documents
- Prepare the witnesses
- Know the forum’s rules and burden of proof

3

## TYPES OF QUESTIONS



First, let’s examine certain types of questions...



After, we’ll discuss when, how, and *if* to use them



4

## TYPES OF QUESTIONS

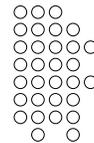


- Leading
- Compound
- Open
- Closed
- Transitional



5

## Leading Questions



A **LEADING** question is one which suggests or contains the desired answer. It may be “tagged” with a demand for affirmation or refutation - a “yes” or “no” answer.



6

## Leading Questions

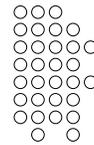


*E.g. – the “tagged” leading question:*

- Q. Ms. Badboss, you considered all the relevant *Douglas* factors in your penalty determination, isn't that so?
  
- Q. Ms. Badboss, you told Mr. Poorworker to complete his report by June 1<sup>st</sup>, isn't that a fact?

7

## Leading Questions

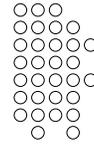


*E.g. – the “untagged” leading question:*

- Q. Did you considered all the relevant *Douglas* factors in your penalty determination?
  
- Q. Did you tell Mr. Poorworker to complete his report by June 1<sup>st</sup>?

8

## Leading Questions

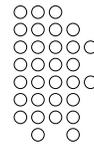


With leading questions, it's the ***questioner*** who is supplying the information, not the witness.



9

## Leading Questions

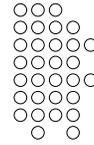


If the ***witness*** is truly to provide the information, the above leading questions should be re-formatted as follows:



10

## Leading Questions



LEADING

Q. Did you consider all the relevant *Douglas* factors in your penalty determination?

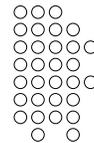


NOT LEADING

Q. What did you consider in making your penalty determination?

11

## Leading Questions



LEADING

Q. *Did you tell Mr. Poorworker to complete his report by June 1<sup>st</sup>?*

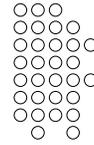


NOT LEADING

Q. What deadline, if any, did you give Mr. Poorworker to complete his report?

12

## Convert Leading Q's into Nonleading Q's



LEADING

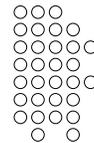


NONLEADING

**AND** keep the information **IN** the Question  
It's easy .... It can be done!

13

## Convert Leading Q's into Nonleading Q's

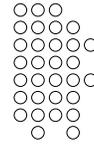


Some simple phrases worked into questions:

- “whether or not”
- “if anything”
- “did you or did you not”

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## Convert Leading Q's into Nonleading Q's

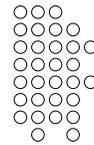


e.g.s.

- Q. Please tell me **whether or not** you told Mr. Poorworker to complete his report by June 1<sup>st</sup>?
- Q. What **if anything** did you tell Mr. Poorworker about completing his report by June 1<sup>st</sup>?
- Q. **Did you or did you not** tell Mr. Poorworker about completing his report by June 1<sup>st</sup>?

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## Convert Leading Q's into Nonleading Q's



Another approach is to present **alternatives** in your question:

*E.g.*

- Q. Did you tell Mr. Poorworker to complete his report by June 1<sup>st</sup> or July 1<sup>st</sup>?

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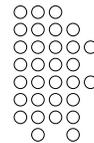
## Joe Kaplan's "Secret" Tip to Convert a Leading Question into a Nonleading Question!



Don't look for the answer to be "printed" here . . . the heading says it's a "secret" . . . doesn't it?



## Compound Questions



Two or more questions asked as one:

e.g.-

Mr. Poorworker, did you tell your supervisor, Ms. Badboss, that you couldn't finish the report by June 1<sup>st</sup> **and** that you had not received the necessary data from your co-worker?

## Compound Questions

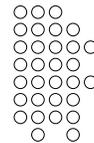


- Both the question and answer are unclear.
- Does a “yes” or “no” answer the first part, the second part, or both?
- Creates a confusing record of no help to either side.



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## Compound Questions

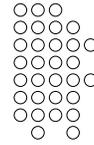


Correct by breaking down into components -

1. Mr. Poorworker, did you tell your supervisor, Ms. Badboss, that you couldn't finish the report by June 1<sup>st</sup>?
2. Mr. Poorworker, did you tell your supervisor, Ms. Badboss, that you had not received the necessary data from your co-worker?

20

## Compound Questions



The Result:

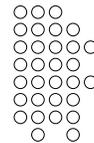
**Clear Question** ...understood by the witness

**Clear Answer** . . .understood by the judge



21

## Open Questions



- The Basic Question.
- Focus is on the Witness.
- Testimony is in Witness's own Words.

22

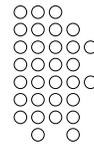
## Open Questions



- **Who**
- **What**
- **Where**
- **When**
- **Why**
- **How**

23

## Open Questions



- **Who** was at the meeting?
- **What** was discussed?
- **Where** did it take place?
- **When** did it occur?
- **Why** was it tape recorded?
- **How** did you learn about it?

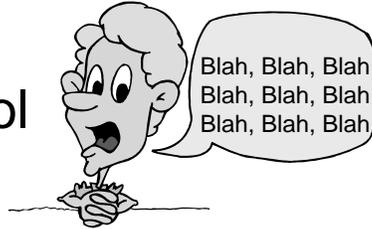
24

## Open Questions



The “DOWNSIDE” of the open ended question –

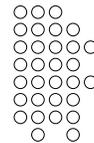
It can surrender control  
of the examination



**from** the questioner **to** the witness

25

## Closed Questions



- A very specific question ... “closed” or “narrowed” to put specific limitations on the scope of the potential answer.
- Requires the witness to focus on providing the narrow or specific information **you** want, *i.e.*, you keep control.

26

## Closed Questions



Some “Limits” –

- **Starting Point**

“What was the *first* thing he said at the meeting?”

- **Ending Point**

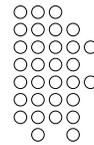
“What was the *last* thing he said at the meeting?”

- **Specific Points In Time**

“What was said at the *3:00 p.m. meeting on June 1, 2005?*”

27

## Closed Questions



Some “Limits” –

- **Sensory Perceptions**

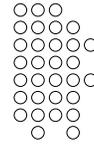
“What did you *see* when Mr. Poorworker was escorted from the building?”

“What did you *hear* when Mr. Poorworker was escorted from the building?”

“What did you *think* when you saw Mr. Poorworker escorted from the building?”

28

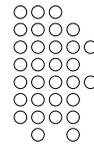
## Closed Questions



There obviously are an unlimited number of ways to “close” a question by asking for specific information, rather than merely asking, “explain what happened.”

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## LEADING – OPEN – CLOSED redux



### LEADING

“As Mr. Poorworker was being escorted out of the building, you heard Ms. Badboss tell Mr. Poorworker that he’d never work for the Agency again, isn’t that so?”

30

**LEADING – OPEN – CLOSED**  
**redux**

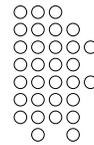


**OPEN**

“What happened when Mr. Poorworker was being escorted out of the building?”

31

**LEADING – OPEN – CLOSED**  
**redux**



**CLOSED**

Q. “Did you hear anyone say anything to Mr. Poorworker as he was being escorted out of the building?”

A. “Yes”

Q. “Who did you hear say something?”

A. “Ms. Badboss.”

Q. “What did Ms. Badboss say?”

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## Transitional Questions

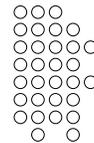


- Less a “question” than a “signal” to the witness or the judge about the direction or the subject matter of the testimony.
- Signals moving from one topic of testimony to another



33

## Transitional Questions

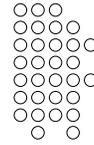


*E.Gs –*

- I am now going to question you about the contents of the PIP notice, do you understand?
- We are now going to discuss your decision to issue a proposed removal notice, OK?
- Unless you have anything further to add, I want to turn your attention to the input you provided the deciding official, all right?

34

## DIRECT EXAMINATION



Unless you have any further questions about transition questions, I am now going to discuss Direct Examination, OK?\*

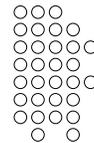
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\*effective use of transition question!



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## DIRECT EXAMINATION



36

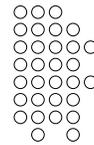
## DIRECT EXAMINATION



- Each party must put on its own case, through testimony and documents.
- MOVING PARTY --  
the purpose of direct examination is to get into evidence the facts that will **enable** you to prove the elements of your burden of proof.

37

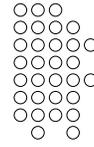
## DIRECT EXAMINATION



- NONMOVING PARTY –  
  
If you are the nonmoving (defending) party, the purpose of direct examination is to get into evidence the facts that will **prevent** the other side from proving the elements to satisfy to satisfy its burden of proof.

38

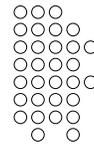
## DIRECT EXAMINATION



- Real life litigation is not “Perry Mason” where the case is won dramatically on cross examination.
- Do not underestimate the importance of direct examination; This is where you prove your case (or prevent the other side from proving theirs).
- Your Goal – “Credible Witnesses”

39

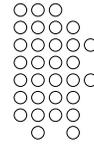
## DIRECT EXAMINATION



**LEADING  
QUESTIONS**

40

## DIRECT EXAMINATION



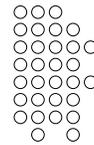
Federal Rule of Evidence 611

### **(c) Leading questions.**

Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

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## DIRECT EXAMINATION

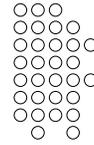


Exceptions to the rule against asking leading questions on direct examination –

- Preliminary matters (employment history, job title, etc.)
- Undisputed, routine matters (*e.g.*, you are supervised by Ms. Badboss, correct?)
- Hostile / Adverse Witnesses

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## DIRECT EXAMINATION- ORGANIZATION



- By Topic
- Chronologically Within Topic

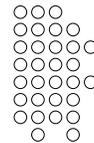


- Start with a Strong Witness
- End with a Strong Witness



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## DIRECT EXAMINATION



- **Listen, Listen, Listen!** Although you *know* what the answer is **supposed** to be, it might not come out of the witness's mouth the way you expected, or it may be incomplete.

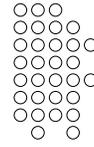


- Your job when that happens: **ask a follow-up question** to extract the expected answer.

(Ah! The importance of being able to convert a leading question to a non leading question!!)

44

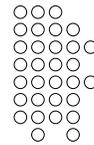
## DIRECT EXAMINATION - MISC



- Deal with Unfavorable Information to Mute the adverse impact.
- Don't ask for opinions.
- Avoid minutia.
- Avoid the appearance of giving signals to your witness.

45

## CROSS EXAMINATION



46

## CROSS EXAMINATION

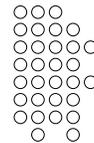


### PURPOSE –

Discredit the other side's case;  
make it appear less credible  
than your case

47

## CROSS EXAMINATION

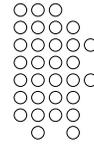


Establish the witness's testimony as:

- incomplete
- inaccurate
- implausible
- untrustworthy
- unreliable

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## CROSS EXAMINATION



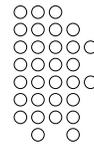
Cross Examination is **NOT** the time to learn information for the first time, that is what discovery is for.

General Rule: “Don’t ask a question you don’t know the answer to.”

Exceptions: The answer can’t hurt you; or  
There is no discovery (e.g., arbitration)

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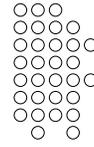
## CROSS EXAMINATION



- The **OPPOSITE** of Direct Exam. On Cross exam the questioner is putting the words in the witness’s mouth through use of leading and closed questions.
- Cross Exam can backfire because a witness can reiterate harmful testimony or clarify testimony to make it harmful.
- The Rule: “Less is More!”

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## CROSS EXAMINATION

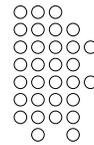


The preparation for a good cross examination starts way before the hearing/trial. It starts with pretrial planning.

- Know your burdens of proof.
- Know everything the witness has previously written or said on the subject.
- Have the relevant documents ready.

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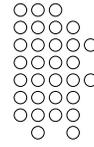
## CROSS EXAMINATION



- The decision to cross exam a witness should be a conscious decision. Don't cross exam just because you can.
- Remember - The decision to cross means the other side gets the opportunity to re-direct.

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## CROSS EXAMINATION



Don't Cross Exam unless you have  
information of witness's

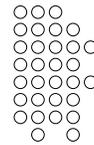
- Prior inconsistent statement
- Inconsistent conduct
- Incomplete testimony

Or you have

- Inconsistent testimony of others
- Inconsistent documentation

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## CROSS EXAMINATION



***Maintain control of the witness!***

- "That's not what I asked. Let me repeat the question."
- "You are not being responsive. Just answer my question and Mr./Ms. Otherside can question you about it if he/she needs to."
- "Judge, will you please direct the witness to answer my question."

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## CROSS EXAMINATION



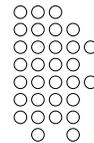
### *Maintain control of the witness!*

If your question calls for a “yes” or “no” answer, demand it –

- “I only asked for a yes or no answer, now please answer yes or no.”
- “Judge, will you please direct the witness to answer “yes or no.”

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## CROSS EXAMINATION – “Dos and Dont’s”



DO:

- Ask questions that are leading
- Ask “closed” questions
- Ask clear, short questions
- Ask for single-fact admissions



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## CROSS EXAMINATION – “Dos and Dont’s”



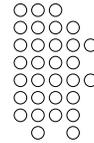
DO (cont'd):

- Be ready with relevant contradictory exhibits to show the witness
- Be ready with witness's deposition transcript



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## CROSS EXAMINATION – “Dos and Dont’s”



DON'T:

- Ask Open Questions
- Ask Compound Questions
- Ask Questions Without Knowing the Answer
- Argue With the Witness



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## CROSS EXAMINATION – “Dos and Dont’s”



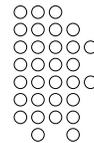
DON'T (cont'd):

- Rehash the Direct Testimony
- Do Not “Clear Up” muddled testimony
- Do Not Invite Explanations; Don't ask “Why”.



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## CROSS EXAMINATION

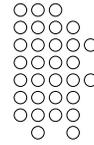


- If you must do a “**cold cross**,” *i.e.*, where you have been unable to obtain the answers prior to trial, proceed very cautiously.
- Try to ask questions that are “safe.”
- Pray!



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## REHABILITATING YOUR WITNESS ("RE" EXAMINATION)

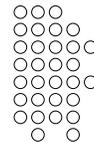


Redirect provides the opportunity to rehabilitate your witness if the witness has been impeached on cross -- or to clarify any "mistatements".

Again, less is more. The more you re-examine your witness, the more fodder there is for re-cross examination.

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## REHABILITATING YOUR WITNESS ("RE" EXAMINATION)



### 3 Steps of Rehabilitation on Re-Direct:

1. **Focus** the witness on the initial impeachment question;
2. Ask the witness to **explain** the seeming inconsistency; and
3. Ask for **affirmation**, so the initial answer on 'Direct' is the more reliable answer.

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## REHABILITATING YOUR WITNESS ("RE" EXAMINATION)



Example:

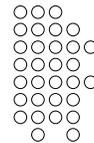
### 1. **FOCUS**

Q. "Do you recall Mr. X pointed out that in your deposition that you testified that Mr. Poorworker missed only one deadline?"

A. "Yes."

63

## REHABILITATING YOUR WITNESS ("RE" EXAMINATION)



Example:

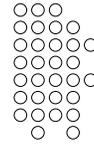
### 2. **EXPLAIN**

Q. "Mr. X. didn't ask you why you testified on direct that Mr. Poorworker missed many deadlines, whereas in your deposition you testified Mr. Poorworker missed only one deadline, so please **explain** that to us now."

A. "The question at the deposition was only about blue reports. Mr. Poorworker also missed deadlines for red reports."

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## REHABILITATING YOUR WITNESS ("RE" EXAMINATION)



Example:

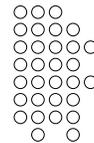
### 3. *Affirmation*

Q. Which answer -- that Mr. Poorworker missed one deadline or that Mr. Poorworker missed many deadlines -- is correct?"

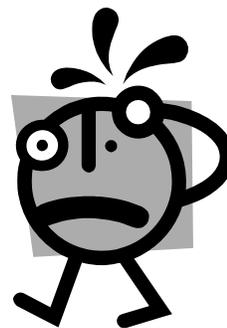
A. As I testified on direct, the correct answer is that Mr. Poorworker missed many deadlines.

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## EXAMINATION OF WITNESS

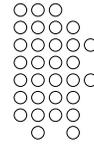


GOT ALL THAT?  
GOOD, NOW CALL YOUR **NEXT**  
WITNESS!



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AND LASTLY . . . .



**THANK YOU**

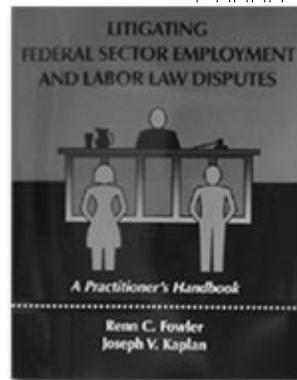
Remember to Fill Out and Turn  
In Your Evaluations!

(Yes -- that was a "compound" instruction!)

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**VALUABLE  
RESOURCE!**

- ***LITIGATING FEDERAL  
SECTOR EMPLOYMENT  
AND LABOR LAW DISPUTES:  
A Practitioners' Handbook***

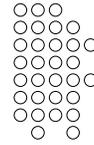


**By Renn C. Fowler and Joseph V. Kaplan**

- Email: [dewey@deweypub.com](mailto:dewey@deweypub.com)
- Phone: 703.524.1355

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**THE END**  
**JOSEPH V. KAPLAN, ESQ**



**PASSMAN**  
**&KAPLAN**  
*Attorneys at Law* P.C.

**1090 Vermont Ave., NW**  
**Suite 500**  
**Washington, DC 20005**

**Tel: 202-789-0100**

**[www.passmanandkaplan.com](http://www.passmanandkaplan.com)**