TEMPLE LAW REVIEW ONLINE

VOL. 97 FEB. 2025

ARTICLE

THE QUEST TO NORMALIZE QUESTMENTS

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"The American trial system is an adversarial one."[1] One adversary is the prosecution or plaintiff. The other adversary is the defendant. Each side is pitted against the other and must battle to prevail at trial. In many cases, these adversaries do not themselves spar; instead, counsel represents them. Counsel become the standard-bearer for their clients, zealously advocating to advance their respective clients' position.

Of all the tools available to counsel at trial, cross-examination is one of the most vital.[2] Through cross-examination, skilled counsel can accomplish a variety of goals.[3]

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1. J. Bradley Ponder, Comment, *But Look Over Here: How the Use of Technology at Trial Mesmerizes Jurors and Secures Verdicts*, 29 LAW & PSYCH. REV. 289, 299 (2005); Angela M. Laughlin, *Learning From the Past? Or Destined To Repeat Past Mistakes?: Lessons From the English Legal System and Its Impact on How We View the Role of Judges and Juries Today*, 14 WIDENER L. REV. 357, 358 (2009).

2. FRANCIS L. WELLMAN, THE ART OF CROSS-EXAMINATION 7 (4th ed. 1948); Harry M. Caldwell & Deanne S. Elliot, *Avoiding the Wrecking Ball of a Disastrous Cross Examination: Nine Principles for Effective Cross Examinations with Supporting Empirical Evidence*, 70 S.C. L. REV. 119, 121 (2018); Jules Epstein, *Cross-Examination: Seemingly Ubiquitous, Purportedly Omnipotent, and "at Risk,"* 14 WIDENER L. REV. 427, 427 (2009).

3. Jack B. Swerling, *"I Can't Believe I Asked That Question": A Look at Cross-examination Techniques*, 50 S.C. L. REV. 753, 753 (1999).

Counsel can elicit the facts necessary to prove claims or defenses.[4] Counsel can also highlight credibility issues inherent in witness testimony.[5]

Though cross-examination need not be confrontational, it often is.[6] When done well, cross-examination can be one of the most memorable parts of trial.[7] It is no exaggeration to say that trials can be won or lost by effective or ineffective cross-examination.[8] For this reason, counsel has every reason to conduct cross-examination in the most effective manner permitted under the rules.

Yet, given how valuable a tool cross-examination is, surprisingly few rules govern its process. The admission of evidence in federal courts, whether by cross-examination or through other means, is governed by the Federal Rules of Evidence (FRE or "Rules").[9] Congress initially passed the Rules in 1975, after several years of prior drafting by the Supreme Court.[10] Congress has amended the Rules periodically over the years, most recently in 2023.[11]

The goal of the Federal Rules of Evidence is provided in Rule 102, which states that the purpose of the Rules is to "administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."[12] To achieve this goal, the Federal Rules of Evidence provide guidance on topics as varied as witness qualifications, privilege, relevance, character evidence, and hearsay.[13] The Federal Rules of Evidence guide the court in determining what evidence is admissible.[14]

Only one Federal Rule of Evidence directly addresses cross-examination.[15] Rule 611 provides the following:

> (a) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

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4. *Id.* at 764; Larry Pozner, *Pozner on Cross: Constructive Cross-Examination*, CHAMPION, May 2023, at 57, 57.

5. Swerling, *supra* note 3, at 753; John E.B. Myers, *Cross-Examination: A Defense*, 23 PSYCH. PUB. POL. & L. 472, 472 (2017).

6. Richard S. Jaffe, *Cross-Examination Principles*, CHAMPION, June 2016, at 46, 47.

7. Swerling, *supra* note 3, at 753.

8. Jaffe, *supra* note 6, at 47.

9. Walter W. Bates, R. Todd Huntley & William S. Starnes, Jr., *Ten Tips for Direct Examination and Cross-examination*, 39 AM. J. TRIAL ADVOC. 339, 353 (2015).

10. G. Alexander Nunn, *The Living Rules of Evidence*, 170 U. PA. L. REV. 937, 957 (2022); Edward J. Imwinkelried, *Moving Beyond "Top Down" Grand Theories of Statutory Construction: A "Bottom Up" Interpretive Approach to the Federal Rules of Evidence*, 75 OR. L. REV. 389, 389–90 (1996).

11. Tiffany Roy, *Five Most Common Types of Flawed Forensic DNA Testimony*, CHAMPION, June 2024, at 12, 14.

12. FED. R. EVID. 102.

13. *See, e.g.*, FED. R. EVID. 701–706; FED. R. EVID. 501; FED. R. EVID. 401; FED. R. EVID. 404; FED. R. EVID. 801–803.

14. *See generally* Rebecca A. Delfino, *Deepfakes on Trial: A Call to Expand the Trial Judge's Gatekeeping Role To Protect Legal Proceedings from Technological Fakery*, 74 HASTINGS L.J. 293, 321–24 (2023) (tracing how the rules have guided the court in setting standards for the admissibility of expert witness testimony).

15. FED. R. EVID. 611.

> (1) make those procedures effective for determining the truth;
>
> (2) avoid wasting time; and
>
> (3) protect witnesses from harassment or undue embarrassment.
>
> (b) Scope of Cross-Examination. Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination.
>
> (c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:
>
> (1) on cross-examination; and
>
> (2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.[16]

Each section of Rule 611 works in concert. Rule 611(a) provides significant deference to the trial judge overseeing the trial.[17] The trial judge is empowered to determine, inter alia, what method of questioning witnesses will be most effective in ascertaining the truth.[18] The trial judge has broad discretion in making this decision.[19] Rule 611(b) sets the general boundaries for the scope of cross-examination questioning.[20] Witnesses may be questioned on cross-examination about any substantive topic that arose during direct examination as well as issues relating to witness credibility.[21] Rule 611(c) specifies the form of cross-examination questions.[22]

Cross-examination questions may be leading.[23] Counsel's right to lead witnesses on cross-examination is so well accepted that the Advisory Committee note to FRE 611(c) describes the use of leading questions during cross-examination as "a matter of right."[24] The Supreme Court has referred to cross-examination as "the greatest legal engine ever invented for the discovery of truth."[25] Counsel's ability to effectively cross-examine would be significantly damaged if leading questions were prohibited.[26]

Although the Federal Rules of Evidence clearly permit leading questions on both substantive matters and issues of credibility on cross-examination and provide the trial judge considerable leeway in ruling on the propriety of those questions, the Rules provide no guidance in what constitutes a leading question.

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16. *Id.*

17. *Id.* 611(a).

18. *See id.*

19. *See* St. Clair v. United States, 154 U.S. 134, 150 (1894); Charles W. Ehrhardt & Stephanie J. Young, *Using Leading Questions During Direct Examination*, 23 FLA. ST. U. L. REV. 401, 410–11 (1995).

20. FED. R. EVID. 611(b).

21. *Id.*

22. *Id.* 611(c).

23. *See id.*

24. FED. R. EVID. 611 advisory committee's note to 1972 proposed rules.

25. California v. Green, 399 U.S. 149, 158 (1970) (quoting 5 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1367 (3d ed. 1940)).

26. Fred A. Simpson & Deborah J. Selden, *Objection: Leading Question!*, 61 TEX. B.J. 1123, 1124 (1998).

It is generally accepted that a leading question is structured to suggest the answer.[27] "By definition, leading questions suggest to the witness the answers desired by the cross-examiner," an answer in support of counsel's theory of the case.[28] These questions are not only structured to elicit a "yes" or "no" answer but to guide the witness toward a specific answer.[29] They contain information that cross-examining counsel seeks for the witness to confirm.[30]

Unlike open-ended questions, which permit the witness to volunteer information, a leading question only allows the witness to verify the correctness of the information in the question itself.[31] The witness must answer "yes," "no," "I don't know," or "I don't remember," rather than provide an explanation.

The real difficulty becomes determining what grammatical structure is permissible when posing leading questions. A leading question is simply a statement converted into the form of a question through a change of grammar or tone.[32] Although there are numerous methods of forming a question, some courts suggest that cross-examination questions are only appropriate when they are formed using grammatical changes.[33] According to these courts, questions formed through tone of voice are statements rather than questions, so they are not proper during cross-examination.[34]

These objectors are wrong. This form of a leading question, sometimes referred to colloquially as a "questment," is no different than a leading question formed using a prefix or suffix.[35] In other contexts, courts regularly recognize questments as leading questions, so questments should be permitted during cross-examination at trial.

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27. Sydney A. Beckman, *Hiding the Elephant: How the Psychological Techniques of Magicians Can Be Used To Manipulate Witnesses at Trial*, 15 NEV. L.J. 632, 643 (2015) (citing BLACK'S LAW DICTIONARY 1023 (10th ed. 2014); *see also* State v. Weese, 424 A.2d 705, 709 (Me. 1981) (ruling on the impropriety of using leading questions on direct examination, the court noted that "[a]n objectionably leading question not only solicits an answer concerning a specific topic but also suggests a desired specific answer in regard to that topic," suggesting such a definition to be generally accepted).

28. Jeffrey A. Boyll, *Witness Explanations During Cross-Examination: A Rule of Evidence Examined*, 58 IND. L.J. 361, 367–68 (1982) (citing C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE, at xi (1st ed. 1954)).

29. *Id.* at 367.

30. *See id.* at 367–68; Beckman, *supra* note 27, at 643.

31. *See* Beckman, *supra* note 27, at 643 (noting that the form of a leading question influences answers by inviting agreement or disagreement with the proposition in the question itself).

32. *See* STEVEN LUBET & J.C. LORE, MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE 101, 112 (6th ed. 2020); Kenneth J. Melilli, *Personal Credibility and Trial Advocacy*, 40 AM. J. TRIAL ADVOC. 227, 239 (2016).

33. *See, e.g.*, Sasser v. City of L.A., No. B295300, 2021 Cal. App. Unpub. LEXIS 671, at *46 (Feb. 2, 2021) (instructing an attorney cross examining to ask a question rather than make a statement); Commonwealth v. Logan, 237 A.3d 1049 (Pa. Super. Ct. 2020) (sustaining objection to a statement of fact put to a witness during cross examination on the basis that this does not constitute a question); Brooks v. State, No. 217, 2014, 2015 Del. LEXIS 96, at *11–12 (Feb. 24, 2015) (same).

34. *Id.*

35. The term "questment" is often used by those affiliated with the National Institute for Trial Advocacy (NITA), a non-profit organization that offers training in trial advocacy skills for lawyers. The term's origin is attributed to Michael Roake. Roake served as a NITA faculty member and was the Director of NITA's Pacific Region Trial and Deposition programs. *See* NATIONAL INSTITUTE FOR TRIAL ADVOCACY 50TH

To illustrate why questments are proper during cross-examination at trial, this Article first explores the linguistic definition of a question. With that definition in mind, the Article then identifies uses of questments outside the cross-examination context. Finally, the Article explains why questments are so powerful during cross-examination at trial, and why, therefore, they should be permitted.

I. THE LINGUISTIC DEFINITION OF A QUESTION

What is a question? Any English speaker would readily identify the preceding words as a question, but what characteristics render these words a question rather than another form of speech? The answer is not entirely straightforward.

On a linguistic level, language can be understood through the theories of semantics, pragmatics, and syntax.[36] Semantics is the theory of how words relate to meanings.[37] If an eyewitness to a car accident was asked whether the truck involved in the accident was going "fast" at the time of the crash, the meaning associated in the witness's mind with the concept of speed would be a matter of semantics. In semantic terms, a question is defined by its ability to establish a set of logically possible answers.[38] Semantically, a witness's answer to a question reveals what meaning that witness ascribes to language.

Pragmatics is the theory of how words are used in context.[39] If an eyewitness to a car accident was asked whether the truck involved in the accident was going "fast" at the time of the crash, the answer might depend on the context. To a timid driver, a truck driving thirty miles per hour might be going "fast." To a professional race car driver, only speeds over one hundred miles per hour might be "fast." The answer is subjective. In pragmatic terms, a question is defined by the questioner's desire to obtain information.[40] Pragmatically, a witness's answer to a question reveals something about how the witness perceives the world.

Syntax is the theory of how words relate to one another separate from their meaning.[41] The word "fast" functions as an adverb when a witness is asked, "Was the truck going fast at the time of the crash?" In syntactic terms, a question is defined by its interrogative form.[42] Questions typically involve an inversion of the subject and the verb as compared to declarations. Questions may also begin with an interrogative pronoun, like "who" or "which," or end with a tag question, like "can't you" or "didn't you."

ANNIVERSARY 98 (John Baker et al. eds., 2021), https://online.fliphtml5.com/oarks/oycj/#p=1 [https://perma.cc/5CK7-ZQZD].

36. *See* Elizabeth Fajans & Mary R. Falk, *Linguistics and the Composition of Legal Documents: Border Crossings*, 22 LEGAL STUD. F. 697, 698 (1998).

37. M.B.W. Sinclair, *The Semantics of Common Law Predicates*, 61 IND. L.J. 373, 374 (1986).

38. *See* Charles W. Morris, FOUNDATION OF THE THEORY OF SIGNS 6–9 (1 International Encyclopedia of Unified Science No. 2 (1938)).

39. Sinclair, *supra* note 37, at 374.

40. *See id.* ("Pragmatics . . . includes in its scope the speaker's purpose . . . ." (footnote omitted)).

41. *Id.* at 373–74.

42. Morris, *supra* note 38, at 6–9.

Objections to questments as a proper form of cross-examination questioning are objections to the syntax of these questions. Yet, from a syntactic perspective, questments are a valid method of forming a question in the English language.

Questions come in a number of different varieties. Questions may be polar, alternative, or open-ended.

Polar questions are those which can be answered with "yes" or "no."[43] In a trial involving a car accident, an eyewitness might be asked, "Wasn't the light red when the truck entered the intersection?" In response, the witness could answer either "yes" or "no."

Alternative questions present a list of possibilities to choose from. If the same witness was asked if the light was red, yellow, or green when the truck entered the intersection, the witness could respond by picking one of the three provided options.

Open-ended questions solicit information beyond what is provided in the question. These questions typically begin with an interrogative word such as "who," "what," "where," "when," "why," or "how." They permit a wide variety of responses. If the witness was asked, "What happened on the day of the accident?" the witness could respond by narrating the day from that witness's perspective. These types of questions are typically reserved for direct examination rather than cross-examination.[44]

Leading questions are a form of polar questions. Polar questions can be formed in three ways. First, they can be formed through adding a prefix or a suffix to a declaration.[45] If counsel sought to prove at trial the declaration, "The truck ran the red light," that declaration could be converted to a polar question through the addition of a prefix. Counsel could ask the witness, "Isn't it true that the truck ran the red light?" In the alternative, the declaration could be converted to a polar question through the addition of a suffix. Counsel could ask the witness, "The truck ran the red light, didn't it?"

Second, polar questions can be formed through changing the word order of a declarative. If counsel sought to prove the declaration, "The truck ran the red light," counsel could reverse the order of the noun and verb to create the interrogatory, "Did the truck run the red light?"

Third, polar questions can be formed through the use of tone.[46] In English, a rising declarative is a sentence which is syntactically declarative but is understood as a question by the use of a rising intonation. Unlike the other two forms, this form adds nothing grammatically to the declaration itself—vocal tone alone is used to indicate that a question is being asked. If counsel sought to confirm with the eyewitness that the truck ran the red light, counsel would simply state, "The truck ran the red light?" using a rising tone of voice at the end of the statement to indicate the need for the witness to respond.

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43. Timothy P. McCormack, Comment, *Expert Testimony and Professional Licensing Boards: What is Good, What is Necessary, and the Myth of the Majority-Minority Split*, 53 ME. L. REV. 139, 140 (2001).

44. Cynthia Ford, *Leading Questions: Rule 611(c): Where You Lead, I Will Follow*, MONT. LAW., Oct. 2013, at 16, 19.

45. Jas Brar, *Friend or Foe?: Responsible Third Parties and Leading Questions*, 60 BAYLOR L. REV. 261, 265 (2008).

46. Simpson & Selden, *supra* note 26, at 1124; Brar, *supra* note 45, at 266–67.

This third form is what is sometimes referred to as a "questment." The word "questment" is a portmanteau, combining the words "question" and "statement." Given that one purpose of cross-examination at trial is to confirm statements as being true or untrue, the term "questment" perfectly embodies the purpose of this type of question. By stating a declaration or statement and seeking agreement from the witness, counsel confirms that the statement is true. A questment is simply one form of a polar question.

To a linguist, a questment is no less a question than any other form of polar question. Why then are some courts unwilling to accept them as a proper form of cross-examination question? The answer is that courts should accept them because in other contexts they are readily accepted as questions rather than declarations.

II. QUESTMENTS OUTSIDE THE CROSS-EXAMINATION CONTEXT

The use of questments is not exclusive to cross-examination at trial. When used in other contexts, courts routinely recognize questments as a form of leading questions.

One such context is that of a plea hearing. During this hearing, the judge engages the criminal defendant in a conversation prior to the entry of a guilty plea.[47] The purpose of this questioning, known as a plea colloquy, is to ensure that the guilty plea is made voluntarily, knowingly, and intelligently.[48]

Judges routinely lapse into the use of questments while questioning the defendant. For example, in *Nelson v. State*, the Minnesota Supreme Court evaluated the plea colloquy between the sentencing judge and a defendant accused of first-degree premeditated murder for stabbing a victim to death with a knife.[49] During the plea colloquy, the sentencing judge engaged the defendant in the following conversation about how the defendant responded to intervenors who attempted to save the victim:

> THE COURT: You chased him away?
>
> NELSON: Yes.
>
> THE COURT: All right, and then did you go back after that to continue what you were doing?
>
> NELSON: Yes.
>
> THE COURT: In other words, to continue stabbing [the victim], is that right?
>
> NELSON: Yes.[50]

Based in part upon this questioning, the sentencing judge accepted the defendant's guilty plea and sentenced him to life in prison without the possibility of release.[51]

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47. Danielle M. Lang, Note, Padilla v. Kentucky*: The Effect of Plea Colloquy Warnings on Defendants' Ability To Bring Successful* Padilla *Claims*, 121 YALE L.J. 944, 947 (2012); *see also* Kelsey S. Henderson, Erika N. Fountain, Allison D. Redlich & Jason A. Cantone, *Judicial Strategies for Evaluating the Validity of Guilty Pleas*, 59 CT. REV. 44, 44 (2023); Tina M. Zottoli et al., *State of the States: A Survey of Statutory Law, Regulations and Court Rules Pertaining to Guilty Pleas Across the United States*, 37 BEHAV. SCIS. & L. 388, 414–15 (2019).

48. *See* Boykin v. Alabama, 395 U.S. 238, 242–44 (1969).

49. Nelson v. State, 880 N.W.2d 852, 858–59 (Minn. 2016).

50. *Id.* at 856.

51. *Id.* at 853–54, 856.

The defendant subsequently moved for post-conviction relief arguing, inter alia, that the sentencing judge's questions were improper because they were leading.[52] In finding that the limited use of leading questions was proper, the Minnesota Supreme Court inherently recognized, without the need for in-depth analysis, that questments are a form of leading question because one of the questions in this plea colloquy was a questment.

Another context in which courts routinely recognize questments as a form of leading questions is when evaluating police interrogations. During these interrogations, police are often focused on eliciting a confession or other details necessary to secure a conviction.[53] Leading is used as a means of gathering this information.

For example, in *Fulcher v. Motley*, a defendant challenged his conviction for murder, robbery, and burglary based on the admission at trial of statements made by his girlfriend to a detective prior to the defendant's arrest.[54] During questioning, the detective asked the defendant's girlfriend about the pants he was wearing at the time of the crime based on a belief that she had been asked to remove blood stains from those pants.[55] The following exchange occurred during this questioning:

> Detective Jones: Okay, do you remember what day that this was?
>
> Ash: No I don't . . . can't really. I, I know it was before the holidays, but I don't remember the date.
>
> Detective Jones: Right before Christmas?
>
> Ash: Around Christmas . . .[56]

These statements were admitted at trial over objections by the defense.[57]

On review, the Court of Appeals for the Sixth Circuit held that the statements should not have been admitted, reasoning that the statements were untrustworthy.[58] In its reasoning, the court noted that the questions were leading.[59]

The fact that courts readily identify questions as leading questions in the context of plea colloquies and police interrogations demonstrates that questments are generally understood as leading questions rather than declarations of fact.

If questments are recognized as leading questions outside the scope of a cross-examination, there is no logical reason why they should be treated differently at trial. One court has expressly sanctioned the use of questments during cross-examination. In *Doumbouya v. County Court*, the defendant was charged with assaulting his estranged wife.[60] At trial, the defense pursued a theory that the wife had manufactured the alleged assault in an effort to gain leverage in a child custody

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52. *Id.* at 860.

53. Kathryn C. Donoghue, Comment, *"You Think He Got Shot? Did You Maybe Shoot Him by Accident?": Linguistic Manipulation of the Communicatively Immature During Police Interrogations*, 13 RICH. J.L. & PUB. INT. 143, 146 (2019).

54. Fulcher v. Motley, 444 F.3d 791, 794 (6th Cir. 2006).

55. *See id.* at 808–09 & n.9.

56. *Id.* at 808 n.9.

57. *Id.* at 794.

58. *Id.* at 808.

59. *Id.*

60. Doumbouya v. Cnty. Ct., 224 P.3d 425, 426–27 (Colo. App. 2009).

dispute.[61] At trial, defense counsel cross examined the wife using leading questions stated in questment format. Specifically, defense counsel asked:

Q. You know that [defendant] is from Africa?

A. Yes.

Q. You know that if he is found guilty of this he'll be deported?[62]

The prosecution objected (on the basis of both form and substance) to these questions before the second was answered.[63] On appeal, the prosecution focused its objection on the form of the question, arguing that the question was a statement by counsel to the jury rather than a question to the witness.[64]

On appeal, the Colorado Court of Appeals disagreed and endorsed wholeheartedly the use of questments during cross-examination.[65] It reasoned that there was "nothing improper with the form of the question" because "in practice '[a] leading question is [often] just a statement disguised as a question.'"[66]

Other courts should follow the reasoning of *Doumbouya* and recognize questments as proper leading questions during cross-examination the same way they recognize questments as leading questions in other contexts. The use of questments during cross-examination should be encouraged, not discouraged, because they are a highly effective method of questioning a witness.

III. THE POWER OF QUESTMENTS DURING CROSS EXAMINATION

Counsel's ultimate goal at trial is to persuade the fact finder. This means counsel must think about more than just the facts that will be elicited, but about the most effective method of eliciting those facts and conveying their importance to the fact finder. The language counsel chooses can have a significant impact on the fact finder.[67] So too does tone and style influence the fact finder.[68] Counsel who make strategic decisions about the style of questioning may gain an advantage in persuading the fact finder.[69] Questments have numerous advantages over other forms of leading questions.[70]

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61. *Id.* at 427.

62. *Id.*

63. *Id.*

64. *Id.* at 429.

65. *Id.*

66. *Id.*

67. *See* Sydney A. Beckman, *Witness Response Manipulation Through Strategic "Non-leading" Questions (or the Art of Getting the Desired Answer by Asking the Right Question)*, 43 SW. L. REV. 1, 1–2 (2013).

68. Kathy Kellermann, Persuasive Question-Asking: How Question Wording Influences Answers 5 (Sept. 27, 2007) (unpublished manuscript) (on file with author), https://www.kkcomcon.com/doc/KPQA.pdf [https://perma.cc/EP2S-LCLZ].

69. Saul M. Kassin, *The American Jury: Handicapped in the Pursuit of Justice*, 51 OHIO ST. L.J. 687, 692–97 (1990); Saul M. Kassin, Lorri N. Williams & Courtney L. Saunders, *Dirty Tricks of Cross-Examination: The Influence of Conjectural Evidence on the Jury*, 14 LAW & HUM. BEHAV., 373, 373 (1990).

70. Many of these advantages stem from the way in which questments help counsel adhere to Irving Younger's Ten Commandments of Cross-Examination, which has been considered "gospel" for decades. *See*

First, questments are shorter. Short questions are usually more effective.[71] Because questments require no prefix or suffix, they are necessarily shorter than other forms of leading questions. They present statements of fact to the witness with which the witness must agree or disagree.[72] Shorter questions tend to get shorter answers, and where counsel seeks a simple "yes" or "no" in response to a question, questments encourage that sort of response.[73]

A general rule of thumb for cross-examination questions is that they should contain seven words or fewer.[74] If prefixes or suffixes are used, that leaves even fewer words to be devoted to the substance of the question. Because questments eliminate prefixes or suffixes, they can be shorter than other forms of leading questions while still conveying the same information to the fact finder.

Second, questments are clearer. They avoid unnecessary repetition. Counsel using other forms of leading questions often lapse into a rut of using the same prefix or suffix for each question. This unhelpful repetition begins to draw the fact finder's attention, shifting focus from the substance of the question.[75] The fact finder becomes more focused on counting the number of times counsel says, "Isn't it true" or "correct" than the substance of the question, in the process missing that important substance.[76] Questments cut through the clutter. They provide variety because each question is structured differently based upon the facts asserted in the questment. Variety is engaging for the fact finder.[77]

Third, questments provide counsel with more control over the witness. Evidence can be offered at trial in a variety of different forms.[78] This includes documentary evidence as well as testimony.[79] Testimony can be a challenging method of introducing evidence because it necessitates the variable of an additional person being involved in the process—the witness.[80] On cross-examination, that witness is typically adverse to

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Joyce S. Meyers, *Evidence*, 34 LITIG. 5, 5 (2008); *The Ten Commandments of Cross Examination*, THE NITA BLOG (May 19, 2008, 10:06 AM), https://thenitablog.blogspot.com/2008/05/ten-commandments-of-cross-examination.html [https://perma.cc/W6E8-SUTW].

71. *See* Jim McElhaney, *Persuasive Cross-Examination*, A.B.A. J., Apr. 2009, at 21, 22.

72. Dale J. Lambert, *Trial Bootcamp Lectures: Cross-Examination*, UTAH BAR J., July–Aug. 2021, at 26, 27.

73. *See* Dennis P. Rawlinson, *Nuts & Bolts, Old Dogs and New Tricks for Direct Examination*, 31 LITIG. 47, 48 (2005) ("Traditional cross-examination uses short questions and short answers. The witness is limited to choosing among alternatives offered by the lawyer and usually can use no more than a word or two."); Kenneth J. Melilli, *Cross-Examination: To Lead or Not To Lead?*, 27 AM. J. TRIAL ADVOC. 149, 151 (2003) (noting that short, leading questions are traditionally used on cross examination to control the witness's responses).

74. Judge Amy Hanley, *The 4 Corners of Cross-Examination and Some Tips for Handling Hostile Witnesses*, June 1, 2022, LITIG. DAILY ONLINE.

75. Alan C. Kohn, *The Gentle Art of Cross-Examination*, 64 J. MO. B., Mar.–Apr. 2008, at 82, 83–84.

76. *See* Ryan J. Winter, *Would Someone Please Wake Juror Number Five?*, MONITOR ON PSYCH., Sept. 2010, at 26 (noting that juror boredom can create inattention).

77. Swerling, *supra* note 3, at 770.

78. Paul W. Grimm, *Impeachment and Rehabilitation Under the Maryland Rules of Evidence: An Attorney's Guide*, 24 U. BALT. L. REV. 95, 96 (1994).

79. Brar, *supra* note 45, at 264.

80. Christopher W. Arledge, *Effective Storytelling on Cross Examination*, ORANGE CNTY. LAW., Feb. 2024, at 41, 41.

counsel and unlikely to voluntarily cooperate with counsel's efforts to undermine the opposing party's case.[81]

Questments provide control on cross-examination because they are difficult to evade. Control is critical during cross-examination.[82] Effective cross-examination questions establish one new fact per question.[83] As each question is asked, the fact finder can draw inferences and conclusions from these predicate facts.[84] Because questments are stripped of everything but the facts themselves, they force counsel to focus on the facts that matter and to establish those facts in a logical progression. A witness faced with a questment must also focus on the facts and either admit or deny those facts. The grammar of a questment leaves less room for a witness to evade the question.

Fourth, questments are more memorable. Cross-examination tends to be pithier than direct examination. Trials can be long and, at times, boring.[85] Cross-examination, when done well, can be a welcome change of pace from long, dense direct examinations.[86] Juries expect cross-examination to be memorable.[87]

In terms of primacy and recency, cross-examination generally follows direct examination and where there is no redirect, it can form the last memory the fact finder has of the witness's testimony.[88]

Cross-examination involves issues of credibility, which can be addressed directly. Credibility issues are scintillating.[89] Depending on the nature of the trial, credibility issues may be more engaging for the fact finder than substantive issues.

Cross-examination is the phase of trial most often shown in pop culture like television and film media.[90] Fact finders expect to be dazzled during cross-examination based on what they have seen in these mediums.[91] It is not the time for counsel to ramble.[92]

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81. *See* Brar, *supra* note 45, at 264.

82. Paul J. Passanante & Dawn M. Mefford, *Cross-Examination*, J. MO. B., Jan.–Feb. 2006, at 28, 29.

83. Jaffe, *supra* note 6, at 47; Thomas W. Cranmer & David D. O'Brien, *Trial Practice: The Art of Cross-Examination*, MICH. B.J., Aug. 2013, at 54, 54–55.

84. *See* Bates et al., *supra* note 9, at 360.

85. Patrick C. Brayer, *Cross-Examination Content and the "Power of Not,"* BRIEF, Summer 2022, at 52, 53–54.

86. *Id.*

87. *See* Henry G. Miller, *Winning—Or at Least Not Losing—On Cross-Examination*, 33 PACE L. REV. 747, 747 (2013).

88. Charles T. Hvass, Jr., *The New Commandments of Cross-Examination*, LITIG., Summer 2022, at 26, 28.

89. For example, credibility issues in the recent Johnny Depp-Amber Heard defamation trial not only captivated the jury but the public at-large. *See 4 Witness Presentation Lessons From The Depp-Heard Trial*, LAW360 (Aug. 2, 2022, 5:36 PM), https://www.law360.com/articles/1517096/4-witness-presentation-lessons-from-the-depp-heard-trial [https://perma.cc/VQ3F-DP7M].

90. Lisa Kern Griffin, *False Accuracy in Criminal Trials: The Limits and Costs of Cross-Examination*, 102 TEX. L. REV. 1011, 1012–14 (2024).

91. *See* Kimberlianne Podlas, *Impact of Television on Cross-Examination and Juror "Truth*,*"* 14 WIDENER L. REV. 479, 479 (2009); Paul B. Bergman, Commentary, *A Practical Approach to Cross-Examination: Safety First*, 25 UCLA L. REV. 547, 547 (1978).

92. Passanante & Mefford, *supra* note 82, at 33.

Questments create a cross-examination that is far more memorable because they allow counsel to create a vignette that the fact finder will remember during deliberation. They create an opportunity to tell a story.[93] When delivered well, a cross-examination formed exclusively of questments feels more like a speech by counsel than testimony by the witness.[94] Speeches are generally composed of declarations rather than questions. Questments feel much more like declarations than other forms of leading questions.

When delivered with an effective cadence, questments feel truly oratorical. Questments provide counsel an opportunity to present a condensed version of a closing argument while the evidence is still being admitted.[95] Not only does the use of questments create a situation that feels like a closing argument, but at every turn the opposing witness must agree with the argument—bolstering the credibility of counsel. At no other time in the trial will counsel be permitted to interrupt the introduction of evidence to give what feels like a truncated closing argument. Questments help counsel best capitalize on this opportunity to do just that.

As long as the American trial system remains adversarial, it will benefit counsel to use the most effective means necessary to try cases. At the end of the day, what matters is whether the cross-examination impacts the fact finder.[96] Because the use of questments enhances the persuasive power of one of the most impactful trial tools, cross-examination, all litigators should join in the quest to normalize the use of questments.

93. Judge Mark W. Bennett, *Eight Traits of Great Trial Lawyers: A Federal Judge's View on How To Shed the Moniker "I am a Litigator,"* 33 REV. LITIG. 1, 21 (2013).

94. *See* HERBERT J. STERN, TRYING CASES TO WIN: CROSS EXAMINATION 9 (1993); David Berg, *Timing in Cross-Examination*, 22 LITIG., Winter 1996, at 6, 6.

95. *See* Commonwealth v. Culver, 51 A.3d 866, 881–82 (Pa. Super. Ct. 2012) (noting that questments functionally substitute the attorney's testimony for that of a witness).

96. Hvass, Jr., *supra* note 88, at 28.