Dynamic Cross Examination is a powerful, moving process of human communication and meaningful interaction between the attorney, adverse witnesses, and the jury, for the purpose of persuading the jurors. This is a substance-based method of cross that gets information from the witness that promotes the defense's specific theory. This reinforcing information comes from the mouth of the witness rather than that of the lawyer. This method differs from the traditional models of cross examination that we have studied and practiced. The Dynamic Cross method, authored by Jim McComas, mixes leading and non-leading questions, it monitors witness behavior, maintains a fluid and energetic pace, masters the powerful leverage of plausibility, and adapts your line of questioning to take advantage of unexpected responses. The Dynamic Cross method can consistently destroy a witness’s credibility, elicit surprise answers, and create powerful moments that win hard cases. Dynamic Cross enables the lawyer to no longer fear losing a case through confronting a challenging witness, but instead focuses on what is necessary to win the case right in front of the jury.

Program Chair & Speaker:
Vilaska Nguyen, Deputy Public Defender, City and County of San Francisco

Moderator:
Jonah Chew, Trial Attorney, Asian American Criminal Trial Lawyers Association

Speakers:
Ji Seon Song, Contra Costa Deputy Public Defender, Asian American Criminal Trial Lawyers Association
Training: Dynamic Cross Examination
National Asian Pacific American Bar Association
2014 Convention

Lecturers: Vilaska Nguyen, Ji Seon Song, Jonah Chew
(75 minutes)

AGENDA:

5 minutes  Introduction to Dynamic Cross (Power Point)
15 minutes  Review of Traditional Yes-No, Posner and Dodd, cross method (Power Point)
10 minutes  Demonstration of Traditional Method with example (McComas Handout)
5 minutes  Critical Analysis of Traditional Approach
10 minutes  Demonstration of Dynamic Cross with example (McComas Handout)
5 minutes  Discussion of the benefits of dynamic cross
15      Principles of Dynamic Cross Examination
10 minutes  Questions

End.
Dynamic Cross Examination

Presented by Asian American Criminal Trial Lawyers Association
(in consultation with James H. McComas)
Why ask Why?

Dynamic Cross Examination is a technique of communication and meaningful interaction between the attorney, the adverse witness, and the jury foreperson for the purpose of persuading the jurors.
Avoid “Why” in Cross Examination, Correct?

• **Cross Examination 101**: Leading questions only; avoid open-ended questions

• The attorney frames the testimony and the witness is confronted with it.

• Control the witness physically and psychologically.
The Ten Commandments,
by Irving Younger

1. Be brief.
2. Short questions, plain words.
3. Always ask leading questions.
4. Don't ask a question to which you do not know the answer.
5. Listen to the witness' answers.
6. Don't quarrel with the witness.
7. Don't allow the witness to repeat his direct testimony.
8. Don't permit the witness to explain his answers.
9. Don't ask the "one question too many."
10. Save the ultimate point of your cross for summation.
Scientific Cross by Posner and Dodd

Three Basic Rules of Cross Examination:

1. Leading Questions
2. One Fact Per Question
3. Organize by Chapters
More on the Yes-No Approach

- Chapter Method: general to specific
- Advance chapters by theme
- Chapter Sequencing:
  - Primacy, Recency
  - Rank
  - Start strong, finish strong
  - Transition
- Trilogies, Looping and Impeachment
Studying the Yes-No Approach

• Taxi driver DD charged with murder; self-defense is theory.

• Investigation reveals PP abusive and violent towards wife.

• Defense cross examines widow PP with Yes-No Approach.
Costs of Control and Convention

- Alienating Jury, perpetuating mistrust of attorney
- Rigid and scripted
- Power of persuasion minimized by attorney’s testimony, not widow’s
- Widow’s story of abuse and experience of violence cut off; minimal proxy witness.
Why are we obsessed with control?

- Paranoid fear that witness will blurt something out that will sink the defense.
- Risk averse; avoiding blame.
- Concerned with looking good.
1. Themes and Negotiation
2. Positive Memories
3. Violence Exposed
4. Had his gun
5. Optional
6. “It’s Your Time”
Witness as a Proxy

• Defense uses the witness’s emotional trauma or personal experience to validate a theme or fact.

• PP becomes a proxy to establish self-defense theory: EP’s threatening words and violent behavior validated.

• Witness testifies, not the attorney.
Developing Dynamic Cross

- Case Analysis by James McComas
- Outcome Levers: issues the jury will rely on in determining the verdict
  - Race, publicity, employment.
- Can we do better than yes-no responses?
  - Necessary to heighten confrontation, to establish witness theory, and can always be used as a default approach.
Identifying Outcome Levers

- Media and Publicity
- Arraignment
- Initial Client Interview
- Individuals familiar with victim or witnesses
- Preliminary hearing
- Pretrial litigation
- Continuous case conferencing
Evaluate Outcome Levers

- Prosecution
  1.
  2.
  3.
  4.
  5.

- Defense
  1.
  2.
  3.
  4.
  5.

Trap Door(s)?
Prepare an Opening Statement for each Witness

- Prepare an opening statement complete with theory for each witness.

- Opening will provide the outline for important themes and issues for the witness.
How will Dynamic Cross Unfold in the Courtroom?
Find the books at www.trialguides.com
In the late 1970s, my dear friend and mentor, W. Gary Kohlman, and I were defending our client Delbert Defendant. The prosecution claimed Mr. Defendant murdered Eugene Placid, but Gary and I insisted Delbert acted in self-defense. This was my first jury trial, as a mere junior counsel, but Gary entrusted to me the task of cross-examining the widow, Paula Placid.

Here are the basic facts of the case. Delbert Defendant (DD) was driving his cab with a fare inside when he got into a road-rage dispute with the soon-to-be-deceased Eugene Placid (EP)—a man he had never seen before. According to DD, the surviving eyewitness, “this crazy m-----f-----” was tailgating him and honking his horn. When the two stopped side by side at a traffic light, EP cussed DD out, who then displayed his middle finger in reply.

DD noticed that the “crazy m-----f-----” continued to follow him, until the fare begged to be let out of the cab anywhere. DD pulled over and stopped on a quiet residential street. The fare exited hurriedly and ran off, never to be seen again. At the same time, EP zoomed up in front of DD’s cab, screeched to a stop, put his car (still running) in park, jumped out, and came running
back about thirty feet to where DD had let off the fare. DD was calmly filling out his manifest sheet.

Seeing that DD's driver-side window was rolled up, EP ran around to the passenger side, where the window was open. EP then started to reach inside. No weapon associated with EP was found at the scene, although DD told the police he thought he saw a gun in EP's hand. Four shots rang out from inside the cab—all were fired by DD. Two blew EP to the hereafter, and two probably sailed out the passenger window after EP fell back. DD remained in his cab on the scene, with his .38 caliber pistol on the front seat beside him, and waited for the police to come. The customary crowd of "concerned citizens" soon gathered.

Officer Krupke arrived on the scene fifteen minutes later, seized the gun, arrested DD, and transported him to the station. DD waived his rights and gave a moving statement of self-defense, relating all of the above facts. He explained that he was in fear for his life, having had a few close calls himself and having heard of tragedies suffered by other taxi drivers. When the "crazy m----f----" came through the window, hollering, "It's your time; it's your time; I'm going to kill you," DD thought EP had a gun. Certain he was about to die, DD pulled his "protection" from under the seat and fired in self-defense.

As it turned out, the state had to introduce DD's wonderfully told self-defense version at trial. Why? Because the police could not find the fare, and they had no other witnesses to put DD in the cab when the shots were fired, or to tell what happened at the time of the shooting.

We directed our investigator to find out about the deceased. EP had no conviction record, no arrest record, and no juvenile record. He was well liked at work (as a security guard). He was active in his local church (as a deacon). He was married once, for the ten years before his death, to his first and only high school sweetheart, Paula Placid (PP). They had no children. Oddly, several female neighbors were unable to provide any information about EP's relationship with PP—their knowledge was limited to what they occasionally observed in public. The "grandma" of the
neighborhood, Ernestine Elder’s, only comment on EP’s death was, “Thank the Lord it wasn’t Paula.”

When our investigator interviewed PP, everything was fine until he asked her to sign a release for her own medical records. At that point, she broke down crying. Our brilliant investigator took advantage of the opening and elicited the following statements from PP:

PP: All those punches, all those broken bones. But then he’d be so sorry, so sorry. I had to forgive him.

PP: He just explodes, he could have killed me . . . I was so scared.

PP: Once he put his hand in lye to punish himself; I knew he really loved me then.

PP: He’d say, “It’s your time; it’s your time; I’m gonna kill you.”

PP: I know he’s been forgiven; he’s in heaven now.

Our investigator wrote out a statement, reviewed it with PP, and obtained her signature. PP thanked our investigator for talking to her, explaining that she never told anyone else about this violence. Armed with her consent, our investigator went to nearby hospitals and clinics and obtained a small mountain of medical records documenting the significant injuries PP suffered, approximately every six months over the prior ten years. None of them identified EP or domestic abuse as the cause.

Under the law at the time, evidence of any prior violence by EP toward PP was admissible, even though the accused didn’t know it, as tending to show EP was the initial aggressor, and to show EP’s state of mind during the fatal dispute.

Our investigator obtained EP’s employment records and found he was an exemplary employee, never missing a day of work and having many commendations for his marksmanship on the shooting range. Interestingly, his service revolver was listed as “missing.”
The prosecutor had no idea that PP’s husband had beaten her—he never bothered to ask her. In his opening statement, the DA made her the emotional heart of his case, invoking the pain of her loss of her one true love to mandate a guilty verdict.

PP, the grieving widow, then took the stand as the state’s leadoff witness. On direct, she testified to basic background information about EP. Then the DA started slipping in good-character-type evidence about the deceased. We did not object—we wanted a wide field on which to cross-examine. Finally, PP identified, and the state introduced, the couple’s wedding photo from ten years earlier. We did not object.

In truth, I conducted a traditional yes-no cross-examination of PP. I had been a lawyer less than two years and was trained in that method. PP was understandably uncooperative, so I impeached her, politely, with the statement she gave our investigator. The content was good, but I started thinking there had to be a better, more effective way to cross-examine this witness.

What follows first is an approximation of the yes-no cross-examination I did. What comes after that is the Dynamic Cross-Examination that I could have done. You be the judge.

**Yes-No Cross-Examination of PP**

Q: Mrs. Placid, I am sorry for your loss.

A: Thank you.

Q: Here is prosecution Exhibit 1—your wedding photo. There’s a big part of the story missing from this picture, isn’t there?

A: No. It was the happiest day of my life.

Q: Ma’am, what’s missing is all the violence your husband committed against you, right?

A: No.

Q: Mr. Placid hit and hurt you on a regular basis, didn’t he?

A: No. It wasn’t like that.
Q: About two months ago, a young man, Mr. Colombo, came to your home and showed you his photo ID as an investigator with the Public Defender Service, didn’t he?

A: He said he was with the DA’s office.

Q: Well, if you thought that, you certainly would have told him the truth, right?

A: Well . . . yes.

Q: He asked you questions, didn’t he?

A: Yes.

Q: You gave him answers, true?

A: True.

Q: He wrote out this document—your statement—and went over every page with you, didn’t he?

A: No, I don’t remember that.

Q: Ma’am, I’m showing you defense Exhibit A; this is the statement, isn’t it?

A: Looks like it.

Q: These are your initials on every page, aren’t they?

A: Yes.

Q: Your signature is at the end, where it says, “The statement on the pages before this is mine, and it is true and correct to the best of my knowledge,” true?

A: Yes, my signature.

Q: Ma’am, here’s a photocopy for you. Now, page 2, in the middle, you told Mr. Colombo, referring to your husband—“All those punches, all those broken bones. But then he’d be so sorry, so sorry. I had to forgive him.” Right?

A: Yes.
Q: Page 3 at the top, you said, "He just explodes, he could have killed me... I was so scared."

A: Yes, but that was really, really rare.

Q: Page 3 at the bottom you said, "Once he put his hand in lye to punish himself; I knew he really loved me then."

A: Yes, I know he loved me.

Q: Page 4, at the top, Mr. Placid would say to you—"It's your time; it's your time; I'm gonna kill you."

A: Yes, maybe once or twice in ten years.

Q: Ma'am, your medical records, defense Exhibit B, show emergency-room visits by you approximately every six months for the ten years of your marriage. That's a lot more than once or twice, isn't it?

A: Well, those records don't say anything about Gene hurting me.

Q: Eugene is the one who took you to the hospital each time you needed care, isn't he?

A: Yes.

Q: He was right there in the ER with you when you said "what happened?" right?

A: Right.

Q: Looking at your statement and these medical records, the truth is that your husband could be violent, true?

A: On rare occasions, yes.

The yes-no method succeeded in getting out the facts of prior violence, about which we knew from the statement. It also may have hurt the credibility of PP—although it is doubtful that any intelligent Case Analysis would make that a goal. Because the good part was rooted in the witness's prior inconsistent statement, a long foundation had to be elicited to finally get to the payoff.
Psychologically, the witness was uncooperative, leaning toward passive-aggressive. We offered her nothing but the character assassination of her late husband, albeit, because of what he did to her, and she did not want to participate in that. Her quibbling had some effect in dissipating the impact of the impeachment.

As time passed, and the Dynamic Cross-Examination method developed, I kept thinking back to this case. How much more productive and powerful could this cross-examination have been? What if I tried to understand and address the witness’s agenda? What if my goal had been broader than just safely eliciting the information already contained in her statement? Of course, that case was over, but the insights gained from it led to many, many Dynamic Cross-Examinations in innumerable, serious felony cases.

**Dynamic Cross-Examination of PP**

Now it's time for the Dynamic Cross-Examination of PP that I wish I'd done. This examination is divided into sections that illustrate what I was hoping to accomplish in each section. In reality, there would be no breaks, with each section immediately following the previous one.

**Section 1: Establish Themes and Negotiate Cooperation**

**Q:** Mrs. Placid, I am sorry for your loss.

**A:** Thank you.

**Q:** Ma'am, do you believe that there is good and bad in every one of us human beings?

**A:** Yes. I believe that.

**Q:** How do you think that fact affects our lives?

**A:** It can be a struggle. We try to do right, sometimes we don't. Even when we should know better, sometimes we lose our way.

**Q:** Do you think that some of us have to struggle with overcoming bad impulses more than others?
A: Yes, I do.

Q: You've seen that in your own life?

A: I have. I don't know—no one knows—God's plan. But some people have a harder time doing what is right.

Q: Do you believe in forgiveness?

A: Absolutely. I believe that anything can and should be forgiven. It is our duty to forgive those who hurt us. It is what His love requires us to do.

Q: Between two human beings, if we have hurt someone, and we hope to be forgiven, what do we need to do?

A: We need to tell the truth about what we did, and then ask for their forgiveness.

***

Q: Mrs. Placid, I will have to ask you some things that may show a not-so-good side of your husband. Do you know what I'm talking about?

A: Yes.

Q: But I know you loved him, and still love him, very much?

A: Yes, I do.

Q: Are you concerned that answering my questions could be unfair to his memory?

A: Yes. I have been worried about that ever since I talked to your investigator.

Q: I thought so. Can I suggest a way of doing this that will hopefully be fair?

A: Please do.

Q: All right. How about if I start by asking questions that give you a full opportunity to tell about all of the good things about your husband. Then, after that, I'll ask about the not-so-good
things, and you can give me full answers on that. So both the
good and the bad will come out together. What do you say?

A: Yes, thank you. That sounds fair, and I will answer all of your
questions truthfully.

Commentary

The first part of section 1 established with PP that I was sensitive
to her and the human condition. The everyone-is-good-and-bad
and the forgiveness questions will make it easier to elicit her tes-
timony and may also lay a broader foundation if I later get to
questions with this witness about my client’s fear and responses.

The second part of section 1 is successfully negotiating a
means of obtaining her actual cooperation. Instead of having to
impeach her with a prior statement, I now expect her to describe
her ordeal with real human emotion. Moreover, I demonstrate to
the jury my qualities of sensitivity and fairness to the widow. I
am counting on these qualities when the time comes for the jury
to apply them to my client. We establish our common humanity
and respect during our exchange, and then I use it as a means to
limit or encourage what I want from the witness during the cross.

Section 2: What PP Wants—Positive Memories of EP

Q: First, let’s talk about the good things you remember. How
would you like me to refer to your husband?

A: You can call him “Gene.” That’s what I did.

Q: Thank you. How old were you when you and Gene met?

A: I was sixteen, a sophomore at Anytown-East, and he was a
junior. He asked me to the school Christmas dance.

Q: How long did you date?

A: Two years. The night before I graduated, he asked me to
marry him. He was wearing his only suit—brown corduroy
at that. [Little laugh]
Q: And?
A: I said, "Yes, I will."

Q: Young love?
A: That's right. We were so in love. Nothing mattered but each other and the life we could make together.

Q: Thinking back, what did you imagine that life to be?
A: Always in love, always happy, taking care of each other, having a family, growing old together. [Light crying]

Q: How big a family were you hoping for?
A: At least two children. More if we could afford it. There were four kids in my family, and I've always loved my brothers and my sister so much. I was the oldest, and I took care of them a lot when we were coming up, so I knew I'd be a good mother.

Q: Did you keep up your relationship with your family after you were married?
A: Not much. We were so busy, and Gene didn't really get along with my parents, sister, or brothers.

Q: So, Gene proposed the night before you graduated. When did you get married?
A: About a month later.

Q: The prosecution introduced this wedding picture of you and Gene as Exhibit 1. You look very happy.
A: I was; I was on top of the world. I think that was the happiest day of my life.

Q: Now Gene graduated a year before you did, right?
A: Yes.

Q: Did he go on to more school or get a job or what?
A: He got an entry-level job at Surety Security. He was full-time in six months, and promoted to Guard-1 by the time we married.
Q: Always a hard worker?
A: Oh, yes. Gene worked overtime whenever they needed him. Helped with training the new people. Went to work every day, never missed a one. He won all sorts of awards for being a reliable employee and a really good marksman on the shooting range.

Q: Was he able to provide enough income for your family?
A: Oh, yes. We were very comfortable. We even saved some money in the bank. Gene was a good provider.

Q: You said earlier that you were looking forward to having children. Did you and Gene start a family?
A: No, we never had children.

Q: Was there a medical problem?
A: No—we, uh, we just decided not to.

Q: Who were your very close friends?
A: We didn’t really have any. It was me and Gene.

Q: Mrs. Placid, will you tell us anything else you want to about the good qualities of your husband, Gene?
A: He was a good Christian man most of the time. A deacon in our church and a regular churchgoer. He was so funny sometimes, told jokes. A hard worker and great provider. He was my first and only love. He could be so sweet and affectionate.

Q: Anything else about his good qualities?
A: Not that I can think of.

Q: Do you feel you’ve had the opportunity to tell us whatever you want about the good part of Gene?
A: Yes, and thank you for that.

Q: You’re welcome, ma’am. It’s only fair.
Commentary

In this section, I am mostly holding up my end of the bargain by letting the witness have her say about why she loved her deceased husband. It is critical that I get her to acknowledge, as she does in the last answer, that she has had the opportunity I agreed to give her. When she does so, she knows that now I expect reciprocity from her in the next, unpleasant section.

Even though my primary goal is to set up section 3, I use this inquiry to develop some facts I really want to know. Specifically, PP really wanted children, but “we decided” not to have any; they had no close friends, and she lost touch with her family because “Gene didn’t really get along with” them—and he was an award-winning marksman. Even in this section, I am carefully laying the basis for what is about to follow.

Section 3: What We Want—EP’s Violence Exposed

Q: As we agreed in the beginning, ma'am, there is good and bad in everyone. We've talked about the goodness in your husband. Now can you please tell us about the part that was not so good?

A: Gene had an anger problem.

Q: Everyone gets angry. Was his a normal kind of anger?

A: No. He would work himself up and then just explode. His anger was explosive. Sometimes he would get angry, explode, and then hurt me, physically.

Q: What did you feel and think when this happened?

A: I was scared to death. When he really exploded, I thought he was actually about to kill me.

Q: Did you know about this when you agreed to marry him?

A: No, not at all. I never saw anger or violence during the two years we dated.
Q: How soon after you were married did this begin?
A: Within a couple months.
Q: What would happen?
A: I'd do some little thing he didn't like. He'd get mad, start yelling. At first, I yelled back, but I quickly learned that just made it worse.
Q: How did yelling back make it worse?
A: His anger and the hitting went up a whole other level when I yelled back at him.
Q: How did he hurt you physically?
A: He'd slap me, punch me, throw me, kick me.
Q: Any threats?
A: Oh yes. He'd threaten to kill me. Sometimes he even got out his gun and pointed it at me, saying he was going to kill me.
Q: Do you remember any of his exact words?
A: Yes, I do. Sometimes he'd scream at me, "It's your time; it's your time; I'm gonna kill you."

[Witness is trembling.]

Q: What did you think the first time you heard him say that?
A: I was terrified, just terrified. I was sure he was going to kill me right then and there.

[Witness is trembling.]

Q: Mrs. Placid, it looks like those words still scare you a lot.
A: Yes, they do. Even now. Even though Gene has passed away.
Q: Did you suffer injuries from these events?
A: Yes. Lots of swelling, big bruises, cut lips, scratches, broken bones, a punctured lung where my rib broke into my lung,
concussions, internal bleeding from being kicked in the stomach. I passed out several times.

Q: Did you seek medical attention?

A: Only for serious injuries or if I passed out. Then he'd drive me to the Anytown General ER. Of course, I didn't tell them how I got injured, just said I fell or something.

Q: During your marriage, did you receive any serious injuries from anything other than his attacks on you?

A: No.

Q: You signed a consent form so that my investigator could obtain your medical records from Anytown General?

A: Yes.

Q: This is Exhibit MDRX. Are these your medical records?

A: Yes they are.

Q: Do they accurately reflect the dates, kinds, and severity of your injuries, as well as any treatment you received?

A: Yes.

Q: Do they accurately reflect how you got injured?

A: No.

Q: Why not?

A: Eugene always took me to the hospital, and I couldn't tell them he was the one who kept hurting me.

Q: Judge, I move Exhibit MDRX into evidence.

DISTRICT ATTORNEY: Objection. No relevance, too prejudicial.

THE COURT: Overruled. Exhibit MDRX is admitted.

Q: Ma'am, these records show twenty-five separate ER treatments for you, for traumatic injuries like you just described, during the ten years you were married—that's about two
every year—and occurring about every six months. Is that what you remember?

A: Yes. That was the pattern.

Q: All caused by your husband attacking you?

A: Yes. All of it.

Q: What would happen after his explosion and violence, and your medical treatment?

A: He’d be so sorry. Apologizing, taking care of me, hand and foot. He’d swear that was the last time he’d hurt me, that it would never happen again. Said he’d go to counseling, which he never did. Told me how much he loved me, and how important I was to him.

Q: Did you believe him?

A: I did. For years and years. After all the apologies, he’d be the same wonderful man I loved at sixteen. But then, about six months later, it would all happen again.

Q: Why didn’t you leave?

A: After all his apologies and good behavior, I just had to forgive him. Once he put his hand in lye to punish himself; I knew he really loved me then.

Q: Do you think he cut you off from friends and family?

A: I didn’t see it at the time, but, looking back, I know that he did. We had no close friends. He didn’t let me work. He didn’t like my family and wouldn’t let me go see them myself. I guess that’s another reason I stayed—all I knew was me and Eugene.

Q: Earlier, we talked about telling the truth and receiving forgiveness. Have you forgiven your husband for all the hurt and fear he caused you?

A: I try to. I’ve struggled with that every day. I never told anyone about this until I talked to your investigator. I hope, now that
I have told the truth about what happened here, that I will be able to forgive him completely and move ahead. Does that make sense?

Q: Yes, ma'am. It makes perfect sense.

**Commentary**

Notice how powerful this section is, because the witness, not me, details the abuse. Nonleading questions elicit the answers, but the witness's willingness to give all this up results directly from my negotiation in section 1 and my good-faith performance in section 2.

By listening carefully to the witness, we realize that she has stopped referring to her late husband as Gene. I'll follow her lead—he's Eugene for the rest of the cross-examination. PP holds up her end of the deal in section 3 in an unforgettable dynamic. Talk about creating something in the courtroom—here I apparently create the basis for her forgiveness of the deceased and the acquittal of my client.

Notice how I guide the dance, in order to elicit information I will use in the following sections—her feelings upon hearing the "it's your time" threat, and EP's success at "cutting her off."

**Section 4: EP Had His Gun with Him**

Q: Mrs. Placid, where did your husband keep his handgun when he was not working?

A: Sometimes he would leave it at work in his locker there. Most of the time, though, he would carry it home and lock it in the little gun safe he had in our bedroom.

Q: Did he get it from the bedroom safe before going to work on the day he died?

A: I'm not sure. I don't have a memory of seeing or not seeing it with him when he left.

Q: Did you have the combination to the bedroom safe?

A: No. He wouldn't tell me that.
Q: Since his death, have you been able to open the safe?
A: Yes. His boss at Surety Security called and said they could not find Eugene's gun in his locker there or anywhere else. So I got a locksmith to open the safe.

Q: Was your husband's gun inside?
A: No it wasn't. He must have taken it with him when he left for work on his last day.

Q: Whenever he brought his gun home and put it in the bedroom safe, did he ever go to work and leave the gun home?
A: Never. That was a required part of his equipment for work, and he always took it back to work when he brought it home.

Q: Have you been through every place you can think of to try to find your husband's gun for his employer?
A: Yes, I have. Twice.

Q: Find it?
A: No.

Q: Did Surety Security find it?
A: No.

Q: Did the police find it?
A: No.

Q: So it appears that your husband took his gun with him from home on the day he was shot, but now it can't be found?
A: That's right.

Commentary
This little section may pay huge dividends. First, it provides a much-needed lower key for the witness after sections 1–3. It creates a tone and method that facilitate the witness's and questioner's
working together in order to solve a mystery, more of which is to come in sections 5 and 6.

Second, the content adds much-needed support to DD’s, claim that he thought EP had a gun at the time DD shot EP. If EP’s gun is not at home, not at work, not in DD’s cab, and not in EP’s car, then it seems likely EP had it when he ran at DD’s cab and DD shot EP. Presumably EP then dropped the gun and some bystander made off with it before the police arrived—a common occurrence at urban crime scenes.

Section 5 (Optional): Because of EP’s Violence, PP Feared Having Children with Him

Q: Mrs. Placid, you told us that you always hoped to have children of your own?


Q: But, you said, you and your husband “just decided not to” have children?

A: Yes.

Q: I’m thinking there is a little more to it than that. Am I right?

A: Yes, you are.

Q: Please tell us the whole reason you didn’t have children.

A: Eugene kept pressing me to have children. But I was worried that children would not be safe in our home, because of his explosive temper and violence. I was really worried that, if he ever killed or crippled me, the children would not be safe and cared for.

Q: Did you tell this to your husband?

A: Yes. He exploded and gave me one of the worst beatings ever. I was in the hospital for almost a week.

Q: So how did you avoid having children?
A: I lied. I told him my doctor said I couldn't have kids, because of damage done from all the times he kicked me in the stomach area. He believed it but still blamed me.

Q: I'm sure it was unimaginably hard, but you did the right thing, didn't you?

A: Without a doubt.

*Commentary*

This section is optional before cross starts, because trying to pull it off is going to depend on some of the answers I elicit in section 2 and on the relationship I build with the witness during the questioning.

Both the answers in section 2 and the rapport evident in my examination so far support going into this area for brief, but hugely emotive, questioning. Remember, I am not trying to avoid manageable risks— I am trying to create dynamics that will win the case.

*Section 6: EP’s Words—“It’s Your Time”—Make PP a Proxy for DD*

Q: Ma’am, have you ever heard anyone other than your husband use the phrase “It’s your time; it’s your time. I’m going to kill you.”

A: No, I haven’t.

Q: How about in books, on TV, or in the movies?

A: No. He was the only one I ever heard say that.

Q: And, basically, that meant he was exploding, and things were about to get very, very bad and very, very dangerous?

A: That’s true.

Q: When I asked you how you felt the first time you ever heard him say that, you started to tremble and said, “I was terrified,
just terrified. I was sure he was going to kill me right then and there."

A: Yes, that's true.

Q: You believed you were about to suffer death or serious bodily injury within seconds of those words?

A: Yes, I really did.

Q: Seems like any reasonable person seeing and hearing that would feel the same way.

A: Of course.

Q: Did you know that, in the circumstances you've described, you had a legal right to use deadly force in self-defense?

A: Yes, I knew it. But there was no way I could defend myself from him. He was much bigger and stronger and angrier.

Q: And, of course, he had the gun, whenever he wanted to get it out?

A: True. I did worry about that.

Q: Mrs. Placid, did you know that, after your husband cut off my client's cab on the street, Eugene came running back, trying to come through the window of the cab, and screamed, "It's your time; it's your time; I'm going to kill you"?

A: Oh, my God! I had no idea!

Q: That's what my client says in Exhibit 2, previously admitted, at page 5-middle—a statement he gave the police immediately after the shooting, long before he could possibly have known what Eugene said to you, when he exploded. Knowing your husband, do you think he was causing a threat of imminent death or serious bodily injury?

A: Yes, I do.

Q: Even more so, if your husband came running at the cab with his gun in his hand?
A: Even more so. Even more so.

Commentary

This is an example of cross-examination by proxy. PP was my proxy for DD. I established her own entitlement to use deadly force against EP, although she was unable to do so. That, in turn, established DD's right to self-defense, because he received the same threat in the same words from EP.

I used leading questions and precise quotes from her prior testimony in order to establish the foundation quickly.

When I spring the proxy comparison, there may be objections. Or there may not be. If I keep it fast, fluid, interesting, and short, I may very well be able to make it happen. But even if there are objections, and I lose them, it really doesn't matter. As long as I get enough of the question out, so that the jury can see and understand the connection between the situations of PP and DD, I will have scored a touchdown.

Summary

Learning from my friend Gary Kohlman to always pay attention and constantly search for creative opportunities in the courtroom, I began, in my first jury trial, to look for a more effective way to engage and cross-examine witnesses. I questioned the rules of the yes-no method and found them conceptually lacking. I saw that the most experienced and effective cross-examiners departed from the strict yes-no rules, but often in an instinctive, almost arbitrary way.

And so began the challenge to find and articulate a dynamic method of questioning that would use the witness as an active participant in creating the opportunities in the courtroom that can lead to our ultimate success. Now that you've seen what the method looks like, let's examine it closely in the next two chapters to see how it works, and how we can all use it safely and effectively.
Dynamic Cross Examination

Presented by Asian American Criminal Trial Lawyers Association
(in consultation with James H. McComas)
Why ask Why?

Dynamic Cross Examination is a technique of communication and meaningful interaction between the attorney, the adverse witness, and the jury foreperson for the purpose of persuading the jurors.
Avoid “Why” in Cross Examination, Correct?

• **Cross Examination 101**: Leading questions only; avoid open-ended questions

• The attorney frames the testimony and the witness is confronted with it.

• Control the witness physically and psychologically.
The Ten Commandments,
by Irving Younger

1. Be brief.
2. Short questions, plain words.
3. Always ask leading questions.
4. Don't ask a question to which you do not know the answer.
5. Listen to the witness' answers.
6. Don't quarrel with the witness.
7. Don't allow the witness to repeat his direct testimony.
8. Don't permit the witness to explain his answers.
9. Don't ask the "one question too many."
10. Save the ultimate point of your cross for summation.
Scientific Cross by Posner and Dodd

Three Basic Rules of Cross Examination:

1. Leading Questions

2. One Fact Per Question

3. Organize by Chapters
More on the Yes-No Approach

• Chapter Method: general to specific
• Advance chapters by theme
• Chapter Sequencing:
  – Primacy, Recency
  – Rank
  – Start strong, finish strong
  – Transition
• Trilogies, Looping and Impeachment
Studying the Yes-No Approach

• Taxi driver DD charged with murder; self-defense is theory.

• Investigation reveals PP abusive and violent towards wife.

• Defense cross examines widow PP with Yes-No Approach.
Costs of Control and Convention

• Alienating Jury, perpetuating mistrust of attorney
• Rigid and scripted
• Power of persuasion minimized by attorney’s testimony, not widow’s
• Widow’s story of abuse and experience of violence cut off; minimal proxy witness.
Why are we obsessed with control?

• Paranoid fear that witness will blurt something out that will sink the defense.

• Risk averse; avoiding blame.

• Concerned with looking good.
Studying the Dynamic Approach

1. Themes and Negotiation
2. Positive Memories
3. Violence Exposed
4. Had his gun
5. Optional
6. “It’s Your Time”
Witness as a Proxy

• Defense uses the witness’s emotional trauma or personal experience to validate a theme or fact.
• PP becomes a proxy to establish self-defense theory: EP’s threatening words and violent behavior validated.
• Witness testifies, not the attorney.
Developing Dynamic Cross

• Case Analysis by James McComas
• Outcome Levers: issues the jury will rely on in determining the verdict
  – Race, publicity, employment.
• Can we do better than yes-no responses?
  – Necessary to heighten confrontation, to establish witness theory, and can always be used as a default approach.
Identifying Outcome Levers

- Media and Publicity
- Arraignment
- Initial Client Interview
- Individuals familiar with victim or witnesses
- Preliminary hearing
- Pretrial litigation
- Continuous case conferencing
Evaluate Outcome Levers

• Prosecution
  1.
  2.
  3.
  4.
  5.

Trap Door(s)?

• Defense
  1.
  2.
  3.
  4.
  5.
Prepare an Opening Statement for each Witness

• Prepare an opening statement complete with theory for each witness.

• Opening will provide the outline for important themes and issues for the witness.
How will Dynamic Cross Unfold in the Courtroom?
Find the books at www.trialguides.com