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Witness Explanations During Cross-Examination: A Rule of Evidence Examined

Professor McCormick prefaced the 1954 edition of his *Handbook of the Law of Evidence* with this observation: "That part of the law of procedure known as evidence law has not responded in recent decades to the need for . . . rationalization as rapidly as other parts of procedural law."[1] Twenty-eight years later his observation still rings true. This note considers one common law rule of evidence which has never been rationally examined: the rule which allows a witness to explain any answer during cross-examination.[2] In an effort to rationally examine the rule,[3] consideration is given to the goals of the adversary system as they are affected by the current rule and by the rule proposed by this note. An attempt is made to rationalize the rule, as McCormick urged, so that it best promotes achievement of the adversary system's goals. This note concludes that the current rule is inconsistent with the goals of the adversary system and advocates a rule in which the cross-examiner is able to hold a witness to a direct answer, without explanation, during cross-examination except in specified situations.[4]

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[1] C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE xi (1st ed. 1954).

[2] Explanation of answers is usually only a problem on cross-examination. On direct examination, counsel wants his witness to fully explain answers and to narrate his testimony. T. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 94-95 (1980); C. MCCORMICK, *supra* note 1, at 8. It is only on cross-examination, where the examiner has had no opportunity to talk to or coach the witness, that explanations may lead to inadmissible testimony. *See infra* text accompanying notes 24-28.

[3] The rule of evidence examined here is not so much a "rule" as a "preferred ruling." In other words, it is not automatically applied whenever a cross-examination witness seeks to explain an answer. "The trial judge is entitled to considerable latitude in determining whether a witness should be allowed to explain his answer." Bank v. Egan, 240 Minn. 192, 201, 60 N.W.2d 257, 262 (1958). *Accord* State v. Goodyear, 98 Ariz. 304, 327, 404 P.2d 397, 413 (1965), *rev'd on other grounds*, 100 Ariz. 244, 413 P.2d 566 (1966); FED. R. EVID. 611(a). However, in the absence of circumstances directing otherwise, the current preferred ruling is to allow a witness to explain himself. State v. Rouse, 256 La. 275, 280, 236 So. 2d 211, 212 (1970). In the same manner, the rule proposed by this note should not be blindly applied, but should be based on the trial judge's perception of the demeanor of both the witness and cross-examiner. *See infra* note 4. The rule proposed by this note differs from the current rule in that the preferred ruling in the same circumstances would be to disallow explanation during cross-examination. *See infra* text accompanying notes 30-31.

[4] The illustrations supporting the proposed rule throughout this note are cases in which the cross-examiner was honestly trying to elicit undisclosed testimony and the witness was trying to keep the full truth from being heard, usually by relevant but unresponsive "explanations." In these situations, it is obvious that witness explanation is undesirable. *See infra* text accompanying notes 55-85. However, sometimes the situation is reversed—the witness is honest but the cross-examiner tries to misconstrue his testimony. *See* Banks v. State, 113 Ga. App. 661, 662, 149 S.E.2d 415, 416 (1966), where the cross-examiner used

THE CURRENT RULE

Many state courts have responded to the question whether a witness may explain an answer during cross-examination.[5] The courts hold that ordinarily a witness is permitted to explain his answer.[6] In cases discussing witness explanations, the general rule varies only slightly. Where the question calls for a yes or no answer, some states require the witness to answer yes or no first, then allow the explanation.[7] Others hold that as long as the explanation by its natural implications contains the answer requested, no objection will be heard.[8] The trial judge always has discretion to limit explanations;[9] however, most courts freely allow explanation of answers during cross-examination.[10]

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an inaccurate hypothetical question to misconstrue the witnesses' testimony. Where this is true, although opposing counsel will usually elicit the necessary explanation on redirect, the arguments supporting the proposed rule do not apply. Therefore, the trial judge should retain his discretion to control testimony under the proposed rule and may allow the witness to explain during cross-examination. Since the trial judge personally witnesses the demeanor of the witness and the cross-examiner, he should have discretion, reviewable only for abuse, to allow an explanation during cross-examination where the cross-examiner is the one trying to interfere with the search for truth. This note does not suggest that the trial judge's discretion should be limited and that the appellate court should reverse when explanation during cross-examination is allowed. *See generally supra* note 3 (trial judges currently have discretion over explanations).

[5] *See, e.g.*, Swygert v. Willard, 166 Ind. 25, 76 N.E. 755 (1906); State v. Rouse, 256 La. 275, 236 So. 2d 211 (1970); Bank v. Egan, 240 Minn. 192, 60 N.W.2d 257 (1953); State v. Marshall, 571 S.W.2d 768 (Mo. Ct. App. 1978); Commonwealth v. Dalton, 199 Pa. Super. 388, 185 A.2d 653 (1962); Adams v. State, 156 Tex. Crim. 63, 225 S.W.2d 568 (1949), *modified*, 229 S.W.2d 64 (1950) (sentence clarified).

[6] *See, e.g.*, cases cited *supra* note 5.

[7] *See, e.g.*, Banks v. State, 113 Ga. App. 661, 661-62, 149 S.E.2d 415, 416 (1966).

[8] Adams v. State, 156 Tex. Crim. 63, 225 S.W.2d 568 (1949), *modified*, 229 S.W.2d 64 (1950) (sentence clarified); *see* State v. Rouse, 256 La. 275, 236 So. 2d 211 (1970).

[9] Bank v. Egan, 240 Minn. 192, 201, 60 N.W.2d 257, 262 (1958); *accord* State v. Goodyear, 98 Ariz. 304, 327, 404 P.2d 397, 413 (1965), *rev'd on other grounds*, 100 Ariz. 244, 413 P.2d 566 (1966); FED. R. EVID. 611(a).

[10] Admittedly, it is difficult to determine how most trial judges exercise their discretion since so few trial transcripts are printed; however, three sources suggest that most courts do freely allow explanations during cross-examination. First, articles by trial lawyers indicate that explanations are generally allowed. *See, e.g.*, Preiser, *Cross-examination of Lay Witnesses*, TRIAL, Dec. 1977, at 22, 24 ("First of all you cannot contain the witness. How many times can you really hold the witness to a yes or no answer—the judge will say, yes, you may explain your answer. You are going to get the explanation."). Second, law review articles by trial judges indicate that explanations are allowed. *See, e.g.*, Shientag, *Cross-Examination—A Judge's Viewpoint*, 3 REC. 12 (1948). Third, excerpts of trial records found in appellate opinions indicate that most trial courts allow explanation. *See, e.g.*, trial court record reprinted in People v. Jackson, 44 Cal. 2d 511, 518-19, 282 P.2d 898, 902 (1955) (statement by trial judge: "You know, Mr. Winters, it is the usual courtroom procedure to permit a witness to explain his answer, and you are not going to stand there and prevent this witness from explaining his answers."); Central Ind. Ry. v. Mikesell, 189 Ind. App. 478, 221 N.E.2d 192 (1966).

In recent years, a few cases suggest that the current rule is being changed to the rule advocated in this note and that witnesses are being allowed to explain their cross-examination answers only on redirect examination. Carreras v. Honeggers & Co., Inc., 68 Mich. App.

The current rule had appeared in decisions in several states by 1910.[11] Explanation of the decision in most of these early cases follows a similar pattern. The opinion reprints the cross-examination dialogue to which exception was taken, followed by the explanation that was given or attempted. The court then states that a witness may explain his answers, and the exception is overruled.[12] Usually no analysis supports the decision. From those few cases which have discussed the reasons for allowing explanation, it appears that the rule is predicated on notions of "natural justice [and] common sense."[13] Natural justice appears to be the idea that the best way to uncover the truth at trial is to put the witness on the stand and let him tell everything he knows about the controversy and that attempts by the cross-examiner to limit a witness' answers are therefore attempts to hide the truth.[14] Recent cases have done little to expand upon this shallow analysis.[15]

Before discussing the propriety of allowing explanations during cross-examination, it must be understood that when judges allow an answer by terming it an "explanation" they may mean more than the general usage of the word. "Explanation," as the courts use the word, has two very different meanings. The first meaning of "explanation" merely refers to clarifying the witness' answer and is the same as the general usage of the word by the public. The second meaning of "explanation" might more correctly be termed an unresponsive answer which contains relevant facts.[16] As the illustration below indicates, this is the type of explanation to which objections are raised, because the answers are potentially disruptive, evasive, and prejudicial.[17]

The latter type of explanation shows how the current rule allowing explanations can and sometimes does contradict the rule that requires a witness to make responsive answers to questions by the examiner. Evidence law has traditionally recognized, at least in theory, the general right of an examiner to have a witness' unresponsive answers stricken

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716, 244 N.W.2d 10 (1976); Guzman v. State, 471 S.W.2d 845, 846-47 (Tex. Crim. App. 1971) (quoting 1 C. MCCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 621 (2d ed. 1956)). Although these recent cases reach the right result, they do not discuss the reasons behind that result. This note attempts to outline the reasons why witnesses should only be allowed to explain cross-examination answers on redirect and thereby show why these recent cases are correct.

[11] *See, e.g.*, Smalls v. State, 102 Ga. 31, 29 S.E. 153 (1897); Brace v. State, 43 Tex. Crim. 48, 62 S.W. 1067 (1901).

[12] *See, e.g.*, Smalls v. State, 102 Ga. 31, 29 S.E. 153 (1897).

[13] *In re* Will of Tatum, 233 N.C. 723, 726, 65 S.E.2d 351, 353 (1951); *accord* Dennehy v. O'Connell, 66 Conn. 175, 181, 33 A. 920, 922 (1895).

[14] Wigmore supports this idea in similar language: "[I]f the answer gives an admissible fact, it is receivable, whether the question covered it or not. No party is owner of facts in his private right. No party can impose silence on the witness called by Justice." 3 J. WIGMORE, EVIDENCE § 785 (3d ed. 1940).

[15] *See, e.g.*, State v. Reed, 174 Conn. 287, 300, 386 A.2d 243, 250-51 (1978).

[16] *See* Adams v. State, 156 Tex. Crim. 63, 67, 225 S.W.2d 568, 570 (1949), *modified*, 229 S.W.2d 64 (1950) (calls explanation "[a]n unresponsive answer which is competent").

[17] *See infra* text accompanying note 26.

from the trial record.[18] This right has primarily been a tool of the cross-examiner, since the party calling the witness often coaches his witness regarding what to say and not to say.[19] However, by extending the meaning of the word "explanation" to include unresponsive answers which contain relevant facts, courts are able to use the rule allowing explanations to limit the number of objections to unresponsive answers.[20] There are suggestions in some cases that this practice grew out of judicial intolerance of the unresponsive answer objection.[21] Were the rule prohibiting unresponsive answers applied strictly, there might be a great increase in objections and requests to strike by cross-examiners, despite the fact that any relevant matter contained in the answer might eventually be allowed into evidence anyway. By use of the rule allowing explanations, the unresponsive portion of the answer is labelled a relevant explanation beyond the scope of the question and is not objectionable.[22] By the interaction of the rule allowing explanation and the expanded meaning of explanation, unresponsive answer objections need only be sustained to answers which are both unresponsive and irrelevant to any matter at trial.[23] The importance of this application of the rule allowing explanations is that, given a judicial intolerance of the unresponsive answer objection, courts are likely to continue giving witnesses free reign to explain cross-examination answers. The current rule, by allowing witnesses to make unresponsive answers during cross-examination, is inconsistent with the goals of the adversary system. Therefore, a change in the current rule allowing explanations is needed to force trial judges to sustain more unresponsive answer objections.

State v. Baker,[24] a typical case utilizing the current rule, illustrates how allowing a witness to explain answers during cross-examination can interfere with the adversary system. At the trial, a friend who accompanied the murder victim on the night of the shooting was cross-examined by defense counsel.[25] The following dialogue ensued:

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[18] *See, e.g.*, McCord v. Stratten, 227 Ind. 389, 86 N.E.2d 441 (1949).

[19] T. MAUET, *supra* note 2, at 11-14.

[20] *See, e.g.*, Adams v. State, 156 Tex. Crim. 63, 66-67, 225 S.W.2d 568, 570 (1949), *modified*, 229 S.W.2d 64 (1950).

[21] This intolerance is illustrated by State v. Ferguson, 280 N.C. 95, 185 S.E.2d 119 (1971):

> The solicitor's first question was intended to place the defendant on the scene. Obviously, the next question would involve the sharpening of the knife and the statement that it would do the work. [The witness], not being familiar with court techniques and niceties, did not wait for the second question. Should the court have stricken the answer and waited for the next question which would produce the answer?

Id. at 98, 185 S.E.2d at 122.

[22] *See* State v. Rouse, 256 La. 275, 279, 236 So. 2d 211, 212 (1970).

[23] *See, e.g.*, Brown v. Wong Gow Sue, 354 Mass. 646, 241 N.E.2d 919 (1968); State v. Ferguson, 280 N.C. 95, 185 S.E.2d 119 (1971).

[24] 288 So. 2d 52 (La. 1973).

[25] *Id.* at 57.

> Q. And is it not a fact that out of ten people that were in the two line-ups, only one man was asked to step forward?
> A. That's correct.
> Q. And repeat the words: Give me that purse?
> A. That's correct. *And the man that was asked to step forward is that man right there, Mr. Doane, the man in the red shirt, and that's the same man that killed Harry Bell; he shot him in the side of the head.*[26]

The Louisiana Supreme Court, applying the current rule, found no error in refusing to strike the witness' answer, saying that a witness "is entitled to explain his answer. . . . Moreover, the witness' answer was relevant and material. He testified to the same effect more than once during the trial."[27]

Although case law provides more extreme examples of the conflict between the current rule and the goals of the adversary system,[28] *State v. Baker* illustrates the problem best because it contains the kind of explanation that occurs frequently at trial. More importantly, it shows how explanations interfere with the ascertainment of truth in the not uncommon situation in which the witness is closely aligned with the party who called him. The current rule can keep the full truth from being heard by the jury, because it allows a reluctant witness to insert emotion-charged explanations whenever the cross-examiner forces him to admit a helpful fact. For example, in *State v. Baker*, the witness, by repeating details of the killing, may have steered the jury away from the facts the cross-examiner was trying to present: that the police line-ups had been irregularly conducted.[29] By stirring the emotions of the jury, the witness may keep the jurors from understanding the full import of the facts the cross-examiner raises.

THE ADVERSARY SYSTEM AND THE PROPOSED RULE

Unlike the rule utilized in *State v. Baker*, the rule proposed by this note is based on a rational consideration of the adversary system. The proposed rule is that a witness cannot explain answers to leading questions during cross-examination except in specified situations,[30] but may give his explanation on redirect examination. The proposed rule recognizes that, although natural justice and common sense may indicate that a witness should be able to interject any relevant fact into his testimony,[31] natural justice is an unattainable ideal. To fashion a rule of trial testimony

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[26] *Id.* at 57-58 (emphasis in original).
[27] *Id.* at 58.
[28] *See* State v. Cook, 280 N.C. 642, 187 S.E.2d 104 (1972). In response to the cross-examiner's specific question, witness was allowed to respond, "Let's back up just a little," and narrate facts of his choice. *Id.* at 650, 187 S.E.2d at 110.
[29] *See supra* note 26 and accompanying text.
[30] *See supra* note 4.
[31] *See supra* text accompanying notes 13-15.

based on that ideal is irrational. Instead, the proposed rule is an orderly component of the adversary system as it operates in reality. It helps achieve the goals of the adversary trial system better than the current rule because it permits the system's own tools for achieving those goals to operate most efficiently.

The adversary system has two primary goals in deciding what evidence to allow at trial and when to allow it. These are the goals of ascertainment of the truth and avoidance of needless consumption of time.[32] While ascertaining the truth is the single most important goal, avoiding needless consumption of time is a goal of increasing importance in today's highly litigious society. To achieve these goals, the adversary system has developed several tools over the years. These tools include cross-examination, the leading question, redirect examination, and question and answer interrogation. As with all tools, they can accomplish the task for which they were designed only if they are allowed to operate as designed. Thus, supplementary rules of evidence, such as the rule regarding explanation of answers, should function without interfering with the operation of these primary tools of the system. The proposed rule does so better than the current rule. To illustrate this contention, the following discussion outlines the way in which the individual tools of the adversary system accomplish the goals of the system, and then illustrates that the proposed rule helps accomplish these goals better than the current rule.

Cross-Examination, the Leading Question, and Redirect Examination

The Tools for the Ascertainment of the Truth

As a tool of the adversary system, cross-examination aims chiefly at the ascertainment of truth, and its value in doing so has been recognized for at least 175 years.[33] The theory of cross-examination as a device for eliciting the full truth from a witness is that:

> a witness, on his direct examination, discloses but a part of the necessary facts. That which remains suppressed or undeveloped may be of two sorts, (a) the remaining and qualifying circumstances of the subject of testimony, as known to the witness, and (b) the facts which diminish the personal trustworthiness of the witness.[34]

The "remaining and qualifying circumstances" remain undisclosed on direct examination for two possible reasons. First, the witness may be biased in favor of the party calling him and therefore reluctant to disclose facts unfavorable to that party.[35] More commonly, these facts are not drawn

[32] *See* State v. Reed, 174 Conn. 287, 300, 386 A.2d 243, 250 (1978); FED. R. EVID. 611(a).

[33] *See, e.g.*, Jackson v. Kniffen, 2 Johns. 31, 35 (N.Y. Sup..Ct. 1806).

[34] 5 J. WIGMORE, *supra* note 14, § 1368. "[Cross-examination] is beyond any doubt the greatest legal engine ever invented for the discovery of the truth." *Id.* § 1367.

[35] *Id.* § 1368.

from the witness because the counsel who called him elicited mostly facts favorable to his client.[36] On the other hand, the facts which impeach the witness' trustworthiness remain undisclosed because no witness wants to be the instrument of his own impeachment.[37]

If nothing more were done to uncover these undisclosed facts, the full truth required to provide justice between the litigants would not be known. Therefore, the adversary system developed cross-examination to enable counsel for the opposing litigant to develop those hidden facts which presumably favor his client. By allowing the opponent to sift through the direct testimony, uncovering lies, bias, exaggerations, and any other divergencies from the truth, the adversary system uncovers as much of the truth as is relevant to effectuating justice between the litigants. Recognition of the power of cross-examination to uncover truth lies behind the long-established doctrine that due process makes cross-examination imperative in civil cases,[38] as does the confrontation clause in criminal cases.[39]

No matter how effective cross-examination is at uncovering truth, it has limitations. Therefore, the adversary system allows the cross-examiner privileges unavailable to the direct examiner in order to bolster his truth-seeking ability. The most effective privilege is the permission to ask leading questions.[40] By definition, leading questions suggest to the witness the answers desired by the cross-examiner,[41] usually by asking the witness whether certain facts are true and forcing him to answer yes or no.[42] Ordinarily, leading questions are not permitted on direct examination[43] because of fear that they supply a false memory to the witness by suggesting "desired answers not in truth based upon a real recollection."[44] However, this suggestive power, coupled with the witness' fear of committing perjury, sometimes proves to be the only possible way to elicit the undisclosed truth on cross-examination,[45] and this is true even if the witness is not consciously biased in favor of the party producing him. One trial judge has written that the very nature of cross-examination

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[36] *Id.*

[37] 3 J. WIGMORE, *supra* note 14, § 773.

[38] *See, e.g.*, Armes v. Pierce Governor Co., 121 Ind. App. 566, 101 N.E.2d 199 (1951); Glassman v. Chicago, R.I., & P. Ry., 166 Iowa 254, 147 N.W. 757 (1914).

[39] Pointer v. Texas, 380 U.S. 400 (1965); Alford v. United States, 282 U.S. 687 (1931).

[40] 3 J. WIGMORE, *supra* note 14, § 773. As a tool of the adversary system, the leading question is generally used only on cross-examination. *See, e.g.*, FED. R. EVID. 611(c).

[41] C. MCCORMICK, *supra* note 1, at 9.

[42] For example, recall the question asked by the cross-examiner in State v. Baker, 288 So. 2d 52 (La. 1973): "And is it not a fact that out of the ten people that were in the two line-ups, only one man was asked to step forward?" *Id.* at 57. *See also supra* notes 24-29 and accompanying text. This question, asking whether certain facts are true and answerable with yes or no, is a classic example of the leading question.

[43] *See, e.g.*, FED. R. EVID. 611(c).

[44] 3 J. WIGMORE, *supra* note 14, § 769.

[45] *Id.* § 773.

as a search for untruths in the direct examination creates a feeling of "contrary flexure" in most witnesses:[46]

> [W]itnesses under cross-examination seem to labor under the notion that the cross-examiner is an opponent to them, that he wants to make them say something they ought not to say, that he is laying traps for them. They forget most commonly, or act as if they forget, that they are to tell not only the truth but the whole truth, and think if they don't tell a lie affirmatively they may negatively suppress the truth.[47]

In other words, witnesses are often uncooperative out of a mere unwillingness to be the instrument of their own discrediting.[48] Nonetheless, the privilege of asking leading questions enables the cross-examiner to elicit the full truth by asking the witness whether the undisclosed facts are not in fact true and forcing a yes or no answer.[49] Thus, the ability to ask leading questions is essential for cross-examination to achieve the adversarial goal of ascertainment of the truth, and as such the leading question is a necessary tool of the adversary system.

Following cross-examination, the adversary system provides for redirect examination by the attorney who produced the witness.[50] Redirect also aims to uncover the truth since its purpose is to uncover the remaining and qualifying circumstances of any new facts elicited on cross-examination.[51] It also allows counsel to rehabilitate any witness whose personal trustworthiness was impeached on cross-examination.[52]

Although cross-examination, the leading question, and redirect examination are separate tools of the adversary system, in practice they work together as a coordinated whole to ensure that every relevant fact a witness knows can be presented to the jury. Because these three elements are so precisely developed, any rule regarding witness explanations must work so that it does not interfere with the effective operation of any of these elements and should take advantage of the truth-seeking powers inherent in this interrogational system. In other words, since the objective of the rule allowing explanations is to present the full truth to the jury,[53] it must work in coordination with the interrogational system designed to do just that. However, the current rule, which seems on its face to allow the complete truth to come forth,[54] actually works at cross-

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[46] Shientag, *supra* note 10, at 14.
[47] *Id.* (citation omitted).
[48] 3 J. WIGMORE, *supra* note 14, § 773.
[49] *Id.*
[50] *See, e.g.*, C. MCMORMICK, *supra* note 1, at 6-7.
[51] *See* Dean v. State, 211 Iowa 143, 233 N.W. 36 (1930). "On redirect examination, then, appellees could clear up any discrepancies brought out on cross-examination." *Id.* at 151, 233 N.W. at 40.
[52] C. MCCORMICK, *supra* note 1, at 105.
[53] *See supra* text accompanying notes 13-15.
[54] *Id.*

purposes with cross-examination and the leading question, while the proposed rule works within the system and ultimately ensures the more complete ascertainment of truth.

The Effect of Explanation on the Ascertainment of Truth

Under the current rule, the ability to use a leading question can be rendered completely ineffective. An uncooperative witness can successfully circumvent attempts to elicit undisclosed facts with a leading question. Instead of having the right to force the witness to admit or deny the facts, the cross-examiner is left with the mere right to ask the leading question. The witness can then avoid answering the leading question by giving a relevant but unresponsive answer which most courts currently sustain as a valid explanation.[55] In effect, explanations allow a witness to avoid the threat of perjury presented by answering the yes or no question. Thus, the current rule limits the ability of the cross-examiner to elicit the truth from a witness because it limits his ability to place the witness in the position where he must admit the fact or commit perjury.

An example of a witness' ability to avoid answering a leading question under the current rule is provided by *Brown v. Wong Gow Sue*.[56] The plaintiff had brought the action to recover for injuries sustained when his foot was trapped between the floor of the defendant's open-walled elevator and a ledge on the hoistway wall.[57] On cross-examination the plaintiff was asked whether he knew "that you had to keep every part of your body so that it didn't protrude or go over the edge of the elevator floor."[58] The following answer was sustained as a relevant but unresponsive explanation:

> When you're standing against the wall and if part of my feet touched the base of the wall at the bottom of the elevator, I would have known maybe . . . I would have known maybe I was leaning one way or the other. At the time it happened I was away from the wall, my body was away from the wall safe, and unconsciously, my feet overlapped.[59]

The plaintiff's answer in *Brown* was no answer at all. The cross-examiner was not able to develop an admission of contributory negligence as he had planned. The witness' ability to substitute a relevant but unresponsive answer allowed him to completely evade the leading question and thereby avoid a powerful admission against interest.

The proposed rule eliminates this problem by denying the witness the

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[55] *See* cases cited *supra* note 8.
[56] 354 Mass. 646, 241 N.E.2d 919 (1968).
[57] *Id.* at 647, 241 N.E.2d at 920.
[58] *Id.* at 649, 241 N.E.2d at 921.
[59] *Id.*

right to explain answers during cross-examination in most situations.[60] If the cross-examiner chooses to ask a leading question, the witness must answer either yes or no and cannot evade the question with a relevant but unresponsive answer. In this way, the proposed rule ensures that the leading question on cross-examination can develop the full truth.[61]

Of course, under the current rule the cross-examiner in *Brown*, had he been persistent, could have eventually elicited the admission by repeating his leading question until the witness admitted that, despite his explanations, the facts asserted were true. This is common practice,[62] and the result of the repeated evasive explanations has traditionally been that the jury may disbelieve a witness' direct testimony based upon his demeanor on cross-examination.[63]

This traditional penalty, however, does not sufficiently counterbalance the harm accomplished by the current rule. For cross-examination to uncover the truth as it was intended to do, the opportunity afforded must be one of effective cross-examination.[64] The current rule enables a witness to render cross-examination virtually ineffective. Not only can he avoid answering counsel's leading questions with his relevant but unresponsive explanations, he may also render the interrogation unintelligible by disrupting an orderly presentation of the remaining and qualifying facts which the cross-examiner desires to prove. As Professor Jones warned, "If non-responsive answers were permitted to stand, there would be no order which examining counsel could dependably rely upon"[65] because the current rule gives a witness substantial power to determine when certain facts are elicited, and use of this power can disrupt the planned order of the cross-examiner.[66] Thus, under the current rule, witness explanations may lessen the power of cross-examination to achieve its main goal,

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[60] *See supra* note 4.

[61] Although the occasion is less frequent, the proposed rule should also apply when a direct examiner receives permission to ask leading questions because he has called an adverse witness. *See generally* 3 J. WIGMORE, *supra* note 14, § 774.

[62] *See, e.g.*, Lowman v. Lowman, 109 Ind. App. 163, 33 N.E.2d 780 (1941):

> Only the trial court sees the witnesses on the stand, their demeanor in testifying, their candor, or lack of candor, in disclosing facts about which they have knowledge. Juries and trial courts, quite often, properly, give more weight to the demeanor of witnesses than to the substance of their statements in the determination of truth.

Id. at 174, 33 N.E.2d at 785.

[63] *See* Shientag, *supra* note 10, at 18.

[64] *Cf.* Warren v. State, 292 Ala. 71, 288 So. 2d 826 (1973) (court held defendant must be given sample of alleged marijuana confiscated at his arrest so that he will have analysis results with which to cross-examine state's expert witness effectively). Wigmore also indicates that cross-examination can fail for lack of effectiveness in some circumstances because of defects "connected with the conduct of the examination." 5 J. WIGMORE, *supra* note 14, § 1390.

[65] 5 B. JONES, COMMENTARIES ON EVIDENCE § 2313 (2d ed. 1926).

[66] An excellent example of the complete disruption of a cross-examiner's efforts to present facts in an orderly manner is State v. Cook, 280 N.C. 642, 187 S.E.2d 104 (1972), discussed *supra* note 28.

and to balance this loss there is only the possibility that the jury will discount the value of the direct testimony because of the evasive explanations. The jury's response is too uncontrollable to counterbalance the loss to the search for truth. As often as not, the jury may conclude that the cross-examiner was trying to "bottle up" the witness and thereby hide the real truth. The proposed rule makes the truth easier to elicit and avoids the necessity of depending upon the jury's impressions. In doing so, it makes cross-examination a more effective tool of the adversary system.

The proposed rule also ensures a more complete disclosure of truth at trial because it takes advantage of the truth-seeking mechanisms already developed by the adversary system. The proposed rule does not keep the witness' explanations out of trial; it does not mean a witness can never explain answers that are given on cross-examination. Instead, it provides only that *during* cross-examination a witness cannot explain answers. The proper time for the explanation is on redirect.[67] The theory of redirect examination has always intended this, because an explanation, if it is genuine and not merely an evasionary tactic, is a remaining and qualifying fact not raised by cross-examination.[68]

This is the key to the proposed rule. The current rule seems to view cross-examination as an isolated event, suggesting that unless the witness explains his answer during cross-examination his chance will be lost and some element of the truth will never be heard. The proposed rule properly views cross-examination as a part of the whole adversary system of interrogation. Thus, the proposed rule does not succumb to the argument that denying a witness the right to explain during cross-examination keeps some element of the truth from the jury.[69] The proposed rule does not impose silence on the witness; it merely delays his explanations until redirect. In doing so, the proposed rule distinguishes between the two kinds of explanation[70] and deals with them in a way the current rule is incapable of doing. First, those explanations which are truly explanations, that is, explanations of remaining and qualifying circumstances of the cross-examination testimony, will be raised on redirect. These must be uncovered if the full truth is to be known. On the other hand, those

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[67] Rehabilitation of an impeached witness provides a useful parallel, since impeachment of witnesses is as much a purpose of cross-examination as is eliciting remaining and qualifying facts. Courts and commentators have always assumed that if a witness is to be rehabilitated by his own testimony, that rehabilitation occurs on redirect. *See* Oppenshaw v. Adams, 92 Idaho 488, 445 P.2d 663 (1968); Aboussie v. McBroom, 421 S.W.2d 805 (Mo. App. 1967); C. MCCORMICK, *supra* note 1, at 105. Since an explanation of cross-examination testimony shares the same purpose of undoing what the cross-examination has done, it follows that the explanation also should occur on redirect.

[68] *See* Smith v. Pacific Truck Express, 164 Ore. 318, 333-34, 100 P.2d 474, 480 (1940); *cf.* 5 J. WIGMORE, *supra* note 14, § 1368.

[69] *See supra* text accompanying notes 13-15.

[70] *See supra* text accompanying note 16.

explanations which are really just unresponsive answers, and which in the context of cross-examination are evasive and undesirable, will no longer be given because on redirect examination the witness has no more occasion to be evasive.[71]

In the latter category is the explanation in *State v. Baker*.[72] Although the facts contained in the explanation were relevant, they did not in any way qualify the facts elicited by counsel and would not have been raised on redirect. In fact, the court noted that the witness had "testified to the same effect more than once during the trial,"[73] showing that the witness' real interest was evasion of the leading question, not full disclosure of the truth. The current rule cannot distinguish these two types of explanations because the witness gives the explanation before it is determined to be of the desirable or the undesirable type.[74] Under the proposed rule, only the desirable type of explanation is given, because on redirect the occasion for evasiveness has disappeared. Thus, the proposed rule makes the whole adversary system of interrogation more effective by bolstering its mechanics.

Question and Answer Interrogation

Question and answer interrogation has two functions as a tool of the adversary system and this explains its preferred position today over free narration by the witness.[75] First, it helps avoid the needless consumption of time at trial because it elicits the witness' testimony in an orderly manner without repetition or omission.[76] Second, the question and answer format aids the search for truth by affording opposing counsel opportunity to object to inadmissible answers before they are given, rather than having to resort to the more ineffective motion to strike.[77]

Even casual observation of the current rule indicates that it works at cross-purposes with question and answer interrogation. The explanation allowed in *State v. Stillman*[78] provides an excellent illustration. After the prosecution's witness had testified on direct examination, defense counsel tried to impeach her by showing that she had asked for five hundred dollars from the defendant so she could leave town.[79] Before she answered, the witness asked, "Your Honor, may I make a statement, please?"[80] Defense counsel insisted on a yes or no answer and the witness responded,

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[71] *See supra* text accompanying notes 50-52.
[72] 288 So. 2d 52, 57 (La. 1973). *See supra* text accompanying note 26.
[73] *Baker*, 288 So. 2d at 58.
[74] *See* Eiland v. State, 246 Ga. 112, 116-17, 268 S.E.2d 922, 926 (1980).
[75] 3 J. WIGMORE, *supra* note 14, § 767.
[76] *See* C. MCCORMICK, *supra* note 1, at 8.
[77] 3 J. WIGMORE, *supra* note 14, § 767.
[78] 301 S.W.2d 830 (Mo. 1957).
[79] *Id.* at 833.
[80] *Id.*

"Yes, I did."[81] When the court then told her she could make her explanation, the witness launched into this tale:

> Your Honor, when I came out of the hospital, my brother-in-law David Mitchell came to my house, saw me himself, and he said there was a man wanted to talk to me and the man wanted to know—. . . . He said he had somebody who had wanted to talk to me, and he took me over to this man's house and the man—. . . . He asked me, hadn't I got myself into a mess, and I asked him what he meant, so he proceeded to tell me. [The court then asked if she was finished.] No, I haven't finished. He took me over to Flora Avenue, Mr. Beelik, and I told him I didn't want to talk to him and he said he had promised he would bring me by . . . . He said he had heard about the trouble that I had gotten into, and he (Mr. Beelik) wanted to know—. . . . My brother-in-law got out of the car and walked around to the front and he said he would stand there and see that nothing happened, that the man only wanted to talk to me. And as I stated before, I did not want to testify here, and so I told him. I did not want to testify, it was my fault for going to him as much as it was his fault for doing it . . . .[82]

Stillman illustrates how the current rule potentially wastes time at trial. When a witness is allowed to make a lengthy explanation during cross-examination there is a possibility that entire portions of the narrative will later have to be stricken, as were the hearsay portions of the testimony in *Stillman*.[83] The answer may also be incomprehensible, as in *Stillman*, and therefore a waste of time. A similar problem is that often a persistent cross-examiner must ask his witness the same question several times before the witness stops making unresponsive answers and properly answers the question. The proposed rule eliminates all these problems. It forces the witness to answer only the question asked and refrain from explanation. By doing so, it eliminates the unresponsive answer which courts have improperly called explanations,[84] thereby avoiding loss of the time these explanations require. It also forces the kind of explanation in *Stillman* to be brought out on redirect, thereby allowing opposing counsel a chance to catch inadmissible matter before the long explanation is given and thus saving time.

Stillman also illustrates how the current rule impairs the search for truth by disregarding the screening mechanism built into the question and answer format. Under the current rule, the cross-examiner has no way of combating an explanation until after the jury has heard it. If the explanation contained inadmissible matter, he must move to strike the answer. However, the ability of the jury to disregard the inadmissible evidence is questionable.[85] Because the jury often cannot disregard the

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[81] *Id.*
[82] *Id.*
[83] *Id.* at 834.
[84] *See supra* text accompanying note 16.
[85] Shientag, *supra* note 10, at 18.

evidence, the search for truth is impaired by the jury's subsequent inability to consider the evidence clearly and objectively. The proposed rule, on the other hand, offers the cross-examiner a better chance to keep the testimony from the jury's ears. Since the proposed rule allows no explanations during cross-examination, any explanations containing inadmissible matter must be raised on redirect in response to a specific question where the natural screening mechanism of the question and answer format again operates. If the question calls for inadmissible matter the cross-examiner has a chance to object before the answer is given; the current rule does not offer this chance.

CONCLUSION

The current rule, which allows explanations during cross-examination, does more to impair the goals of the adversary system than it does to support them. If the adversary system hopes to uncover the full truth behind a controversy without a waste of time, the cross-examiner must be free to sift through the direct testimony and to elicit all the undisclosed facts. To do this, the cross-examiner must be able to lead an uncooperative witness to the point where he must admit the truth or be threatened with perjury. This is possible only where the cross-examiner has the power to hold the witness to a direct answer without explanation. The proposed rule gives the cross-examiner this power without denying the witness his opportunity to tell everything he knows. The proper place for witness explanation is on redirect examination. When explanations are elicited on redirect the goals of the adversary system will be met.

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