Give the Witness Some Elbow Room

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Dear Trial Judges of America:

Would you consider a small fix that would have a major positive effect on the quality of justice in your courtrooms?

Resist the impulse to strike information that a witness tacks on when answering a yes-or-no question and to instruct the witness that the answer must be merely "yes" or "no." The rules of evidence don't require you to strike the explanation or limit the answer, and neither does the search for truth. In most cases, doing so only obscures the truth. Or buries it.

Here's an example of the problem:

The plaintiff's expert is opining on the value of the plaintiff's five-bedroom house (Property A). The defendant's lawyer thinks she can score some points by showing that a five-bedroom house around the corner (Property B) was sold shortly before the valuation date for an amount well below the expert's valuation for Property A. The lawyer's impeachment strategy is to show that the expert could have used Property B in his comparable-property analysis but didn't. First, the cross-examiner asks a bunch of questions to let the jury know that valuation experts rely on data from recent sales of comparable properties and that the expert's choice of comparables can have a profound impact on the opinion of value. She also gets the expert to acknowledge that another property around the corner (Property B) has the same number of bedrooms as Property A, yet sold for a far lower price. Then this:

Defendant's Lawyer: Isn't it true that, in forming your opinion about the value of the plaintiff's house, your comparable-property analysis did not include the five-bedroom house around the corner that sold shortly before the valuation date?
Witness: Yes. I didn't use that house around the corner because it was too different from the plaintiff's house to be a valid comparable.
Defendant's Lawyer: Your honor, I move to strike everything after the word "Yes."
Judge: Granted. The jury will disregard everything after the word "Yes."

Of course, not all of you would grant that motion. Some of you would deny it, reasoning that the plaintiff's lawyer will just bring out the explanation on redirect, so why strike it. But in a triumph of formalism over fact-finding, many of you would allow that motion, depriving the witness of the chance to dispel, right then and there, what the witness believes will be a misleading impression: that he cherry-picked the comparables to engineer an opinion favorable to the plaintiff.

Why strike something that helps the fact finder understand the witness's testimony better? Striking the supposedly unresponsive portion undermines the very truth-finding function that many of you believe is served by granting the motion. And as you'll

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see shortly, the explanation isn't really unresponsive. The witness's complete answer would usually stop jurors from forming mistaken impressions that could incubate for hours and perhaps for the rest of the case. When the explanation is relevant to the answer or places the "yes" or "no" in context, striking it almost always undermines the interest of justice.

To understand why, let's look at the basic nature of yes-or-no questions. Some are quite simple. They call only for the witness to admit or deny simple noncontroversial facts: "Was John in the room when you got there?" "Had you ever met him before?" "Were the two of you the only ones there?"

Other yes-or-no questions may seem simple on the surface, but they're not. They have a subtext. They seem to be asking one thing, but underneath they're really asking something else. They take advantage of inferences and conclusions that people are likely to draw based on how the question is worded.

Take for example the question about the expert's choice of comparables: "Isn't it true that, in forming your opinion about the value of the plaintiff's house, your comparable-property analysis did not include the five-bedroom house around the corner that sold shortly before the valuation date?"

Here, two meanings occupy the same question at the same time. On the surface, it seems to be asking only for a straightforward confirmation or denial about a narrow fact—whether the expert excluded Property B from the comparables used in valuing Property A. But underneath, it's really asking: "In doing your analysis, didn't you bypass a relevant comparable to goose up the value of the plaintiff's property?"

Why is that the real question? Because the question as asked implicitly defined the category of relevant comparables and placed Property B in it. As the question is worded, jurors aren't thinking about any attributes other than the ones mentioned: location, number of bedrooms, and recency of sale. Most jurors wouldn't independently consider whether any factors not mentioned might be relevant, like whether Property A is on a quiet, shady side street and Property B is at a bus stop on a busy street. They wouldn't stop to think about other differences that could make the comparison improper or unfair, such as quality and age of construction; need for capital improvements; amenities; lot size; curb appeal; floor plans; caliber of kitchens, bathrooms, and closets; and many others.

An unexplained "yes" would thus allow jurors to draw the easy inference that the expert's opinion is defective and perhaps result-driven, rather than data-driven, precisely the impression the cross-examiner hopes the jury will form. An unexplained "yes" serves as the answer not just to the surface question but to the subsurface one as well, the one that leads to the mistaken inference.

In contrast, the witness's explanation after the "yes" addresses the underlying question and helps negate the inference. It does this by telling the jury that two properties can differ in important

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The witness promises to "tell the truth, the whole truth, and nothing but the truth." At first blush, that testimonial oath seems like a redundancy. How does the "truth" differ from the "whole truth"?

Ken Berman provides the answer: A "yes" or "no" may accurately respond, yet obscure important context that would reveal the larger and more significant truth. So I largely agree. Generally, the witness should be permitted to explain after answering a yes-or-no question, and judges should rarely, if ever, strike the testimony that follows the simple one-word response.

Striking a witness's explanation may subvert the truth-finding process and arguably the oath. And striking can be counterproductive for the efficiency concern that is often the reason a judge cuts off or strikes testimony. Because the lawyer will be able to elicit the explanation on redirect, striking part of an answer and requiring its repetition later, on redirect, wastes the jury's time.

For that reason, I wonder if it's really so bad to be on the receiving end of those motions to strike. A cross-examiner who repeatedly requests that the judge strike the witness's explanation will appear as the lawyer who is both delaying the trial *and* afraid of the whole truth. Once the jury sees that opposing counsel as the one who is obstructing the truth-finding process, one is well on the way to victory. And while Berman worries that redirect is too late to undo a misimpression created by a mere yes-or-no answer, ask yourself whether a jury actually disregards a struck answer.

The greater threat, then, to a trial lawyer may be when a judge directs the witness to answer only "yes" or "no" in the first place, without any explanation. I understand why judges sometimes resort to that instruction. Although it should be done sparingly, at times it is a necessary antidote to a recalcitrant witness.

Take Berman's hypothetical expert's response to the question about his failure to consider a nearby house when making his valuation. The answer Berman contemplates—a "yes," followed by a succinct explanation—should not trouble any judge. But often that's not what happens.

Assume instead that the witness responds, "Well, I'm only supposed to consider comparable sales." He hasn't answered the question. In fact, he hasn't even committed to whether he viewed the other house as a comparable. Now, multiply that type of evasive answer, which happens all the time, by several instances or,

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ways, even though they may be near one another and have the same number of bedrooms. The explanation is a fair response. It tells the truth. And it tells more of the truth than the unexplained "yes." It's actually the witness's attempt to tell the *whole* truth.

Why Witnesses Explain Answers

Witnesses innately understand when two meanings occupy the same question. It's why their instincts prompt them to answer both meanings by including an explanation. That isn't done only in the deposition room or courtroom. It's done in the boardroom, the classroom, and the dining room. It's an everyday occurrence. It's what people do.

In social or business settings, we understand not only what's being asked but also why it's being asked. We understand the point of the question. In our instinct to be accurate, we don't hesitate to add information to make our meaning clearer and to stop someone from drawing the wrong conclusion.

When someone asks, "Were you late?," they're usually asking not simply whether you arrived after the appointed time or missed a deadline, but whether you were *unjustifiably* late. The word "late" has a judgmental character that creates that impression, which is why people commonly include a helpful explanation with their answer: "Yes. There was a huge accident on the turnpike." If the person answers with just the word "yes," then the listener might assume the lack of an excuse. After all, if there were one, it would have been stated in the answer.

That is how we use language. We process and interpret questions through certain shared expectations and understandings that form the foundational underpinnings of communication. We aim to deliver answers that meet those expectations and speak to those understandings. That's what we do naturally, which is why many witnesses won't suppress those impulses in the courtroom and why jurors won't suppress how they're conditioned to interpret the answers.

Questions have subtexts and assumptions, penumbras and curtilages. They come with baggage. The whole meaning of a question is more than just the sum of its words. The meaning includes the impression it forms, the images it creates. A yes-or-no question seeks a confirmation or denial. If the confirmation comes, then in the listener's brain the image is confirmed and takes hold.

When a question is asked, the responder and the third-party listener react to it at the same time and generally in the same way. They hear the words and typically see the picture the question paints. A helpful responder crafts an answer that addresses not only the question's literal words but also its subtexts and penumbras, its images and impressions, what the responder and everyone else are thinking, consciously or subconsciously.

Consider the following question and how each of these two responses creates a different impression:

"Do you enjoy drinking alcohol?"

Answer A: "Yes."

Answer B: "Yes, but only on special occasions with my family."

Both answers are truthful. The latter is more precise. It also stops the listener's imagination from drawing a false conclusion. It adds helpful and, in some ways, necessary information.

When you as trial judge force witnesses to answer only the surface question and deny them their explanation that addresses the subsurface one, you're forcing them to use the single "yes" or "no" to do double duty, to answer both. That is terribly unfair to the witness and contrary to the goal of getting to the truth. The answer to the subsurface question may well be the opposite of the answer to the surface one. The complete answer—the whole truth—addresses all parts of the question, not just one.

If an expert is asked, "Before this case, had you ever appraised a 16th-century Florentine painting?," the subsurface question that the listener subconsciously hears is "Do you have the proper experience and qualifications to appraise this painting?" A bare "no" could easily be mistaken as a "no" answer to the subsurface question as well, leading the jury to form an unwarranted impression that the witness lacks relevant expertise.

But if the witness answers, "I never had to, because the appraisal methodology that we art appraisers use applies to all time periods, geographies, and genres of art, including 16th-century Florentine paintings," that answer responds to *all* parts of the question, both the stated and the implied. For a witness who wants to tell the *whole* truth, making the witness give only a yes-or-no answer stops the witness from doing that. It handcuffs and limits the witness to a partial truth, to a misleading half-truth.

Worse, when you grant a motion to strike the explanation, you're not simply helping pave the way for jurors to form the very impressions that are contrary to the witness's truth. You're also sending a potential message to jurors that you endorse that impression. The jury may well interpret your order to strike the explanation and your instruction to disregard it as your own negative assessment about the credibility of the witness or the explanation. In effect, you may be aiding the cross-examiner's impeachment effort and unwittingly putting your thumb on the cross-examiner's side of the scale, to the detriment of both the witness and the party who sponsored the witness, all because the witness answered in an instinctively natural way designed to stop misleading impressions.

To be sure, if you strike the explanation, the witness may have the chance to return to it during redirect, assuming the witness's lawyer remembers to address it, but redirect is a poor substitute for letting the witness's explanation stand when it's first given. Context is important. If you strike the witness's contemporaneous explanation and make the witness address it later (sometimes

much later) on redirect, you've stripped the original answer of context vital to understanding it.

Federal Rule of Evidence 106 endorses the importance of allowing closely related information to be presented as a package "that in fairness ought to be considered at the same time," rather than in piecemeal fashion at different times in the trial. While that rule applies to writings, its logic and rationale fully apply to testimony. As the advisory committee explained, "[t]he rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial."

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The latter point is especially critical. When repair work is delayed to a later point in the trial, misimpressions have already begun to form through which the fact finder will filter other evidence. So when the witness tries to dispel the misimpression on redirect, it can come across as just spin-doctoring. At that point, the explanation is also out of context. Recreating context on redirect is a real challenge. The best cure is to prevent the misimpression from forming in the first place. All of this argues for letting the explanation stand when the witness first gives it, at least in most cases. Certainly, it suggests not granting motions to strike reflexively simply because the witness strayed beyond a simple "yes" or "no."

Laws of Evidence and Motions to Strike

Laws of evidence do not mandate granting motions to strike in these circumstances. When a witness volunteers information with the answer, and when that information is relevant for some purpose, courts can allow it to stand even if it strays beyond the precise scope of the question.

In *People v. Maestas*, 183 Colo. 378, 385 (1973), the Colorado Supreme Court, crediting Wigmore, cited that principle when it allowed an expert witness's volunteered information to stand. The question asked only about a bloodstain's size, but the expert

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more typically, by many instances. The patience of all but the most forgiving judge will be tested.

The nonresponsive witness subverts the truth-finding process and prolongs the trial. Those two threats call for some sort of judicial response. Unsurprisingly, it sometimes comes in the form of a judge's instruction to answer just "yes" or "no."

So, much of the ability to avoid judicial intervention in the Q-and-A process lies with the witness and thus with the attorney who prepares the witness. Witness compliance with two basic lawyer rules—listen to the question, and answer it directly—should prevent a judicial instruction to answer the question "yes" or "no." And when an explanation is needed to ensure that the "yes" or "no" is not misleading, a brief, to-the-point explanation should prevent it from being struck. These are the very same principles that should guide lawyers answering questions during oral argument—directly answer the question, then succinctly provide your fuller explanation.

Of course, as Berman observes, many witnesses are appearing in court for the first time. What to do when your witness's failure to provide yes-or-no answers prompts a judge's instruction to do so?

One possibility is to ask the judge to modify the instruction to the witness to reflect that a yes-or-no answer may give the jury the wrong impression. When faced with a witness who refuses to answer a yes-or-no question that way, one federal district judge I know gives the witness these options: Answer "yes," "no," or "I can't answer yes or no." That third choice forces the questioner to either modify the question or allow the witness to give an explanation.

From the judge's perch, there are times when the measures Berman critiques may be necessary. But he's right that striking explanations undermines the truth-finding role of courts. That measure is extreme and should not be used lightly. What to do when the judge is considering such a motion to strike? Invoke the oath. Remind the judge that the witness has taken an oath to tell "the whole truth," and that's not possible unless the witness is allowed to put the answer in context.

Berman's article is a useful reminder of the wisdom of the venerable oath. And judges and lawyers alike would also do well to remember another theme of Berman's article: As much as we may want to be the central actors in a trial, it is the witnesses—the only participants in a trial whose statements are evidence—who will lead us to the truth. ■

volunteered that the bloodstain was also spattered. That extra detail added relevant information that the jury could consider in assessing whether the defendant participated in the fight.

Similarly, in *State v. Crocker*, 197 N.C. App. 358, 365 (2009), defense counsel, on cross-examination, asked whether the witness, a doctor, had ever asked the victim if the victim was telling her the truth. The witness replied: "I did not specifically ask her. I felt like what she was telling me was the truth." The first sentence was responsive. The second sentence explained the first, gave it a context, and answered the logical but implicit question "Why not?"

Defense counsel moved to strike the second sentence. The judge denied the motion. The appeals court found no error, explaining that the cross-examiner's question was "designed to elicit the type of response" that the witness gave.

Rulings like those echo through the case law. See, for example, *State v. Batts*, 303 N.C. 155, 159 (1981) ("[R]esponsiveness is not the ultimate test of admissibility. If an unresponsive answer contains pertinent facts, it is nonetheless admissible; it is only when the unresponsive answer produces irrelevant, incompetent or otherwise inadmissible information that it should be stricken."), and *State v. Kassebeer*, 118 Haw. 493, 517 (2008) (same).

Some jurisdictions have different rules. California's Evidence Code section 766 states: "A witness must give responsive answers to questions, and answers that are not responsive shall be stricken on motion of any party." The code does not specifically address additional information tacked onto an otherwise responsive answer, but case law says that this information may stand if otherwise relevant and admissible. *See People v. Sanchez*, 181 Cal. Rptr. 3d 360, 378 (Cal. Ct. App. 2014). In other states, judges have discretion whether to strike a nonresponsive answer. *E.g.*, *State v. Smith*, 336 S.C. 39, 44 (1999); *State v. Roberts*, 154 Vt. 59, 73 (1990).

In federal court, practices vary. In *United States v. Delorme*, No. 10-12069, 2011 U.S. App. LEXIS 13272, at *3 (11th Cir. June 28, 2011), a trial judge was held to have permissibly instructed a defendant to answer questions with just the words "yes," "no," or "I don't know." The asserted justification was the need to maintain the pace of the trial and that the defendant had already given nonresponsive answers, answers exceeding the question's scope, or argumentative answers. But in *United States v. Canon*, No. 04-5310, 2005 U.S. App. LEXIS 12001, at *5 (6th Cir. June 17, 2005), a trial judge did not strike a government witness's unsolicited explanation in answer to a yes-or-no question on cross-examination, and the failure to strike it was held not to be an abuse of discretion.

The upshot of cases like these is that, in most jurisdictions, no rule of evidence requires striking surplus information in an answer, particularly where the information helps explain the answer or put it into context.

It's a myth, by the way, that yes-or-no questions can always be answered that way truthfully. Lawyers may argue: "It was a simple yes-or-no question, but the witness couldn't even give a simple yes-or-no answer." Those arguments imply that anything besides a "yes" or "no" is evasive.

That's a cheap shot. If a lawyer makes that argument, you might want to consider instructing the jury that not all yes-or-no questions can be so answered and that explanations can be a natural and fair response.

Consider questions that have some innocuous-sounding adverb or adjective that the witness can't easily embrace: "Did you regularly shred large quantities of paper like what you shredded on October 13?" "Were you happy to be chosen to lead the effort?" "Was it a big challenge?" Except when the answers lie at an extreme, questions like those cannot be easily answered in one word.

And what if the shortest truthful answer consists of just these three words: "Yes and no." An answer like that begs for an explanation. It can't be understood without one.

What if the shortest truthful answer is "sometimes," or "not necessarily," or "not exactly," or "it depends," or "it never got that far," or "only on Tuesdays and Thursdays," or "we're still considering that," or "I tried," or "if that were possible, then yes, but it's not," or any of the thousand other phrases that roll a "yes" or "no" into a more nuanced, more accurate, more truthful answer? While it's simple to think that a yes-or-no question deserves a yes-or-no response, an unexplained and unqualified "yes" or "no" is absolute. It may overstate. It's black and white, even when the factual, truthful answer is some shade of gray. A naked "yes" or "no" can send the fact finder in a false direction.

To be sure, many lawyers counsel their clients not to explain their "yes" or "no" answers, fearing that an ill-considered explanation would open the client to more damaging interrogation while a helpful explanation would draw a motion to strike. The concern with the helpful explanation is that if the judge grants that motion, nothing will have been gained, and if the judge also instructs the jury to disregard everything after the "yes" or "no," the witness might well be worse off.

But after years of counseling clients not to volunteer information and to keep the answers as short as possible, lawyers are beginning to recognize that the downside risk in self-suppressing a helpful explanation is greater than the downside risk of giving one. First, for the explanation to be stricken, the interrogating lawyer must move to strike it. Many lawyers won't do that. While making that motion may need to be a split second decision, a lot happens in that split-second and every choice comes at a price. The lawyer must think: If I make the motion, will it look like the answer hurt me? Will the jurors think I'm trying to keep information from them? What's the chance that the judge will grant the motion? If the judge denies it, won't I be worse off for the effort, as the jury will then think not only that the answer hurt me but also that I was desperate to broom it away? Won't they think even more about the answer than if I simply let it slide by?

All that split-second analysis may well suppress the impulse to move to strike. And for every motion to strike that is not made, the explanation stands.

Second, when lawyers do take the chance and make the motion, you trial judges decide what to do. If you deny the motion, the explanation stands.

Third, if you grant the motion, the jurors have still heard the explanation. You might instruct them to disregard it, but if the explanation makes sense, there's a good chance its effect will remain.

Fourth, when you grant the motion, it puts a pin in the testimony. If the explanation was a good one, the witness's lawyer will know to come back to it on redirect, when the witness will give the explanation a second time and perhaps expand it or reinforce it.

The Odds Favor the Witness

All things considered, the odds favor the witness. The rational choice is to give the explanation, even if that risks drawing a motion to strike. The chances are that the witness will be better off—or at least no worse off—for having given it, even when you grant the motion.

So, if the odds favor the witness, if witnesses will be better off for giving the explanation even if you strike it, why does it make sense to ask that you as trial judges be more indulgent when witnesses explain their answers? It's because if you grant the motion, the witness will be better off only some of the time, not all the time. Sometimes, your ruling will damage the witness for no good reason and hurt the search for the truth. When that happens, the quality of justice degrades, sometimes seriously, and the chance of an unjust result rises.

Witnesses take an oath to tell the whole truth. When the whole truth requires an explanation, the truth would be better served by letting the witness give it. Divorcing the explanation from the answer and sending it to the end of the line, where maybe it will come out later or maybe not, hurts both the witness and the earnest juror who wants to get the full picture.

Yes, cross-examiners don't want to get hurt by the explanation. But they need to be prepared for the answers their questions produce. The better way for them to deal with an explanation that hurts their case is to follow up, test it with more questions, pick it apart with contrary evidence, or conduct their examinations in ways that corner the witness into logical inconsistencies. If the explanation still stands up after all that, then the explanation has proven its worth.

Cross-examiners who move to strike a reasonable and relevant explanation are essentially conceding that they have no way to deal with it. Instead, they turn to you for help, hoping that you'll give them a break that they really don't deserve.

This is not to suggest that you should always deny a motion to strike. Some explanations contribute nothing; others are inadmissible no matter when given. If the explanation does not provide a useful context for the answer, or prevent the formation of a misleading impression, or shed more light into an area that the question is probing, or make the jury or the appellate court understand the witness's answer better, or speak to an issue that will help the jury do its job, or make a better decision, or put forth relevant information, then by all means strike it.

But motions to strike should be disfavored, granted only when the interests of justice so require. If a witness is treating questions as an invitation to make self-serving speeches unrelated to the question or is using the speaking opportunity as a chance to be unreasonably repetitive, striking those speeches and admonishing the witness to address the question would be a good thing. If the witness is speculating or offering hearsay or foundationless facts, then granting the motion is legally necessary.

Still, an answer is not unresponsive and does not merit striking simply because it goes beyond a one-word answer. Witnesses have enough of a challenge dealing with skilled cross-examiners. It's not a fair fight. The cross-examiner is a professional questioner. Many will eagerly take a witness's words out of context and assign them unintended meanings.

Most witnesses are not professional answerers. They need and deserve the safeguard of an explanation to counter cross-examiners who will manipulate answers to their own advantage. Even expert witnesses are often skilled only in the craft that makes them an expert, not necessarily in that of testifying.

Witnesses want you and the jury to understand them. They should not have to accept the cross-examiner's words as their own, which is what happens when a witness is forced into a one-word answer taken from a two-word menu. If the question does not fairly or accurately present the truth as the witness understands it, then the witness wants you and the jury to know not only that it isn't accurate but also *why* it isn't accurate.

A witness's natural conversational defense mechanism is to explain. In most instances, that's all that separates witnesses from becoming unwitting contributors to someone else's story, a story that goes against their own truth. When you force the witness into a yes-or-no cubbyhole or strike the witness's explanation, you're not taking away the witness's sword; you're confiscating the witness's shield and handing a sword to the cross-examiner to chop off whatever he or she would prefer not be heard.

Justice is served when you give witnesses more room to make themselves clear. They can use it. And the truth will be the better for it. ■