

IRVING YOUNGER'S 10 COMMANDMENTS OF CROSS EXAMINATION

1. Be Brief

Be brief, short and succinct. Why? Reason 1: chances are you are screwing up. The shorter the time spent, the less you will screw up. Reason 2: A simple cross that restates the important part of the story in your terms is more easily absorbed and understood by the jury. You should never try to make more than 3 points on cross-examination. Two points are better than three and one point is better than two.

2. Use Plain Words

The jury can understand short questions and plain words. Drop the 50 dollar word in favor of the 2 dollar word. "Drive you car" instead of "operate your vehicle."

3. Use Only Leading Questions

The law forbids questions on direct examination that suggest the answer. The lawyer is not competent to testify. On cross-examination the law permits questions that suggest the answer and allows the attorney to put his words in the witnesses' mouth. Cross-examination, therefore, specifically permits you to take control of the witness, take him where you want to go, and tell your important point to the jury through the witness.

Not asking controlled leading questions leaves too much wiggle room. What happened next? I would like to clear up a couple of points you made on direct? These questions are the antithesis of an effective cross-examination. Any questions which permit the witness to restate, explain or clarify the direct examination is a mistake.

You should put the witness on autopilot so that all of the answers are series of yes, yes, yes!

4. Be Prepared

Never ask a question that you do not know the answer to. Cross is not a fishing expedition in which you uncover new facts or new surprises at the trial.

5. Listen

Listen to the answer. For some, cross-examination of an important witness causes stage fright; it confuses the mind and panic sets in. You have a hard time just getting the first question out, and you're generally thinking about the next question and not listening to the answer.

6. Do Not Quarrel

Do not quarrel with the witness on cross-examination. When the answer to your question is absurd, false, irrational contradictory or the like; Stop, sit down. Resist the temptation to respond with "how can you say that, or how dare you make such an outrageous claim?" The answer to the question often elicits a response, which explains away the absurdity and rehabilitates the witness.

7. Avoid Repetition

Never allow a witness to repeat on cross-examination what he said on direct examination. Why? The more times it is repeated, the more likely the jury is to believe it. Cross-examination should involve questions that have nothing to do with the direct examination. The examination should not follow the script of the direct examination.

8. Disallow Witness Explanation

Never permit the witness to explain anything on cross-examination. That is for your adversary to do.

9. Limit Questioning

Don't ask the one question too many. Stop when you have made your point. Leave the argument for the jury.

10. Save for Summation

Save the ultimate point for summation. A prepared, clear and simple leading cross-examination that does not argue the case can best be brought together in final summation.

Summarized from The Art of Cross-Examination by Irving Younger. The Section of Litigation Monograph Series, No. 1, published by the American Bar Association Section on Litigation, from a speech given by Irving Younger at the ABA Annual Meeting in Montreal Canada in August of 1975.

The Power of the Proper Mindset

During cross-examination,
the real witness is you

JAMES W. McELHANEY

MIKE RANDOLPH LOOKED TROUBLED when he caught up with Angus and me in Zapata's Chili House last Tuesday. "Angus," he said, "I need help." "Tell us about it over lunch," said Angus. "These blue corn-cheese enchiladas will improve your outlook on almost anything."

Mike managed a weak smile. "I've got the most important cross-examination of my life coming up," he said. "This is the toughest witness I've ever seen, and the truth is, I'm a lousy cross-examiner. I'm not sure how effective blue corn-cheese enchilada therapy is going to be."

Mike said his opponent's expert economist was injured in an auto accident and has been replaced by Dr. Patrick Halloran—known to the trial bar as "Horrible Halloran" for his ability to virtually take over a case. Regardless of what the question calls for, he talks about whatever he wants, no matter how hard the cross-examiner tries to control him.

"One time Halloran really humiliated me in federal court," said Mike. "He kept bringing up damaging information unrelated to my questions. But whenever I asked Judge Garcia to instruct him to just answer the question, she said, 'The witness may explain his answer.'"

"That's typical for a lot of judges," said Angus.

"I know," said Mike. "So the next time Halloran did it, I didn't ask for help. Instead, I said, 'Dr. Halloran, isn't it true you're a professional witness?' He didn't even look at me. He just turned to the jury, smiled and said in his Irish accent, 'This is no job for an amateur.' They roared in laughter."

"Finally Judge Garcia—who was laughing along with everyone else—rapped on the bench with her gavel and said, 'You may continue with your amateur hour, Mr. Randolph,' and they all laughed again."

ANGUS GETS TO THE POINT

AFTER COFFEE AND SOPAPILLAS, ANGUS SUGGESTED THAT Mike come to the office that evening so we could spend some time working on his cross-examination techniques.

Later on, Angus diagnosed the problem in about 15 minutes. "Mike," he said, "the point of cross-examina-

tion is not to try to win an argument with the witness."

"What do you mean?" said Mike. "That's what they do every week on *Chicago Law Dogs*."

Angus snorted. "That's as true-to-life as a survivor show," he said. "And besides, you don't want to do what other lawyers do with cross."

"The purpose of cross-examination is not to 'fix direct examination' or 'clear up' what the witness has said, which is what most lawyers imply when they start asking questions."

"And don't use cross to get information from the witness—that's what discovery is for."

"The purpose of cross is not even to attack the witness's credibility—unless it's a necessary part of your game plan," said Angus. "Jurors and judges don't like it when lawyers beat up witnesses. They don't identify with you; they identify with the witness."

"Instead, the most valuable purpose of cross-examination is to let you testify—to tell your side of the witness' story so the witness has to agree that what you say is true."

"Wow!" said Mike. "That's radical."

"No, it's not," said Angus. "It's the main reason for permitting leading questions on cross: not to argue with the witness, but to let you use him as a vehicle to tell the judge and jury your side of the story."

"In other words, you are the real witness on cross-examination. And to do that effectively, you need to develop some basic verbal habits that will let you stay in control."

"But I don't have time to learn new verbal habits," said Mike. "Trial is in six weeks, and I've got an immense amount of work to do. I can't even take an eight-hour crash course in cross-examination techniques and memorize a bunch of complex rules."

Angus smiled. "First, the 'crash course' is going to take less than the next half hour," he said. "Second, you don't need to memorize the rules; you just need to understand them. And third, the most difficult thing to do is acquire the proper mindset: That on cross-examination, you are the real witness."

Then Angus gave Mike this list:

Lead. Ask only leading questions. The point of cross-examination is not to get information, but to have the witness agree that what you say is true. When you ask anything other than a leading question on cross, you are surrendering control. And once lost, it's almost impossible to get it back.

Ask short questions. It's a basic pattern of conversational behavior: The longer the question, the longer the answer. So make your questions disarmingly short: "This is a letter to Mr. Jackson? On your stationery? Dated Aug. 5? Signed by you? Offering to sell him your interest in Fast 'n' Tite Adhesives? For \$16 million?"

Questions like that don't give the witness any wiggle room.

How do you learn to ask questions like that? It's easy.

You ask for one fact at a time.

Use simple words. Your job as a trial lawyer is to command instant understanding—not to sound like you’re drafting a complex commercial contract as you speak. Or even to sound like a lawyer.

So talk like a real person again, with words everyone understands, unencumbered by the convoluted sesquipedalian tergiversation that you acquired in law school.

Avoid introductions and tag endings. Listen to the way lawyers typically start cross-examination questions: “Let me ask you this question.” “It is true, is it not ...” “Isn’t it a fact that ...” “Would you indicate for the benefit of the ladies and gentlemen of the jury, please, what, if anything ...”

Then listen to the way we end our questions: “Isn’t that true?” “Isn’t that correct?” Or, “That’s what occurred on that occasion, is it not?”

These are just thick slices of verbal bread that hide what little content is inside your word sandwich.

Use headlines to change the topic. Like paragraphs and chapter headings in a book, announcing a new topic can rewind everyone’s attention span.

And it matters how you do it.

The worst way is to bury the new heading in the extended verbiage of a typical question: “Now then, Ms. Reynolds, directing your attention to the 17th of July 2006, at approximately 2:30 in the afternoon, let me ask what, if anything, were you doing on that occasion?”

Instead say, “New topic. A meeting on July 17, 2006. At City Hall. You met with Police Sergeant Dennis McGuire? About 2:30 in the afternoon?”

Ask for facts, not opinions. Unless the witness is locked in with a document or deposition testimony, you’re looking for trouble every time you ask for an opinion or evaluation. What you may not realize is that adjectives and adverbs are evaluative words, and putting them in your questions invites the witness to give his opinion—which you probably won’t enjoy.

Get one fact at a time. Think of cross-examination as a series of facts—dots that the judge and jurors will connect in their minds as the story unfolds. Which means the jurors participate in putting the picture together, making it their idea. And people like their own ideas—which is the secret behind the storyteller’s art of showing instead of telling.

Take the blame. No matter how well you ask them, there are times when the witness will dodge questions and start talking about something he hopes will hurt your case.

Whatever you do, don’t turn the cross-examination over to Mongo, your inner beast. Mongo is the one

who breaks your pencil or slams your book when the judge gives you a bad ruling. And when a witness gives you a hard time, your inner beast says, “Mongo kill witness now!”

How do you control Mongo? Most lawyers don’t. They get nasty, sarcastic, overbearing or rude, and they start arguing with the witness. And that inflicts serious damage on their case.

So what should you do? Tell Mongo to rejoice. The witness has just handed you a golden opportunity

to make everybody in the courtroom (except the witness and the other lawyer) take your side.

How do you seize that opportunity? Take the blame.

Say you ask the other side’s doctor whether he performed a spinal tap on the plaintiff, and instead of answering yes or no, he gives you an extended harangue about spinal taps.

Rather than letting Mongo rise to the challenge of a fight, take the blame. “I’m sorry, doctor, but the question I meant to ask you was whether you did one of those spinal taps on Mr. Baker. Could you answer that question?”

Then suppose the witness tries to keep up his tirade about spinal taps. Do you fight then? Why, when you can say, “Pardon me, doctor, but does that mean you didn’t do that test?”

“Wow!” said Mike. “I can’t wait to start practicing these ideas on my wife and kids.”

“Wrong,” said Angus. “Those techniques are too powerful to use on your family. Instead, practice on your dog, your car, your desk, a tree or that computer that keeps giving you trouble. But practice until these cross-examination habits become a comfortable way to tell a story.” ■

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