

EXPOSING THE MONSTER: EFFECTIVE CROSS-EXAMINATION

No one has instructed more articulately or entertainingly on the subject of cross examination than Irving Younger. No paper written on cross-examination can be published without paying homage to him. Hence, my introduction:

IRVING YOUNGER'S TEN COMMANDMENTS OF CROSS-EXAMINATION

1. Be brief.
2. Short questions, plain words.
3. Always ask leading questions.
4. Don't ask a question, the answer to which you do not know in advance.
5. Listen to the witness' answer.
6. Don't quarrel with the witness.
7. Don't allow the witness to repeat his/her 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.

If you have not had the pleasure of listening to an Irving Younger lecture on cross-examination, listen to it now. If you have not listened to it more than once, listen to it again. It is repetition and his wonderful stories demonstrating each point which will drill the Ten Commandments of Cross-Examination into your brain – so that they become learned behavior.

PREPARATION IS KEY

After you have mastered Irving Younger's Ten Commandments of Cross-Examination the next thing you must do is prepare. The most effective cross-examination is due to one thing and one thing only – preparation. If you do not know everything about your case, everything written or testified to by the witness who you are questioning and everything you can reasonably find out about the witness, you will likely not succeed in exposing the monster, a/k/a the truth.

a. Keeping the Juries' Interest

Juries expect drama in the courtroom. They have seen it every day of their lives on TV: Perry Mason, Matlock, LA Law, Law and Order. Cross-examination is the pinnacle of drama in the courtroom. Jurors expect it and you better deliver. If you do not, you will suffer the consequences.

b. Outline Your Examination

Preparation of cross-examination should take as long as preparation of direct-examination of your client. It need not be as long (and definitely should not be) but it needs to be logical, concise and flowing. Cross-examine in a logical progression to a specific goal.

The three best friends you have for preparing your cross-examination are: (1) deposition testimony; (2) documents written or received by the witness; and (3) demonstrative evidence. Always keep in mind that juries need to be entertained. They like “the show” and the flash. The only way you can deliver is by preparation.

I use a method of preparation of the outline that works effectively for me. I use large post-it notes and place them on the wall. Each sheet lists one area of potential cross-examination. I write on the sheet all admissions I expect to get from the witness during the questioning. I then write next to each (in a different colored marker) the deposition testimony, the documents, or the testimony of others that support the admission I expect to get from the witness. I then put it all in a logical sequence, opening with something strong and closing with something strong. I ask other people who know about the case, and some who do not, if a particular fact makes any difference to their opinion one way or the other (or you can test it at a mock jury trial) and if I receive a negative reply I strike it from the list of questions. However, I never substitute what my gut tells me is important with what others tell me because no one knows the case better than me.

c. What the Witness Expects

The witness you are about to cross-examine is either arrogant or scared to death. They have seen the same television shows that the juries have watched: Perry Mason getting someone to confess to murder on the stand; Jack McCoy getting someone so riled up that they say remarkable things. The scared one will be afraid that he/she will look like an idiot. The arrogant one will think he/she can do no wrong. Obviously, the arrogant ones are the most fun to cross-examine.

Understand that not all witnesses adequately review their deposition testimony. Some are too lazy; some are too busy; some are too arrogant; some just don't understand the importance. You, however, prepared as you are, are none of the above.

Some witnesses review their deposition testimony to the point where it is memorized and their answers in court to questions are spoken with the exact words as used at the deposition. This is helpful to suggest that the witness is not being truthful. Again, preparation is necessary so that you can immediately direct yourself to those questions and answers in the deposition.

d. Control the Witness

Be courteous to the witness. This puts the witness off his/her game immediately. Treat the witness with respect. Make the witness feel comfortable, as if you are having a conversation. You are then the one in control.

Do not let a witness control you. You have the reins and the floor and, except for the parameters established by the Judge, you can do whatever you want to do in whatever way you want to do it. If the witness is not being responsive to the questions, seek assistance from the Judge. Do not argue with the witness. Have the Judge instruct the witness that he/she needs to answer the question presented. This makes it appear to the jury that the Judge is on your side and that you know what you are doing. Do not “cop an attitude” with the witness. Someone on the jury may identify with the witness or may like them. You do not want to alienate a jury member.

Be firm but fair.

e. Using the Ammunition Effectively

Have the ammunition ready: deposition cites, documents, prior statements. Have them either enlarged, ready to be displayed on an Elmo, or at the ready in the computer. Ask the question; get another variation of what was said before; and WHAM! – hit them with a visual showing a variation:

Yes vs. no.

Maybe vs. definitely.

Answer to same question before vs. answer to same question in court.

However, do not use this technique with unimportant issues: birthdates, hire dates, supervisor’s names, etc. Only use it when it means something – and it will not be lost on the jury.

When you have all of your questions outlined go through them and cut out unnecessary ones with surgical precision. The jury’s attention span is only so long. You can make your points without overkill.

f. Demonstratives Are Helpful

Consider using a magnetized board, one you can revisit/reuse during other parts of the case, but most importantly in your closing argument. Pay attention to design and color usage on the board.

If you are comparing other employees you can have columns for each employee and, going through the qualifications of each, you can place a magnetized piece in the column with the correct information. College degree: yes or no. Managerial experience:

yes or no. Highest rating on performance appraisal: yes or no. You can craft the board to carry the message you want, already knowing the answers that will fill in each area of inquiry.

In a sex harassment case, if notice is an issue, you can create a board with a listing of all that the plaintiff did to report or what existed which would have provided notice to the employer. If an organizational chart would be helpful you can use that and place over the names of each who knew of the harassment a magnetized message, e.g., "knew".

If you are dealing with the sexual harassment policy of the employer and whether or not it was followed (or ever has been), you can list the steps required by the policy and go through each with the witness to show that the employer did not follow its own policy. Be creative and visual. It is fun.

g. No Need to Cross-Examine Every Witness

There are times when you do not have to cross-examine a witness. It is hard for an attorney not to ask questions. However, by not asking questions the jury may think nothing they said had any significance; or, you can ask a later witness if they are aware that the first witness testified contrary to their testimony.

At times one question can be as effective as many. After a witness has provided damaging testimony that is consistent with everything he/she has said or written in the past, consider the following question:

Q: Mr. Allen, I have just one question. Are you still employed by Defendant Company?

Do not ask the same cross-examination questions of each witness. Consider:

Q: (to first defense witness) Ms. Allen, are you still employed by Defendant Company?

A: Yes.

Q: Is this your only source of income?

A: Yes.

Q: Do you use the money you earn at Defendant Company to pay your bills, to live?

A: Yes.

Sit down.

The next witness:

Q: Mr. Smith, are you still employed at Defendant Company?

A: Yes.

Q: Do you have children.

A: Yes, I have two.

Q: Are you the sole breadwinner of the family?

A: Yes.

Sit down.

The next witness:

Q: Ms. Johnson, are you still employed at Defendant Company?

A: Yes.

Sit down. Message has been delivered.

Make sure you know the answer before the question is asked. Wonder what would happen if the witness is a trust fund recipient and only works for sport and only for ethical companies? Not good.

BREAKING A COMMANDMENT

When, if ever, is it acceptable to break an Irving Younger Commandment? I can only think of one Commandment which is breakable – “Do not ask a question you do not know the answer to.”

However, there are very limited circumstances in which it can be broken: when the answer is so painfully obvious that anyone who answers the question differently loses all credibility with the jury.

Consider:

Q: Mr. Owner, how long have you owned Defendant Company?

A: 25 years.

Q: You are very proud of the work you have done at Defendant Company?

A: Of course.

Q: When you meet people for the first time, would you agree generally within the first five minutes of the conversation there is discussion about what you do for a living?

A: Usually.

Q. And you proudly tell those people who you are meeting for the first time of your position at Defendant Company?

A. Yes.

Q. When you see acquaintances who maybe you don't see except every six months or so, you generally talk about work and what you are doing there, right?

A. Yes.

Q: And when you see your close friends the conversation always includes what is going on at work, right?

A. Yes.

Q. Does it surprise you to learn that when my client meets people for the first time, when he sees acquaintances and close friends that he now has to tell them that he has no job?

A. (who cares what it is).

In other words, crafting questions correctly to a person who has a job can aid in the presentation and understanding by the jury of your client's damages. This is worth breaking Commandment #4. But maybe it is not really broken because you do know what the answer is unless the witness is just unbelievable and that is a fine result.

ENJOY THE EXPERIENCE

Do not dread cross-examination. Do not be afraid of it because you think it is the unknown. It is not – provided that you follow Irving Younger's Ten Commandments of Cross-Examination and prepare. Enjoy! There is nothing like a successful cross-examination and the feeling you get when you sit down when it is completed.

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