

The Art of Cross-Examination

By Thomas W. Cranmer and David D. O'Brien

Few trial techniques are more difficult to perform or impossible to master than cross-examination. For that reason, perhaps more articles have been written about how to effectively cross-examine a witness than any other component of trial advocacy. Of all the scholarly work that has been devoted to the subject, however, it is remarkably easy to select the best. The gold standard on cross-examination was developed more than 30 years ago by Irving Younger, a prosecutor, judge, and professor born and raised in the Bronx who spent three decades in the practice of law. Younger was a dynamic and engaging trial attorney whose reputation in the courtroom preceded him everywhere he went. He handled many high-profile cases, including the defense of American folk singer Pete Seeger for contempt of Congress during the McCarthy Era for refusal to answer questions about alleged Communist Party ties. Younger was a formidable force in front of a jury, known for his sharp wit, propensity for theatrics, and ability to take apart a witness with just a handful of carefully planned questions.

But for all his skill as a lawyer, Younger's most enduring work was accomplished as a teacher. In the summer of 1975, he delivered an outdoor speech to 182 participants at the National Institute of Trial Advocacy's annual trial skills program on Flagstaff Mountain in Boulder, Colorado. The black-and-white video of Younger's presentation—titled “The Ten Commandments of Cross-Examination”—is undeniably dated. It is a period piece from the same time as the

Oscar-winning movie *All the President's Men* and features a healthy dose of sideburns, thick-rimmed glasses, and plaid pants. But the content of the speech Younger gave that particular day on a mountain top has endured through the decades. It still stands as the single best and most widely discussed lesson delivered on the subject of cross-examination. Tens of thousands of lawyers, judges, students, and lay people have packed into auditoriums to hear Younger deliver his 10 commandments in person since the time he first presented them. His rules of cross-examination, which we have attempted to summarize below, are worth committing to memory by anyone seeking to be an effective trial lawyer.

Younger's commandments are essentially premised on these core principles: maintaining control of the witness, having a workable theory of the case, and maintaining your own personal credibility. Before taking up Younger's commandments, the examiner must ask the following:

- Has the witness hurt my case?
- Is the witness important?
- Was the witness's testimony credible?
- Did the witness give less than expected?
- What are my realistic expectations on cross-examination?
- What risks do I need to take?

If the answer to these preliminary questions is that cross-examination is appropriate, here are the commandments:

1. Be Brief

Be as brief, short, and succinct as you can under the circumstances. For members of a jury, even the simplest of trials is incredibly complex. Jurors are hearing the facts of the case for the first time, and they only hear them once. To add to the difficulty, jurors for the most part receive information orally as opposed to visually, making it even more difficult to absorb. The best way to ensure that the jury will follow and remember the key points you want to convey is to be brief. This is antithetical to many lawyers, who are prone to lengthy speeches and often appear to be paid by the word. A trial is not a filibuster. In the context of cross-examination, less is most definitely more.

2. Use Plain Words

It is imperative to drop the legalese when cross-examining a witness. The jury will best understand short questions and plain and simple words. Younger said that in his five and a half years as a trial judge in New York City trying hundreds of auto accident cases, he heard dozens of lawyers ask some variation of the question, “What did you do

It is imperative to drop the legalese when cross-examining a witness. The jury will best understand short questions and plain and simple words.

“Trial Practice” is designed to provide advice and guidance on how to effectively prepare for and conduct trials.

then with respect to the operation of your motor vehicle?” Not once did he hear the simple question, “How did you drive your car?” That two-cent approach is worth more than an ounce of gold.

3. Use Only Leading Questions

A lawyer’s most powerful weapon on cross-examination is the ability to put words in the witness’s mouth. Take advantage of that power. Nothing is worse than allowing the witness to tell a story in his or her own words. To get the witness to say what you want to hear, ask leading questions. If you give a witness wiggle room through open-ended inquiry, the witness will likely take advantage of it by telling the story he or she wants to convey. Put the witness on autopilot so you are feeding, bit by bit, the pieces of information you want the witness to acknowledge and the witness is responding with, “yes, yes, yes,” as you stand there and allow the witness to make your case.

4. Be Prepared

Cross-examination is not the time for discovery. It is not a deposition. You should never ask a question to which you do not already know the answer; if you do, the witness will likely give an answer you weren’t expecting and won’t like. Complete your preparation before trial and only ask questions on which the witness can be impeached should the witness stray from the answer he or she has no choice but to give.

5. Listen

Witnesses often say extraordinary and unexpected things on the stand, and cross-examiners march right by without a pause. This is due in large part to the high level of preparation required for cross-examination and the lawyer’s commitment to get to the next question on his or her outline. It is also the result of stage fright. Going head to head with a witness is nerve wracking, particularly with all the eyes that are on you in the middle of a trial. Don’t let your nerves get the best of you. Don’t march blindly through your list of questions. Take time to stop and smell the flowers. If the witness says something remarkable, follow up on what you

If the witness has given testimony on direct examination that is helpful to your case, you should reintroduce those gems to the jury as many times as the judge will allow.

hear. If the witness does something remarkable, such as look at his or her lawyer for help with a tough question, follow up on that as well. Sometimes the best pieces of evidence come off script.

6. Do Not Quarrel

Do not argue with a witness. If the witness responds to a question with an answer that is patently ridiculous, leave it alone. The jury will recognize the absurdity, and you can remind them of it later during closing argument. Challenging the witness on an answer he or she gave only provides the opportunity to retreat from it, rationalize it, or explain it away. Keep in mind, however, that the rule against quarreling does not mean you must accept whatever answer a witness gives. If the witness gives a false answer, impeach him or her. If the witness gives a nonresponsive answer, it is perfectly appropriate to be firm and repeat the question. You are entitled to receive an answer to the question you asked. Repeated efforts by a witness to avoid your inquiries only benefits your position and signals to the jury that the witness has something to hide.

7. Avoid Repetition

Never allow the witness to repeat on cross-examination what he or she said on direct examination. The more times a piece of testimony is repeated, the more likely the jury is to remember and believe it. There is, however, an important exception to this rule. If the witness has given testimony on direct examination that is helpful to your case, you should reintroduce those gems to the jury as many times as the judge will allow.

8. Disallow Witness Explanation

Never permit the witness to explain anything on cross-examination. That is your adversary's role. The time afforded you on cross-examination is the opportunity to use the witness to make the points you want to make in support of your theory of the case. You are in control of the examination. Do not give up that authority by permitting the witness to tell the story he or she wants to sell. A simple "stop sign" hand gesture coupled with a, "Thank you, you've answered my question," will often suffice to cut off an explanation that is not responsive to anything you have asked.

9. Limit Questioning

To be an effective cross-examiner, you have to know how to stop and take your seat when you have made your point. It is tempting to ask follow-up questions to reinforce what you have already gotten the witness to say, but asking one question too many can often sink your entire case. Unfortunately, of all the rules developed by Younger, this is probably the most difficult one to follow because it requires instinct in reading witnesses and determining how far you can safely go. This instinct comes with experience and, typically, only after learning the hard way by asking the one additional question that should have been left unspoken.

10. Save for Summation

Cross-examination is not closing argument. You do not need to spell everything out for the jury in the course of your questioning or explain the significance of the testimony you have procured. If you try to

do so through continued questioning of the witness, you give a chance for explanation and risk losing the ground you have just gained. Exercise self-control and save your ultimate point for summation. There is nothing wrong with leaving the jury to wonder where you are going with a particular line of inquiry. This will only heighten their attention and make your ultimate point that much more powerful when you finally drive it home.

Although Younger's rules are relatively easy to articulate, they are not always easy to put into practice. Cross-examination is a highly personal skill. In addition, trials are fluid events in which the landscape is constantly changing and things almost never go as expected. No two cases are the same and no set of lists is absolute. There are always exceptions to the rules and circumstances in which they should not be followed.

All that being said, there is not a single trial lawyer practicing anywhere in the country who can go wrong using Younger's commandments as general guiding principles. They have more than withstood the test of time and will dramatically improve your odds of becoming an effective cross-examiner. ■



Thomas W. Cranmer is a trial lawyer handling both civil and criminal matters. He is a managing director at Miller Canfield and co-chair of the firm's Litigation Department. Tom is also a former president of the State Bar of Michigan.



David D. O'Brien graduated magna cum laude from the University of Michigan Law School where he served on the editorial board of the Michigan Law Review. He is a principal in the

Litigation Department at Miller Canfield. Dave practices primarily in the field of criminal defense and has been named as a Rising Star by Michigan Super Lawyers for the past three years.