**Winning Strategies for Persuading Judges and Juries in Entertainment Cases**

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This panel will explore techniques that lawyers use in the courtroom for persuading judges and juries. Panelists will share their views on the most persuasive way to approach the following topics:

 1. Judge or jury — do your methods of persuasion change depending upon the level of sophistication of your audience?

 2. Selecting themes and theories — do they matter, and how do you approach developing them?

 3. Jury selection — do you work with jury consultants, and how do you approach exercising peremptory strikes?

 4. Opening statements — what makes an opening effective?

5. Direct examination of fact witnesses — what is the most effective means of presenting your facts?

 6. Cross examination of fact witnesses — how do you really control a witness?

 7. Direct examination of expert witnesses — how do you make musicology and accounting interesting?

 8. Cross examination of expert witnesses — how is that different than examining fact witnesses?

 9. Jury instructions, verdict forms and charge conferences — can you influence the way that the jury considers the issues?

 10. Closing arguments — how do you wrap up your time before the jury?

 11. Post-trial practice — how do you argue error in the trial court?

 12. Appeal — should the trial lawyer handle the appeal?

**CROSS EXAMINATION COMMANDMENTS AND COROLLARIES**

By Tim Warnock

No study of cross examination would be complete without consideration of Irving Younger’s Ten Commandments of Cross Examination. According to Judge/ Professor Younger, the following Ten Commandments are not to be broken in cross examination:

1. Be brief;
2. Short questions, plain words;
3. Always ask leading questions;
4. Don’t ask a question to which you don’t know the answer;
5. Listen to the witness’s answers;
6. Don’t quarrel with the witness;
7. Don’t allow the witness to repeat his direct testimony;
8. Don’t permit the witness to explain his answers;
9. Don’t ask the one question too many, and
10. Save the ultimate point of your cross for summation.

Are any rules related to trial practice really so important that they rise to the level of a commandment? I suggest that each of these commandments has an important corollary that one should consider in crafting a cross examination. Perhaps, by focusing on the corollaries, we shall overcome the risk of being criticized for asking the open ended question or asking the witness a question without our already knowing the answer.

**BE BRIEF**

Not so fast.

Ideally, every witness examination would be brief, but brevity is not always possible. Younger certainly could not have been advocating omitting critical elements of one’s case. Stated differently, how does a lawyer decide what topics to omit?

Perhaps the point is not to feel compelled to cross examine a witness on every possible point but rather to limit the cross examination to those points that are truly important to understanding the witness’s credibility and knowledge of the relevant facts. The question then becomes how to retain the judge or jury’s attention when the cross examination is unavoidably lengthy.

Principles of primacy and recency — the idea that the audience focuses most attentively on the first and last points in the cross examination — are certainly important considerations on how one should arrange a cross examination in order to have the most impact on the jury or judge, but other points can be made effectively as well.

One technique is to assist the transition from one point to the next with a short pause and a verbal cue: I would like to shift your focus, Mr. Guthrie, away from the morning of the accident and to the efforts that you claim to have made to find work after you recovered from your injury.

**SHORT QUESTIONS, PLAIN WORDS**

Consider making statements rather than asking questions.

The jury is looking for leadership, and you can be that leader. As your credibility with twelve strangers grows, so does the likelihood that they will listen to your closing argument more attentively and resolve close questions in favor of your client.

How can your credibility grow? One way is to phrase your questions as statements with which the witness must agree.

You may be tempted to ask a witness “isn’t it true that Ms. Hawes did not try to interview for any of ten jobs that were listed in the newspaper after she recovered from her injuries?” Instead, consider making the following statements: the newspaper lists jobs; Ms. Hawes certainly had access to the newspaper; after she recovered, ten different jobs appeared in her chosen field; she did not try to interview for a single one of those jobs.

Assuming that those statements are factually accurate, your witness will have little choice but to say “yes” after each statement. Each time you make a statement and the witness says “yes” or agrees with you, you appear to be knowledgeable. If you appear to be knowledgeable with each witness that you cross examine, your credibility grows with each examination. By the end of the trial, when you stand and speak, the jurors will view you as a person who tells them things that are true. Leave the questions for the depositions.

As for plain words, you may not be able to simplify terms of art. A neurologist may have to discuss neurodegenerative disorders in order to make her point.

**ALWAYS ASK LEADING QUESTIONS**

Unless you know that the witness’s response to an open-ended question will be helpful.

If you are going to trial, you probably have taken the deposition of most of the people who your adversary will call as witnesses. For some points, you know that the witness’s testimony will be favorable without having to lead the witness.

For instance, you may know and need to prove that the witness resigned rather than was fired from a particular job. If you know that the witness will testify “I resigned from the band The Weavers because three of the band members performed on a commercial for cigarettes,” then you can ask the witness why he resigned rather than telling him why he resigned. You can then refer to the witness’s testimony in your closing argument. You may want that page of the transcript in order to read the quote.

**DON’T ASK A QUESTION TO WHICH YOU DO NOT KNOW THE ANSWER**

Unless the answer does not matter.

On occasion, a witness will dig herself into not just a hole but a pit. When that happens, an effective end to a line of questioning is to give the witness a question that makes your point regardless of the answer.

For example, assume that an expert witness has offered an opinion that proves to be indefensible. Perhaps the witness was not aware of all of the relevant facts and, as you offer each additional fact, the expert witness backs farther and farther away from the opinion offered during her direct examination. At the conclusion of the cross examination, you might ask “exactly what is it you did to earn the $5000 fee that you testified that you charged the plaintiff?”

Does the answer really matter? The question itself punctuates the uselessness of the opinion. If the answer is “I read the plaintiff’s deposition and reviewed the relevant medical records,” the jury still gets the point that the work was worthless absent consideration of the additional facts that you shared during cross examination.

**LISTEN TO THE WITNESS’S ANSWERS**

Unless you do not care what the answer is.

Of course, the occasions on which you do not care about the content of the answer will be rare, but they will exist. A slavish adherence to this commandment might deprive you of an opportunity for advocacy.

**DON’T QUARREL WITH THE WITNESS**

Unless quarreling helps you make your point.

As a general rule, a cross examination grounded in short plain statements of fact to which a witness has little choice but to agree or be impeached leaves little room for a quarrel. The point is not without exception, however.

 Assume that a witness has taken a position on direct that you know you can impeach. Assume further that the witness does not know that you can impeach him on that particular point.

You may want to marry the witness to the point to enhance the effect of the impeachment. You might remind the witness of her earlier testimony: “you testified during your direct examination that the insurance company did not know that Josh White and Sam Gary had moved out of the house on Eastland Avenue at the time the company sent notice to that address, correct?” When the witness answers “yes,” the follow-up question might be “that cannot possibly be true, can it, Ms. Lampell?” When he answers “yes” again, the next question might be, “do you expect the jury to believe your testimony that the company did not know that they had vacated the property?” Now, when the answer is “yes,” the quarrel stops and you calmly ask, “so, I assume you did not know that one of the company’s adjusters watched them move out?”

**DON’T ALLOW THE WITNESS TO REPEAT HIS DIRECT TESTIMONY**

More than once.

You cannot avoid having a witness who is inclined to use every question as an opportunity to tell his story again and again. An effective tool to curb that tendency is to calmly await the conclusion of his answer on the first occasion when he repeats his direct testimony on a point and then turn your attention to the members of the jury as you slowly and deliberately repeat the exact question that you asked. At that point, everyone in the courtroom knows that the witness failed to give you a direct answer to a precise question, and everyone wants to see whether he will do that again.

For instance, you ask “if you had a hammer, Mr. Seeger, you’d hammer in the morning?” The witness responds by saying “hammering is really a lost art. With the advent of the nail gun, very few people, even among those involved in home building, are skilled at swinging a hammer.” That is when you can turn to the jury, wait a moment, and then ask again, “if you had a hammer, Mr. Seeger, you’d hammer in the morning?” At that point, if he says anything other than “yes,” he looks ridiculous. He will not likely give a nonresponsive repeat of his direct testimony again unless he wants to continue to look ridiculous.

**DONT PERMIT THE WITNESS TO EXPLAIN HIS ANSWERS**

Unless you know the explanation is porous.

You listen politely during the witness’s direct examination to an answer that you know is unsupportable. When you rise to begin your cross examination, you may ask “you testified on direct, Mr. Hellerman, that the songs were substantially similar to one another. How exactly did you reach that conclusion?” While the witness repeats his explanation, you might list the points of the explanation on a chart if you then have the facts necessary to come back and refute each item on the list.

**DONT ASK THE WITNESS ONE QUESTION TOO MANY**

At trial.

The classic example of this commandment is an anecdote involving President Lincoln in his early days as a trial lawyer. Lincoln was allegedly cross examining a woman who testified that she saw the defendant bite off a man’s nose. Lincoln asked “you did not see the defendant bite the victim’s nose, did you mam?” The witness said that she did not. Lincoln the asked the famous “one question too many”: “then how do you know he did it?” The witness is reported to have said “because I saw him spit it out.”

Lincoln did not have the ability to take depositions or access to a document camera, a videographer or Trial Director software, but you do. When you are taking your depositions, you should definitely ask one question too many on each point. Unless you thoroughly follow to the end each topic that you elect to explore with a witness, you will not know at trial where to draw the one-question-too-many line. Your examination in the deposition is no less of a cross examination than your examination at trial.

**SAVE THE ULTIMATE POINT OF YOUR CROSS FOR SUMMATION**

Unless you intend to punctuate the admission itself during closing argument.

Conventional wisdom in trial-advocacy circles is that you can lead the jury to the conclusion, but allowing the jurors to draw the conclusion for themselves offers a greater likelihood that the juror will hold on to the point. If she drew the conclusion, she must be right. If you told her what to think by making the ultimate point, she may not hold on quite so tightly to your conclusion.

Sometimes, however, you may want to remind the jurors of the witness’s testimony rather than relying on the jurors to remember the conclusion themselves. For instance, if you know that a witness will make a crucial admission on your “ultimate point” for that particular witness, you might make a note of the time of the admission so that you can refer to the moment in your closing: “Where have all the flowers gone? Paul Stookey knows. He testified on Tuesday morning. Right before we took our morning break. I looked at the clock. It was a quarter to ten. I asked him that precise question, and he said ‘girls have picked them every one,’ don’t you remember that?”

**CONCLUSION**

There is a time for everything: a time to gain, a time to lose. Commandments, however, purport to remove one’s discretion to do other than as commanded. Why deprive yourself of the tools for advocacy that disobeying these commandments provide?

Every one of Irving Younger’s Ten Commandments is a sound principle of an effective cross examination. Adhering to them without an exception just might be a mistake.

Younger was good, but he was not perfect. After all, his conviction of Pete Seeger for refusing to answer questions about his Communist Party membership was overturned on appeal by the United States Court of Appeals for the Second Circuit.