

CROSS EXAMINATION: THE RULES OF THE GAME

Cross examination is the litigator's greatest weapon, but properly playing the game requires knowledge of the rules and maximum preparation. An ill-prepared cross-examination is risky. Effective cross examination is a learned skill, and as in any game, only practice makes perfect. The purpose of the game is to expose the truth of the case.¹ However, the problem facing the lawyer is that the opponent's witness does not want to cooperate.² Cross examination is the means by which the advocate exposes the exaggerations and falsity of the direct testimony, however since the witness is uncooperative, the game is never easy.

Irving Younger's Ten Commandments³ are the

¹ *Pozner, Larry S. & Roger J. Dodd, Cross-Examination: Science and Techniques* (1993), p 4.

² *Id.*

³ *Younger, Irving, The Art of Cross-Examination.*

most widely cited rules of the game.⁴ They are:

1. **BE BRIEF:** Limit your cross to only the most important most necessary points.
2. **BE SELECTIVE:** Do not cross examine a witness who did not hurt your case and/or who cannot testify to additional facts that would help your case. If the witness did not hurt or add to your case, and you give in to the temptation to cross, you may harm your case and lose valuable points. The late Irving Younger in the Art of Cross-Examination, said, “It seems to be part of the young lawyer’s personality that he is afraid to say, ‘No questions on cross-examination.’ He thinks that his client will feel that he is not earning his fee, or that the judge will look

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Pozner, Larry S. & Roger J. Dodd, in Cross Examination: Science and Techniques argue that there are only three rules: Leading Questions Only; One New Fact Per Question; and, Cross Examine in a Logical Progression to a Specific Goal. Even Younger recognized that there are really only six to seven rules, however, presenting them as the “Ten Commandments” is more effective. *Younger, Irving, The Art of Cross-Examination.*

down on him and say, 'You are afraid. You can't be a trial lawyer if you are afraid. You've got to do something.' Not at all. The mark of the master is to do as little as possible; the courage to stand up and say, 'No questions,' when there is nothing to be gained by cross examination, is the mark of supreme mastery."

3. **USE PLAIN WORDS:** Use short specific questions containing simple words. Include only one fact per question. Avoid questions where the "fact" being asked is subject to interpretation. For example in trying to establish the witnesses ability to work and earn a living, rather than asking, "You are able to work?", a question that may lead to the following answer: "Depends on what you mean by 'able' or 'work'". Instead, you may want to ask the following:

Q: You have a college degree?

A: Yes.

Q: You worked outside the home for wages during the marriage?

A: Yes.

Q: You worked outside the home for six years during the marriage?
A: Yes.
Q: Your last position was as a supervisor?
A: Yes.
Q: You supervised 5 employees?
A: Yes.
Q: You held the supervisor position for 2 years?
A: Yes.
Q: You worked as a supervisor in 1998 and 1999?
A: Yes.
Q: In 1998 you earned \$50,000.00?
A: Yes.
Q: In 1999 you earned \$60,000.00?
A: Yes.

By keeping your questions short you minimize the opportunity for opposing counsel to object and interfere with the pace of your game.

4. Use short **ASK ONLY LEADING QUESTIONS**: All answers in cross examination should be “Yes”, “No”, or “I do not know”. By asking leading questions the lawyer establishes control. You control the witness when your questions do not provide the witness an opportunity to provide harmful testimony. A true leading question not only suggests the answer, it declares it.⁵ It is the time to put words in the witnesses’ mouth; to make

⁵ *Pozner, Larry S. & Roger J. Dodd, Cross-Examination: Science and Techniques (1993), pp. at 298-299.*

him go where you want him to go.⁶ While on direct you tell a story, on cross you **never** start a questions with

Who

What

When

Where

How

Why

Questions that begin with any of the above are open ended and cause the loss of valuable points in the game

⁶ *Younger, Irving, The Art of Cross-Examination.*

5. **BE PREPARED--NEVER ASK A QUESTION TO WHICH YOU DO NOT ALREADY KNOW THE ANSWER:** “Cross examination is not the time to discover new facts. It is not the time to be curious.”⁷ In this jurisdiction, since we are allowed to take discovery in family cases, this rule takes on great importance. If you are handling a case, which economically does not support the taking of depositions, request admission, propound written depositions questions or serve interrogatories. “If you have not adequately conducted your investigation before trial, cross examination is not the time to do it.”⁸
6. **LISTEN TO THE ANSWER:** Since preparation is the first step in an effective cross examination, there is a temptation to stick to the script. However, if you do not listen to the answer, you may miss an opportunity to impeach the witness with a prior inconsistent testimony. Or, on the other hand, if you do not listen to the answers you may not hear the favorable testimony that you are seeking to obtain and you miss the opportunity to

⁷ *Burke, Peter M., & Gianfranco A. Pietrafesa, An Introduction to Cross-Examination, New Jersey Lawyer, the Magazine, December 1998.*

⁸ *Younger, Irving, The Art of Cross-Examination.*

end the examination on a strong point.⁹

7. DO NOT QUARREL WITH THE WITNESS: Regardless of what the witness testifies to, do not argue with the witness. When you ask a question, and “the answer is contradictory, absurd, patently false, irrational, crazy or lunatic...Stop. Sit down.” You have finished when you get that kind of answer.”¹⁰ Arguing is legally improper.¹¹ Do not argue with the witness because in doing so, you give the witness the ability to explain the inconsistency.¹² It is more effective to argue the point to the judge during closing argument.

8. DO NOT PERMIT THE WITNESS TO EXPLAIN: Most judges allow witnesses to explain the answer, at length if necessary. However, with the use of leading questions, timing, pace and intonation, the lawyer can control the witness and limit the explanations. If a witness explains an answer, follow with a question that needs no explanation. Get the witness out of the habit of explaining. In the alternative speed the pace of the

⁹ *Burke, Peter M., & Gianfranco A. Pietrafesa, An Introduction to Cross-Examination, New Jersey Lawyer, the Magazine, December 1998.*

¹⁰ *Younger, Irving, The Art of Cross-Examination.*

¹¹ *Mauet, Thomas A., Trial Techniques.*

¹² *Younger, Irving, The Art of Cross-Examination.*

questions. This is most effective when the questions are very short.

9. DO NOT ASK THE WITNESS TO REPEAT THE TESTIMONY GIVEN ON

DIRECT: Repetition leads to acceptance. If you allow the witness to repeat the direct testimony, the judge may believe it or accept it as fact. Repetition of direct testimony only serves to reinforce it in the mind of the judge. Rather, keep your goal in mind: to point out the exaggerations and/or falsities of the direct testimony.

10. LIMIT QUESTIONING: AVOID ONE QUESTION TOO MANY: At

the ABA's Family Law Trial Advocacy Institute, held yearly in Houston, Texas, this is referred to as going over the "so bridge". You want to avoid the "So Bridge". An example of one to many questions, is as follows:

Question: Your wife was a volunteer parent teacher?
Answer: Yes.
Q: Your wife was active in the PTA?
A: Yes.
Q: Your wife was a soccer mom?
A: Yes.
Q: Your wife takes the children to every practice?
A: Yes.
Q: Your wife took the children to every game?
A: Yes.
Q: Your wife gave up playing tennis when her matches conflicted the soccer games?
A: Yes.
Q: Explain to the Court why you never did these things for your children.

A: She would not return to work even after the children started school. I had to go to work and make a living so that she could do those things. I wanted to do them, but someone had to financially support the family.

Going over the “so bridge” in this example takes away from the conclusion that your client is a wonderful mother. “Your cross-examination should only suggest the point... Your closing argument will drive the point home.”¹³

¹³ *Burke, Peter M., & Gianfranco A. Pietrafesa, An Introduction to Cross-Examination, New Jersey Lawyer, the Magazine, December 1998.*

10. **SAVE THE EXPLANATION FOR SUMMATION:** The “Why” is answered during closing argument. “Resist the urge to draw out the cross-examination so the judge or jury comprehend at once the nature of our questioning, and the brilliance of the cross-examiner. Pull it together during summation.”¹⁴

In *Cross Examination: Science and Technique*, the authors point out that while Judge Younger’s Ten Commandments are a good beginning, they are also limiting. However, a word of caution: until you have perfected the basics, try and adhere to the rules of the game, no matter how limiting. While cross examination is a matter of style, you must first start with the basics. In every game there are drills that must be practiced before achieving mastery; these rules are the foundation upon which your skill grow. With time, and practice you will develop a style that works for you, and the limitations of the commandments can be lifted. Practice and you will win the game.

¹⁴ *McCurley, Mike & Kim W. Mercier, “Cross Examination”.*