MICHIGAN LAWYERS WEEKLY
www.milawyersweekly.com
Vol. 25, No. 18
March 14, 2011
THE DOLAN COMPANY

focus on Courtroom Techniques

'Ten Commandments of Cross-Examination' get a much-needed revision

By Richard H. Willis

In 1975, Irving Younger, then a professor at Cornell Law School after an illustrious career as a prosecutor and judge, handed down his now-famous "Ten Commandments of Cross-Examination."

This list became the core of Younger's tapes on cross-examination and required listening for every trial lawyer.

Now it's 2010. Younger died in 1988. It's time to take a critical look at his Ten Commandments, and like St. Ignatius did, tweak them a bit.

1. Be brief

Still good advice for the typical cross-examination, but what about the expert witness who has taken three hours to destroy your case? Making three points and sitting down is going to get you fired.

Sorry, Professor Younger, but let's couple "be brief" with "if possible," and add "be transparently organized." Let the jury know by your questions where you are going. Have themes for your cross-examinations and a destination in mind.

2. Use plain words

My kids used to tell me, "Dad, it's a car, not a vehicle." You don't have to dumb down your cross. But do omit the impressive words used only to show you know as much as the witness in favor of teaching a jury the vocabulary of your case. If appropriate, begin with a definition of terms both the witness and the examiner can agree upon.

3. Ask only leading questions

True, but after 20 consecutive questions beginning with the phrase, "Isn't it correct that …," you are going to sound like an overbearing FBI agent. Vary your (mostly) leading cross by non-leading questions that you know the answers to. If the witness waffles, you can impeach.

4. Be prepared

Know what the witness is going to say. How? You must develop the habit of taking "trial ready" depositions.

Don't go into a deposition assuming the case is going to settle. You won't ask the hard questions and you won't find out everything you need to know. You won't get a feeling for how this witness is going to do on cross-examination. Go to every deposition with the mindset that the case will go to trial.

5. Listen

For Younger, this commandment was about getting over stage fright. But how?

Don't write out your cross in a Q&A format. Instead, try bullet points or an outline. When you

are freed from your notes, you will pick your head up and start looking at the witness. Only then will you be able to pick up on the instinctive signals witnesses give when you are on to something.

6. Do not quarrel

Often you run into a witness who is so evasive or absurd in their efforts to obfuscate that they won't even agree that it is hot in South Carolina in the summertime. That's when the hair on the back of my neck starts to rise, and Dick the Lawyer takes a back seat to Conan the Destroyer.

Resist! When you get a patently ridiculous response, think "Thank you!" The jury isn't stupid, and neither are you. Don't jump and ask that one question too many "How can you possibly say that?" That gives the witness a chance to explain away a foolish answer.

7. Avoid repetition

Younger's point was not, "Do not repeat yourself," although that can be bad too but the point is not to let the witness repeat the story given on direct.

Is repetition ever a good thing? Yes, when you are repeating a question to get an answer the witness has dodged: "I'm sorry, but perhaps you didn't understand my question. Let me try again." Simply repeat the question, shortening it by a word or two each time, and hone in until the witness gives the inescapable response. It is an effective technique when used sparingly.

8. Disallow witness explanation

Great advice, but how? This is tough particularly after the court has instructed, "You must answer yes or no, and then you can explain."

If your question permits an explanation, it is probably too long a question. Don't give the witness anything to have to explain. Break it down into small bites — one fact, maybe even one word. If the witness then launches into an explanation, you can put a stop to it without looking like there is something you don't want the jury to hear.

9. Limit questioning

Younger wanted to avoid at all costs asking one question too many, usually a conclusion you want the witness to agree with. The question almost always follows a great line of baby steps, and begins with the word "So …"

I agree, but there is another school of thought that suggests that what a witness says on cross is often less memorable than the lawyer's questions. Cross-examination allows you to give your version of the case and present your themes by simply using the witness as a sounding board.

If they don't agree, so what? The jury expects conflict in a cross-examination — that's what makes it interesting. Sometimes asking one question too many can highlight the issue in dispute or set up a direct examination later, when you have more control. Under these circumstances, the one question too many that elicits a response you know you can knock down later is exactly what is called for.

10. Save it for summation

Younger urges you to save your conclusions for the closing. Often, it is in the "kitchen table conversation" of direct examination where a case is won, not on the high wire of cross-examination.

Your summation will not be drawn so much from your cross-examinations as your directs. Younger's point is that if you go for the conclusion you want on cross, you won't get it. Instead, elicit the facts you can get, and draw your conclusions later when a witness isn't there to argue.

I prefer a variant of this: know when to stop. Most of the time, you should stop your cross when you have discredited the witness or drawn out an important concession. Unfortunately, you are going to sometimes find yourself stopping after realizing that you are getting killed. If you must admit defeat at the hands of a witness, have the humility to do so gracefully.

This doesn't mean you have to slink back to your chair and pout. Even with the most unshakable witness, you can find a point of agreement so you can conclude the examination with at least the appearance of having had the last word on the matter. This "safety net" question should be planned in advance, in case all else fails.

Richard H. Willis is a partner at Bowman and Brooke LLP's Columbia, S.C., office. He also is an adjunct professor at the University of South Carolina, where he teaches trial advocacy. This story originally appeared in South Carolina Lawyers Weekly, which, like Michigan Lawyers Weekly, is a Dolan Company newspaper.