

Be careful not to ask one question too many

By: F. Dennis Saylor IV and Daniel I. Small ◉ December 28, 2017

The Ninth Commandment of cross-examination, according to the late Irving Younger, is “Don’t ask one question too many.”

That is a pretty common problem. A lawyer cross-examines for a while, establishing a series of facts that he believes is helpful. He then asks one last question, intended to be the triumphant capstone of his line of inquiry.

Typically, the question asks the witness to agree with some broad conclusory statement that makes the witness look like a liar or a fool. But the witness — surprise! — doesn’t agree. And the whole thing falls flat, or actually causes harm to the cross-examination.

This does work on TV, where lawyers routinely ask triumphant conclusory questions that cause witnesses to cave or collapse in tears. But in real life, questions like that just don’t work.

Let’s suppose a criminal case involves an attack at night, and the issue is whether the victim can identify the attacker. You’re the defense attorney, and you ask the following questions:

You were attacked on a country road?

Yes.

The attack occurred after midnight?

Yes.

There was no moon?

Correct.

The nearest light was a hundred yards away?

Correct.

There were no other lights in the area?

Correct.

The first thing that happened in the attack was that your glasses were knocked off?

Yes.

And the whole episode took maybe two or three seconds?

Yes.

A smart lawyer, obeying the Ninth Commandment, stops there. You have plenty to work with when the time comes to argue your case. And when you do argue, you won’t have a witness arguing back at you.

What happens if you don’t stop and don’t wait for closing argument? What happens if you go on to the “capstone” question?

So you couldn’t really see your attacker, could you?

What happens is you get this kind of answer:

Well, I could see him well enough to identify him. There's no doubt in my mind he's the right guy. I got a good look at him.

Not exactly the answer you want. Some lawyers will then proceed to make it even worse:

How can you say you got a good look at him when it was so dark and you weren't even wearing your glasses?

Because I saw him clearly. He's definitely the guy. I'll never forget him.

It doesn't work much better if you try to get the witness to agree to something less sweeping:

It was pretty dark out there, wasn't it?

Not so dark that I couldn't see his face.

Witnesses won't generally agree to broad conclusions that make them look foolish. So don't ask that last capstone question. It definitely won't work as a means of eliciting evidence, and it's not a good time or place to argue your case because the witness can talk back.

Worse, as a practical matter, it may wreck your entire cross-examination. So know when to stop and sit down. Save your arguments for the end of the trial.

Previous installments of Tried & True can be found [here](#). Judge F. Dennis Saylor IV sits on the U.S. District Court in Boston. Prior to his appointment to the bench, he was a federal prosecutor and an attorney in private practice. Daniel I. Small is a partner in the Boston and Miami offices of Holland & Knight. He is a former federal prosecutor and teaches CLE programs across the country.

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