

## Elicit facts, don't argue in cross-examination

By: F. Dennis Saylor IV and Daniel I. Small    September 21, 2017

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Effective cross-examination persuades by eliciting facts, not by bickering with the witness.

Our advice here is simple: Don't do it. Arguing with witnesses is rarely — make that *never* — productive. On the contrary, it can be annoying at best and excruciatingly painful at worst.

If a witness wants to argue with you, don't take the bait. Stay under control. Ask questions, and press your questions when necessary, but don't argue. Remember that the most effective approach is usually just to repeat your (short, simple) question until the witness answers it.

Certainly you should never go out of your way to provoke an argument. In particular, don't ask argumentative questions. An argumentative question is one that is not designed to elicit facts but to argue an issue to the jury.

The following questions elicit facts:

*How fast were you driving?*

*You were driving 50 in a 30-mile-per-hour zone, were you not?*

But the following questions are argumentative:

*You were driving recklessly, weren't you?*

*You didn't care about the danger you were creating, did you?*

If you ask an argumentative question, inevitably you're going to wind up in an argument. Don't do it.

When a witness says something argumentative anyway, don't get sucked in. And don't ask things like, "*How can you say that?*" Don't ask it no matter how ridiculous the testimony may be. The answer, whatever it is, will not help you.

Don't deliberately ask unfair questions. Just about every witness will try to push back if he thinks he's being treated unfairly. You can be tough, and you can be relentless; but if you are unfair, the witness will probably try to argue with you.

Again, the point of cross-examination is to elicit facts that are helpful to you, ideally in a way that is persuasive all by itself. At best, arguing with the witness obscures those persuasive facts; at worst, the jury tunes out completely.

Many years ago, when Judge Saylor was in private practice, he was in the federal courthouse in Boston, sitting outside the grand jury room waiting for his client to emerge. Around the corner, two court security officers were talking sports. Officer No. 1 said something like this:

*I'm from Pittsburgh. Pittsburgh is the best sports town in America. There's nothing like the fans in Pittsburgh.*

A typical response (outside of western Pennsylvania) would have gone like this:

*Pittsburgh? No way. The fans in [Boston, Chicago, Detroit, wherever] are way more intense. They're crazy about their teams.*

That's just an argument — a naked argument, unencumbered by any facts. It doesn't persuade anyone, and really isn't intended to. Officer No. 2 might have responded that way. But he didn't; instead, the conversation went like this:

*You say that Pittsburgh is the best sports town in the U.S.?*

Yes.

*[pause]*

*Pittsburgh doesn't have a pro basketball team, does it?*

*They had a team in the old ABA, but no. It's never been a big basketball town.*

At that point, Judge Saylor thought to himself: "That's a pretty good question. How can it be the best sports town in America if it won't even support a basketball team?"

The officer continued:

*The hockey team — the Penguins — they've struggled financially, haven't they?*

*Yeah. Although they've had some big stars, like Mario Lemieux. And won a few Stanley Cups.*

*But in fact, aren't they one of the only sports franchises that ever went bankrupt?*

*Yeah, that's true.*

*They went bankrupt twice, I think?*

*Yeah, twice.*

*And the baseball team — the Pirates — they've had some rough years, too, haven't they?*

*Yeah, they just haven't drawn the crowds. They were great in the old days, but they just can't fill the stadium.*

*The Pitt Panthers are the big college football team in town, right?*

*Yeah, Pitt and Penn State.*

*But Penn State isn't in Pittsburgh, is it?*

*No, it's up in State College.*

*How many people does Pitt draw for football?*

*Oh, maybe 45-50,000 people, depending on the opponent.*

*So, maybe half, two-thirds of a Big Ten or SEC crowd?*

*Yeah, I guess.*

*But they love the Steelers in Pittsburgh, don't they?*

*You bet. They're crazy about them. Crazy fans.*

*Kind of like the way they love the Cowboys in Dallas, or the Packers in Green Bay?*

*Same idea. More so, I guess. Very intense.*

Under the circumstances, a superb cross-examination. By eliciting a handful of facts, Officer No. 2 was able to reduce Officer No. 1's claim all the way down from "Pittsburgh is the best sports town in the U.S." to "Pittsburgh is one of the better pro football towns in the U.S." Not by arguing with him — that goes nowhere — but by eliciting facts.

Footnote: In 2009, the Sporting News named Pittsburgh "the best sports city" in the U.S. and Canada. Go figure.

*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.*