

Ten Commandments of cross-examination

By: F. Dennis Saylor IV and Daniel I. Small ◉ December 7, 2017

In 1975, Irving Younger, then a professor at Cornell Law School, gave a talk in which he set forth the “Ten Commandments of Cross-Examination.” It caught on almost immediately and is now widely considered the standard advice on the subject.

The “Ten Commandments” (which are sometimes given with slight variations) are as follows:

1. Be brief.
2. Ask short questions and use plain words.
3. Always ask leading questions.
4. Don't ask a question to which you do not 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.”
10. Save the ultimate point of your cross for summation.

This is excellent advice, and you could do worse than to follow it strictly. However, like the original 10, some of these commandments are more important than others, and some should be read with a bit of flexibility.

First Commandment: “Be brief.”

This is another way of saying (1) be economical, so people will listen and not grow impatient, and (2) remember that cross-examination is potentially dangerous, so don't spend any more time on it than necessary.

Even so, not every cross-examination will necessarily be brief. Perhaps this should be phrased: “Don't spend a moment longer than necessary.”

Second Commandment: “Ask short questions and use plain words.”

You're trying to communicate with, and persuade, the jury; you're not there to show off. Use plain, ordinary words, in short, simple questions. Anything else risks losing the jury, or worse — turning jurors against you.

Third Commandment: “Always ask leading questions.”

This should be obvious, at least as a general rule. Asking a hostile witness an open-ended question usually invites disaster. Still, a surprising number of lawyers do it. Sometimes, they're so unhappy afterward that they turn around and ask that the answer be struck, even when it's directly responsive to their own open-ended question.

Leading questions are pretty much the only means you have to control the witness and take him or her where you want to go.

Having said that, in rare circumstances, a non-leading question can be quite powerful. To give a famous example, in the courtroom scene in “To Kill a Mockingbird,” Atticus Finch asks the accuser (the purported rape victim): “Why don't you tell us what really happened?”

But don't try it unless you are 100 percent sure that it's going to work and not going to hurt you no matter what the answer is.

Fourth Commandment: "Don't ask a question to which you do not know the answer."

This is almost always true. Cross-examination is not a fishing expedition. Normally, it is extremely dangerous to toss out a question without having any idea what the witness might say. But sometimes you have no choice, and sometimes (if you pick your spots very carefully) the answer can't hurt you.

Fifth Commandment: "Listen to the witness's answers."

Despite the fact that you think you know what the witness is going to say, it doesn't always go the way you planned. You'd be surprised how often lawyers seem to ignore helpful testimony because they're so caught up in what they're doing. Don't just talk; listen.

Sixth Commandment: "Don't quarrel with the witness."

This is not a debate, and if it becomes one, you will likely lose. Don't start down that path. If your questions are truly short, simple and clear, they should leave no room for debate. If the witness tries to quarrel with you anyway, don't engage; just press your question.

Seventh Commandment: "Don't allow the witness to repeat his direct testimony."

This is good advice, but if you follow it too rigorously, you may soon be violating the Sixth Commandment. This might be rephrased: "Don't ask questions that permit the witness simply to repeat his direct testimony."

Some lawyers seem to think that repeating what the witness said, in a sarcastic and incredulous tone of voice (accompanied by eye-rolling and head-shaking), is an effective method of persuasion. It isn't, and may well make matters worse. Don't do it.

Eighth Commandment: "Don't permit the witness to explain his answers."

This is a tricky issue. As we said in an earlier column, you don't want to interrupt the witness and risk looking like a bully, if you can avoid it. At a minimum, though, you shouldn't invite the witness to provide an unhelpful explanation. But lawyers do it all the time. Keep your questions short, and keep the focus on your questions.

Ninth Commandment: "Don't ask the 'one question too many.'"

Don't get greedy. Ask the factual questions that you know you can get the right answers to, that lead to the conclusion you want, but then stop. We'll address this further in a future column.

Tenth Commandment: "Save the ultimate point of your cross for summation."

This does not mean that the point of your cross should be obscure or unclear. Ideally, the jury should be able to grasp the point without further explanation. But don't try to underscore the point of your cross in a single triumphant question. It's one more thing that just won't work.

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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