The fundamental principles of cross-examination in American trial practice: Part II

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For the most part, Irving Younger’s Ten Commandments taught American trial lawyers how not to cross-examine. However, the ultimate question still loomed: How then do you cross-examine?

Beyond the Ten Commandments: The Three Rules

The Ten Commandments focused on cross-examination as a largely defensive manoeuvre. Younger’s message to the prospective cross-examiner was clear: Try not to get hurt too badly.

Modern American trial advocacy has resoundingly rejected this mindset. Cross-examination is no longer viewed as a defensive manoeuvre in the courtroom. Rather, it is an offensive series of tactics designed to advance the cross-examiner’s theory of the case.

The cross-examiner can best advance her theory of the case if she keeps in mind the dual purpose of cross-examination:

1. Eliciting favourable testimony (so-called constructive cross-examination).
2. Destructive cross-examination.

This involves asking those questions that will discredit the witness and/or her testimony so that the factfinder will minimize or even disregard them altogether.

Of course, the cross-examiner may utilise only one of these approaches with particular witnesses. Conducting a destructive cross-examination of a jailhouse snitch is particularly effective, for example, while a constructive cross-examination would be of little, if any, value. In my experience, however, most adverse witnesses have at least one or two helpful nuggets to offer on cross-examination. Therefore, the cross-examiner should always consider eliciting favourable testimony from the witness before attempting a destructive cross-examination.

Whether you conduct a constructive or destructive cross-examination, the need to control the witness is of paramount importance. In The Art of Cross-Examination, Francis Wellman cautions: ‘In all of your cross-examinations, never lose control of the witness; confine his answers to the exact questions you ask. He will try to dodge direct answers or if forced to answer directly, will attempt … an explanation that will rob his answer of the benefit it might otherwise be to you.’

While, historically, authors on trial advocacy have unanimously agreed that control of the witness is absolutely critical, precious little has been written about how to practically establish that control in a courtroom. Younger’s Ten Commandments were a valiant first effort, but even these are viewed today as too prescriptive, and focused too closely on cross-examination as a defensive manoeuvre.

Cross-examination experts Roger Dodd and Larry Possner, have suggested that there are three – and only three – rules for effective witness control, and, hence, successful cross-examination. The three rules are:

1. Ask leading questions only.
2. Establish one new fact per question.
3. Cross-examine in a logical progression to a specific goal.

The first two rules deal with the language of cross-examination, and the third with the structure of cross-examination. These rules represent the most progressive thinking on cross-examination in modern American trial advocacy, and, hence, they deserve closer scrutiny.

Rule Number 1: Ask leading questions only

The Federal Rules of Evidence and the rules of evidence of all the States, permit leading questions on cross-examination. This right is almost wholly denied the direct examiner. The leading question is the fundamental distinguishing factor of cross-examination. It is the critical advantage afforded the cross-examiner that should always be pressed.

Yet, in American trial practice, this is an oft-violated rule. Inexperienced trial lawyers usually make two interrelated mistakes: they lead too much on direct examination and too little on cross-examination.

For generations past, when asked what a leading question is, trial lawyers have given the standard definition of Bergan and Cornelia Evans’s Dictionary of Contemporary American Usage, that is, ‘a question so worded as to suggest the proper or desired answer.’ Nowadays, however, trial advocacy teachers view this definition of a leading question as far too lax.

A proper leading question on cross-examination should not merely suggest the answer, it should declare it. Actually, the term ‘leading question’ is a misnomer, since a leading question is not a ‘question’ at all. Rather, it is a short, declarative statement, followed by affirmation from the witness. In short, when asking proper leading questions on cross-examination, the cross-examiner testifies and the witness simply ratifies.

Note the progression in the following examples from an open-ended question that has little place in cross-examination to a ‘proper’ leading question of the kind advocated by cross-examination experts today:

Q: How do you feel about drinking?
Most trial lawyers will identify this question as open-ended, because it leaves the witness free to respond in any way that she may choose.

Q: Do you like to drink?
Many trial lawyers of the old school would argue that this question is leading, since it suggests a monosyllabic (‘yes’ or ‘no’) answer. However, it is not. It still falls far short of the desired goal of declaring the answer.

Q: You like to drink, don’t you?
Irvind Younger would have applauded this question as a proper leading question in accordance with The Ten Commandments. It is unquestionably more closed ended, and more conducive to a restrictive monosyllabic answer. However, modern American trial advocates would take it even further.

Q: You drink?
Q: You like it?
Making the question even shorter by asking two questions, each limited to a single fact, further limits the witness’s room to manoeuvre. After the witness answered ‘yes’ to the first question, she can hardly answer ‘no’ to...
the second without looking utterly foolish and incredible.

The more important lesson from the last example, however, is that asking questions in leading form is not enough. Leading questions should also be short and simple. Short questions hold several advantages for the cross-examiner. First, short questions are easier to understand and therefore less likely to lead to confused stares or incomprehensible answers from the witness. Secondly, long questions invite long answers. There is a rhythm to any cross-examination and the cross-examiner is the chief force in setting that rhythm. Thirdly, logic seems to dictate that the more qualifiers the cross-examiner utilizes in a question, the better the question controls the witness. Actually, the converse is true. Each additional term is an additional invitation to argue or give a non-responsive reply.

To further advance the goals of brevity and simplicity, it has been suggested that cross-examiners should eliminate introductions (e.g., ‘Isn’t it a fact that . . .’/’Would you tell the court . . .’) and tag endings (e.g., ’. . . correct? ’ . . . isn’t that right?’) from most cross-examination questions. Introductions and tag endings should be used sparingly and be reserved for oratorical emphasis (the occasional ‘The fact is, Mr. Smith, that . . .’) or to prod the witness to answer when a prompt answer is not forthcoming.

The virtue of shorter, simpler questions becomes at once apparent when, for example, the cross-examiner attempts to establish a series of related facts:

Q: You were in the bar?
A: Yes.
Q: With John?
A: Yes.
Q: A man walked in?
A: Yes.
Q: The man had a gun?
A: Yes.
Q: The man was wearing a jacket?
A: Yes.
Q: Red?
A: Yes.

This method of questioning renders most of The Ten Commandments superfluous. The cross-examiner is automatically brief, short, plain and nonrepetitive. Since the statements are questions only because the cross-examiner verbally punctuates them as such, she is not likely to ask ‘one question too many,’ ‘permit the witness to explain,’ or to ‘ask the witness to repeat’ the direct examination.

Another tremendous advantage of the leading question is that it permits the cross-examiner to choose the emotion of the answer and the facts to be stressed. The open-ended question results in the following:

Q: Did you note that in your report?
A: No, I did not.

The leading question, on the other hand, results in the same answer, but the cross-examiner utilizes the added benefit of the persuasive devices of word choice, tone of voice and word emphasis:

Q: Nowhere in your report did you ever note that?
A: No, I did not.

Authors Larry Possner and Roger Dodd sternly warn the cross-examiner to avoid, under all circumstances, the so-called ‘seven enemy words’ that invite uncontrolled, unpredictable and narrative answers. They are:

1 Who . . . ?
2 What . . . ?
3 When . . . ?
4 Where . . . ?
5 How . . . ?
6 Why . . . ?
7 Explain . . .

Questions that start with any of the seven enemy words have no place in cross-examination. They are by definition open-ended, and they are the stuff of direct examination. When the cross-examiner breaks this rule and asks open-ended questions that invite narrative answers from the witness, two adverse consequences follow. Firstly, the cross-examiner loses all control over the witness. Secondly, the cross-examiner sends a message to the factfinder that the witness is reliable.

The truly catastrophic consequences that can follow from the use of an ‘enemy word’ in cross-examination were exemplified recently during the defense lawyer’s cross-examination of one of the government’s star witnesses in a major, well-publicised drug and money-laundering case. The cross-examination lasted for more than ninety minutes and focused solely on prior inconsistent statements made by the witness under oath.

Throughout, the cross-examiner kept the witness under tight control with short, leading questions about each instance in which the witness had previously lied under oath. The witness had no choice but to answer ‘yes’ to every question. After ninety minutes of grueling cross-examination, the witness’s credibility was in tatters. But then disaster struck. Brimming with self-confidence following his earlier success, the cross-examiner abandoned the ‘leading question only’ rule and asked:

Q: Can you explain to this court why, after taking an oath, after swearing to God to tell the truth, you lied repeatedly?

Having been given this opening, the witness took full advantage of it and sank the cross-examiner’s case with the following answer:

A: In the beginning, I lied to keep my money. But as I came to know your client better, I began to lie to keep my life. I lied then, because I realised your client would kill me and he would kill my family. He would do anything to anybody if it helped him."

Rule Number 2: Establish one new fact per question

The initial question discusses one fact. Each succeeding question contains one additional or new fact to be added to the body of facts established by previous questions. Through this method, the scope of the fact at issue is sharply controlled, and with it the permissible scope of the witness’s answer. The essence of this method can best be illustrated by an example from a first grade reading text:

John threw the ball.
John threw the red ball.
John threw the red ball at Sue.

Apart from supreme witness control, the ‘one fact per question’ rule offers the cross-examiner several advantages. It is not as, so often believed, ‘glitz and glamour,’ drama, big gestures, or flashes of oratorical brilliance that win lawsuits. Lawsuits are dominated by the facts. The person that controls the facts controls the courtroom. It is the trial lawyer, not the factfinder, who is intimately familiar with the facts of the case. The factfinder must therefore be logically brought to the conclusion sought by the cross-examiner. The structure of ‘one fact per question’ achieves this objective by meticulously building a picture so that the factfinder reaches the desired conclusion, even though the conclusion itself may never be put to the witness.

By establishing one fact at a time, the cross-examiner can add a powerful impact to answers. It allows the cross-examiner more opportunity to use voice and emphasis. The cross-examiner chooses the pace of each individual question, and allows the factfinder to concentrate on the development of the picture long before the entire picture is revealed. Consider the following example:

Q: On the 22nd of February, you saw the police hold William Johnson at gunpoint right outside his house?

Not only is this a compound question that will likely draw an objection from the opposing trial lawyer under the rules of evidence, but this question can also be made much simpler and more powerful by following the ‘one fact per question’ rule:

Q: I am going to ask you about the 22nd of February. You were there when William Johnson was arrested?
A: Yes.
especially when those specific facts are
developed from general propositions to spe­

Thilt 's right.
A: Suppose, for example, the first question of a
A: Yes.
A: No.
A: Yes.
A: Yes.
A: Yes.
A: Yes.
A: Yes.
A: Yes.
A: Pointed at William Johnson?
A: Yes.

Rule Number 3: Cross-
make a logical progression to a specific goal
In contemporary American trial practice,
each area or topic to be covered in cross-
examination is commonly referred to as a
'chapter.' The choice of the word 'chapter' is
deliberate, and is meant to signify that there
should be a structure to the cross-
examination on each topic. Just as in a book,
there must be a purpose to each 'chapter' in
cross-examination, and each chapter should
interlock with the others. Cross-examina-
tion should never be a sputtering jumble of
thoughts. It should always be a surgically
precise series of inquiries into specific topics
selected by the cross-examiner.

Logic dictates that each chapter should be
developed from general propositions to spe-
cific goals. Witnesses will more readily
agree to questions framed generally, before
they will agree to questions on specific facts,
especially when those specific facts are
harmful to the witness. The witness will not
likely respond with a monosyllabic 'yes' or
'no' to harmful specific facts, unless she first
has been brought to that point in a chapter
leading from the general to the specific.

Suppose, for example, the first question of a
chapter is 'You are a liar, aren't you?' Both
trial experience and common sense tell us
that there will be great reluctance on the part
of the witness to agree to this statement,
even if she knew it to be true. However, if the
cross-examiner starts generally and proceeds
methodically and logically, one fact at a
time, to the specific goal of 'liar,' the witness
can be forced to give the desired answer:
Q: You will agree that people sometimes lie?
A: Yes.
Q: You told Detective Wylie you knew noth-
ing about the case?
A: Yes.
Q: That was not the truth, was it?
A: No.
Q: Instead of telling the police the truth,
you chose to lie?
A: Yes.
Q: You did not want to tell Detective Wylie
the truth?
A: That's right.
Q: The truth was likely to get you in trouble?
A: Yes.
Q: So you lied
A: Yes.
Q: You lied because you believed a lie
would help you?
A: Yes.
Q: You are willing to lie if it would help you?
A: Yes.
Q: You are a liar?
A: On occasion.
Q: On occasions when you think it will help
you?
A: Yes.

In addition to the structure of the specific
chapters within a cross-examination, there
are a few principles on the overall structure of
cross-examination that should be mentioned.

Be brief
This principle is important, both with respect
to its psychological impact on the witness
and the organisational structure of the cross-
examination.

When the trial lawyer stands to cross-exam-
ine, the witness is bound to be wary of her.
At this point, the cross-examiner has a crucial
advantage. The witness does not know how
much the cross-examiner knows. During the
first few minutes of cross-examination, the
witness will assess the cross-examiner. It is
rare indeed for a witness to start taking liber-
ties at the outset of cross-examination. But,
the longer the trial lawyer cross-examines
without landing a punch, the more confident
the witness will become; and the more confi-
dent the witness becomes, the more difficult
the witness becomes to control.

From an organisational perspective, I prefer
to rephrase this principle to state: Have the
cross-examination establish as few basic
points as possible. A cross-examination
should preferably have no more that three or
four points that support the cross-examiner's
theory of the case. Why not more? Because
the factfinder has a finite capacity to retain
information. The factfinder receives facts
aurally and often only once. Attempting
too much on cross-examination creates two
problems, namely (i) the impact of your
strongest points will be diluted, and (ii) the
less significant points will likely be forgotten
altogether. Therefore, the cross-examiner
should stick with her strongest ammunition
and avoid the peripheral material.

Primacy and recency
Open with a flourish and end with a bang!
These are the principles of 'primacy' and
'recency.' They are not so much principles
of trial advocacy as they are principles of
human nature. Start strong, because people
remember beginnings. End strong, because
people remember things that happened more
recently.

Arguably the best American trial lawyer
of the twentieth century, Edward Bennett
Williams, was fond of bellowing at his
young associates as they left his office for
Court: 'Get up and draw blood with your
first question! Show everyone who's in
charge!'

Conclusion
In the last century, cross-examination in
American trial practice has slowly but surely
shifted from the realm of 'art' to that of 'sci-
ence.' There undoubtedly are basic princi-
pies and identifiable techniques and methods
that every trial lawyer can and should learn.
These principles and techniques distill expe-
rience, and they honour the essential charac-
teristics of an adversarial process. Following
these rules can make any trial lawyer a good
cross-examiner.

Endnotes
1 In American trial advocacy, we use the term
'factfinder' for ease of reference to indicate
the judge, in case of a Bench trial, or the
jury, in case of a jury trial.
2 F Wellman The Art of Cross-examination at
32 (Touchstone, 1997).
3 LS Possner & RJ Dodd Cross-examina-
tion: Science and Techniques at 297 et seq
(Michie, 1993).
4 Fed. Rules Evid, Rule 611(c); 28 USCA.
5 Possner & Dodd, supra, at 298.
6 Portions of the transcript quoted in Possner
& Dodd, supra, at 303.