

CROSS EXAMINE BY BEING NICE: SUGAR IS BETTER THAN SALT

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When I began law practice, it was a time of immense popularity of Irvin Younger tapes. Lawyer, professor and judge, Irvin Younger, was, at that time, perhaps the most sought after speaker for major legal seminars dealing with trial skills. He was a leader in the formation of the National Institute of Trial Advocacy.

We ambitious young lawyers treasured our Irvin Younger cassette tapes on various trial-related subjects. Professor Younger was known for his rules for various areas, including his rules for cross examination. We were taught to violate those rules at our peril. These rules continue to be readily available on the web. They include such things as: always ask leading questions; never ask a question unless you either know the answer or can handle whatever answer is given; never ask why; never try to make more than three points on cross examination.

The rules are very helpful, but, like most rules, the exceptions can often overtake the rule. Today's witnesses, particularly experts, corporate representatives and other perhaps sophisticated witnesses, have been very thoroughly prepared, but often in a rather standard fashion. Like politicians at a news conference, they have been provided with canned answers to be given almost as mini speeches that frequently have little to do with the question that was asked, as well as tricks to avoid answering uncomfortable questions, such

as a failure to understand a question or a professed bad memory. These witnesses are trained adversaries. The style of the lawyer who cross examines them may be as important as the content of the questions on cross. These witnesses are prepared to have a very adversarial exchange. How should we approach them?

Try to be nice.

Being nice can be confusing to the witness, and it can be disarming. Mutt & Jeff police questioning has been with us for a long, long time, and it is the good cop who usually extracts the most valuable information.

Body language and facial demeanor, particularly at the start of the examination is important. A respectful smile, open palms and a non-adversarial voice tone help to open up any witness. Don't try to get too close to the witness. Give the witness plenty of time to answer. Begin the examination with a series of questions calculated to draw answers in areas of expected agreement. Many of these questions can be asked without leading the witness. Give the witness a chance to brag. This can be about his expertise, his profession, the importance of his opinions and the thoroughness of his work. Let the witness set a high standard. When the witness gives an unresponsive answer, try to bring the witness back to the question in a respectful way, perhaps by saying in a non-sarcastic tone, "That's very interesting, but can you help me with . . ." and then repeat your question, again without sarcasm. Use a voice tone calculated to communicate the importance of the witness's answer to your question. Try at all costs to avoid putting the witness on the defensive in a pointed and perhaps sarcastic adversarial exchange.

The old saying that you catch more flies with honey is true. Be the good cop.

With that in mind, I present the following ten thoughts for cross examination of

today's well prepared witnesses.

I.

INTRODUCTION

Our term *well educated, well prepared witnesses* includes experts hired for use at trial, corporate executives and professionals. Many have extensive experience as witnesses in depositions and in trials. Many have been in court far more times than the attorneys for either party. Large companies, such as automobile manufacturers, have a stable of engineers who do nothing but assist in defense of cases, with each engineer specializing in a particular area, such as seat belt systems, air bags or roof crush. They are the witnesses produced for 30(b)(6) depositions and are often the witnesses called at trial by their company. They are well trained in the art of testimony, and their skills have been honed by experience. Many are physically attractive. They come to court well dressed, but without inappropriate flair. Their companies use them repeatedly because they are effective spokespersons for the company's positions. These witnesses will not deviate at trial from the company line.

The training of sophisticated witnesses by their counsel seems more and more to produce certain forms of testimony.

Witnesses are taught to declare an inability to understand questions that they do not wish to answer, even simple questions phrased with common, everyday words. Certain responses of President Clinton at his deposition, an inability to define "is" or "sexual relations," quickly became national humor and almost cost him his presidency. Sadly, this feigned inability to understand the meaning of unambiguous words is commonly encountered in examination of adverse sophisticated witnesses. They testify this way

because their lawyers tell them to testify this way.

A second common response of sophisticated, trained witnesses to questions that they do not wish to answer is an inability to recall. These memory lapses are sometimes so flagrant that one wonders if these bright, educated souls have developed some strange form of selective dementia. Or perhaps, counsel has coached them to believe that less than the whole truth is somehow not perjury.

The third common form of answer is the set speech. It was said that President Reagan would hold a press conference with fifteen well-rehearsed answers written on fifteen 3 x 5 cards. He would respond to questions by skillfully providing one of the fifteen “answers,” usually with a smile, and he would then quickly recognize a different reporter for the next question. Many of the “answers” of well-prepared sophisticated witnesses are but set speeches, often unresponsive to the questions. The more questions that are asked, the more the rehearsed “answers” will be repeated.

A form of testimony similar to the *set speech* is *undaunting advocacy*, with each answer expanded to make a point critical of some aspect of your client’s assertions.

II

TRUTH TELLING

It is said most seriously that the object of all legal proceedings is the search for truth.

We should all, at all times, be engaged in a search for truth.

Effective advocacy should not pass over into calculated deception, but it does. Such is a an ugly blight upon our profession. Unfortunately, a lawyer’s desire to win at all costs often spills over to his witness preparation. Too many sophisticated witnesses today believe simply, “I understand how the game is played.”

It is easy to get by with complex, technical deception set forth in an affidavit or a voluminous, multi-colored, attractively bound report. The sophisticated witness's deception is rarely apparent on direct. It is only by effective cross examination that false and deceptive premises are exposed.

Indeed, the best advice to any witness who wishes to do well on cross is to convince the witness to tell the truth, even when it hurts.

III

EXPERTISE

It is not reasonable to expect their witness to do your preparation. A lengthy deposition is not *lawyer preparation*. A lawyer who would effectively question an expert or other sophisticated witness must first understand what the witness is talking about. We've all been to school, in fact, lots of school. Most of us at least gave some thought to other fields of study, such as medicine or engineering, before pursuing law. It's only too late to learn after the examination is over.

IV

LANGUAGE

Tax lawyers, physicians, expert witnesses and specialists in any field share a common trait. They use words, indeed their own languages, in such a way as to make the ordinary incomprehensible to the uninitiated. Tax lawyers use numbers. "Why we've got a section 436 issue to deal with." Physicians use Latin. Experts take ordinary words that all understand and twist them to their own ends beyond recognition. Every business and trade has its special works. Humpty Dumpty taught us:

"When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it

means just what I choose it to mean – neither more nor less.”

“The question is,” said Alice, “whether you *can* make words mean so many different things.”

“The question is,” said Humpty Dumpty, “which is to be master – that’s all.”

Lewis Carroll, *Through the Looking Glass*, p.230.

Our former President showed us how this works when he defined for himself what intimate acts are not encompassed by the term *sexual relations*.

When the defendant’s toxicologist says that their toxin is *safe*, or that it is *below detectable limits*, or that it has caused no *harm*, think of what some claim are not *sexual relations*.

The lawyer who would effectively cross a sophisticated witness must first cross the language barrier.

V

THE FACTUAL PREMISE

Computer nerds developed the acronym GIGO for garbage in, garbage out. What is the factual premise upon which the witness hangs his hat? Has he built upon shifting sands or a solid rock?

VI

SILENCE IS GOLDEN

It has been said many ways, but the simple fact remains. One learns by listening, not by talking. It is important to prepare in advance to cross examine any sophisticated witness, but thorough preparation is wasted by the lawyer who fails to pay close attention to what the witness says, and how he says it, be it on direct or on cross. What a witness

says, or doesn't say, can call for a very different line of questioning than what had been prepared.

VII

SEEING IS BELIEVING

Demonstrative aids work best when such clarify rather than complicate. Many cross examinations, particularly of experts, revolve around written materials, such as depositions, documents, treatises or medical records. An observer is often at a loss as to what the lawyer and witness are talking about. The lawyers all have copies. The witness has a copy. The judge should have a copy. It's the jurors who are so often left out. They need to see and read what is being discussed by the witness while it is being discussed.

VIII

PLOWING WITH THEIR MULE

I was advised long ago not to try to plow with another man's mule. It is risky business. Nonetheless, there are few witnesses who will not agree with at least some of the positions taken by your witnesses, or with some of the *bona fides* of your case. Take advantage of any opportunity to advance your cause. An intellectually honest witness may well dispute an important issue in your case, but readily agree with other matters. An overly partisan or deceptive witness may reveal his colors by his refusal to agree with any position you take, or by long-winded, unresponsive answers. Give him a chance to pull your plow. Let the jury see him in action.

IX

BREVITY AND WAIVER

Perhaps the scariest course to take when the time comes to cross examine is to stand

and calmly say, “I have no questions for this witness.” It can also be quite effective.

Cross examination is the crucible that tests any witness. It is particularly critical in the case of expert witnesses. An expert who goes through a rugged cross without being harmed gains considerable credibility with a jury. An uncrossed witness is an untested witness. What is more impressive, being favored to win the big game by the pundits, or winning the big game?

The reality is that most cross examinations of most witnesses enhance the witness’s credibility. Moreover, lengthy crosses that revisit what was said on direct give the witness a chance to repeat, reexplain and clarify what he already said so that jurors have a second chance to get what they may have missed or failed to fully understand.

X

GOOD GUESSING

Before a lawyer rises to cross examine a witness, the lawyer needs to have made key assessments about the witness, though, of course, without full information. These assessments are similar to jury picking. Good lawyers need to be good guessers.

An attack on the credibility of a conscientious, honest witness is counterproductive. An effort to get the *advocate* to agree with your side of the case won’t work. The *forgetful witness* will not begin to remember. The witness who proclaims an inability to understand simple questions will continue to proclaim his ignorance.

Effective cross examination takes advantage of who the witness is and does not seek to change the witness.

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