IADC Committee Newsletter

TRIAL TECHNIQUES AND TACTICS

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David Hassett offers practical advice and tips on conducting cross-examination using real-life examples from IADC members. Also, Chris Berdy reports on Alabama's switch from Frye to Daubert as the standard for determining the admissibility of expert witness testimony. Lastly, Glenn Jacobson provides a "One Minute Trial Tip"

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International Association of Defense Counsel
TRIAL TECHNIQUES AND TACTICS NEWSLETTER *July 2011*

The Ten Commandments Of Cross-Examination: A Trial Lawyer's Commentary On The Insights of Irving Younger

ABOUT THE AUTHOR

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Cross-examination can be one of the most important and exciting aspects of trying a case. But it is also one of the most challenging components of a trial, and errors in cross-examination can at times make or break a case. One of the most prominent experts in this area is the late Irving Younger, a former judge and Cornell Law Professor who crafted the Ten Commandments of Cross-Examination. I have enjoyed listening to Younger's tapes on cross-examination and believe that experienced and inexperienced attorneys alike can benefit from his expertise.

For this article we revisit Younger's Commandments and provide what we hope to be helpful comments concerning them. In conjunction with drafting this article, we spoke to several IADC members and obtained from them a few real-life examples of situations when they adhered to (or departed from) Younger's Ten Commandments[1], which are:

1. Be Brief

Be brief, short and succinct. Cross-examination should be a "commando raid." In and out. It is not the invasion of Normandy. You should never try to make more than 3 points on cross-examination. Two points are better than three and one point is better than two.

The number of points you need to make on cross is obviously dependent upon the particular witness and the complexity of your case. The issue here, however, is to keep the examination short and to the point. Today, more than ever before, we are being told that the attention span of the average juror is shrinking. If you spend too much time with the checklist and set-up type of questions you risk losing the interest of the jury. Get to the point you want to make in a clear and concise manner and, as Irving Younger is fond of saying, "SIT DOWN!"

The principle to bear in mind here is "less is more."

[1] Summarized from *The Art of Cross-Examination* by Irving Younger. The Section of Litigation Monograph Series, No. 1, published by the American Bar Association Section on Litigation, from a speech given by Irving Younger at the ABA Annual Meeting in Montreal Canada in August of 1975. *See also The Irving Younger Collection: Wisdom & Wit from the Master of Trial Advocacy*, published by the American Bar Association, 2010.

2. Use Plain Words

A jury will better relate to you when you speak plain English. Use short questions and plain words.

I think it is important to articulate your questions in a clear and meaningful manner. An awkwardly worded question will lead to confusion. The point here is to keep it simple and don't try to appear smarter than everyone else in the courtroom by using flowery language.

3. Use Only Leading Questions

Never, never, never on cross-examination ask anything other than a leading question. Cross-examination is not the occasion for finding out about the case. Cross-examination permits you to take control of the witness, take him where you want to go, and tell your story to the jury through the witness.

The Hallmark of any good cross is controlling the witness. It is the use of leading questions that permits the lawyer to maintain control over the witness.

An effective cross should have an end game. The Perry Mason cross which results in the witness recanting all of his direct testimony is not a reasonable goal.

Clear, concise and leading questions will not only allow control over the witness and the responses made by the witness, but will also demonstrate your skill as a lawyer and show the confidence you have in your case.

4. Never ask a question that you do not know the answer to (unless you don't care what the answer is).

This is not a deposition. This is not the time to discover new facts about your case.

I do not agree completely with this premise. I don't believe it is practical to actually know the answer to every question asked on cross. I do believe, however, that you should never ask an open-ended question that would allow a witness to potentially undermine your entire case. When a need arises to pursue an issue that came out on direct that you may not have expected, you can always ask narrow, leading questions to carefully chip away at the testimony. In other words, test the waters before jumping in head first. Having said that, the following humorous anecdote from an IADC member clearly demonstrates the harm resulting from violating this commandment:

> I was trying a high stakes case in which the plaintiff contended that he was destitute as a result of the defendant's negligence. We doubted this claim. On cross-examination of the plaintiff, I asked exactly one non-leading question. This is how it went:

Q. Mr. Smith, your passport shows that you've traveled outside the country extensively during the past18 months?

A. Yes, I've been out of the country.

Q. In fact, Mr. Smith, you've been to Jamaica?

A. Yes.

Q. The Bahamas?

A. Yes.

Q. Costa Rica?

A. Yes.

Q. Now Mr. Smith, I take it you don't travel for free?

A. Actually, I do.

Q. Excuse me?

A. My brother is a pilot with American Airlines. I fly for free.

Q. I see.[2]

A colleague of mine related a story that demonstrates that this commandment applies to judges as well. In the course of prosecuting a murder trial, my colleague and opposing counsel were called to side bar by the presiding judge. While looking to the rear of the courtroom, the judge asked counsel if the elderly woman observing the proceedings was the defendant's grandmother. As my colleague turned to look toward the back of the courtroom, he recalls defense counsel immediately responding, "Judge, that's my wife!"

5. Listen to the witnesses' answers.

Seems self-evident, but you've got to make yourself do it.

In order for you to complete a smooth and effective cross that holds the jurors' attention, you must listen to the witness' answers. You can't approach cross-examination in the courtroom with a checklist waiting to ask question #5 as soon as answer #4 is provided. First and foremost, you will lose an opportunity to counter an unfavorable answer by posing a follow-up question. Second, you should presume (hope) the jury is indeed listening and if you ask questions that suggest you are not listening, you will certainly lose credibility with the jury.

[2] Thanks to Spencer Silverglate of Clarke Silverglate, P.A. in Miami, Florida for his story.

6. Do Not Quarrel

Do not quarrel with the witness on cross-examination. When the answer to your question is false, irrational or contradictory, "sit down." You do not want to elicit a response that ends up rehabilitating the witness.

I am not in total agreement with this one. While it certainly is not appropriate to push back every time a witness gives an unfavorable response, I believe the jury gives us the license to directly challenge a witness who has proffered a false or contradictory answer – particularly an expert witness. The point is not to quibble with the witness over unimportant details that don't impact your case.

If, however, the witness' responses are damaging to your case, I believe in certain instances the jury would expect you to be confrontational. Like many issues during trial, this is a judgment call you will need to make on your feet.

7. Avoid Repetition

Don't allow a witness to repeat his direct testimony. The jury is more likely to believe the witness' story if it is repeated during cross-examination.

This is extremely important and needs very little explanation. It is essential that you not assist your opponent in underscoring his case during your cross-examination.

8. Do Not Allow Witness Explanation

That is the job of your adversary.

This represents the very reason that leading questions are designed to elicit "yes" or "no" answers. The following story from one of our members illustrates the point:

My client, an emergency room physician, was testifying in a jury trial where he was being accused of negligently causing an esophageal tear during emergent intubation attempts on a patient that was suffering from status asthmaticus.

On cross examination, the claimant's counsel asked my client, "Do you agree that you improperly intubated by client and caused the tear of her esophagus?" My client responded in the negative, at which point claimant's counsel violated the 8th commandment by asking, "Well, why do you feel that that is the case?"

At that point, my client, who was chomping at the bit to get his entire story out to the jury, began relating in extreme detail what had happened to the claimant during the entirety of her ER presentation up to the time of the intubation attempt. After my client had been speaking for about

10 minutes, claimant's counsel interrupted my client's testimony and turned to the Judge, noting that my client was now giving a narrative and should be required to respond to further questioning.

The court, who had been intently listening to my client's explanation of the course of events, looked at claimant's counsel and replied, "Counsel, you asked the question 'why?' The witness will be allowed to respond to your question." With that, my client continued to testify for another 10 minutes to explain his situation, after which I am pretty certain that the jury had now heard enough to conclude that my client was in fact not negligent in proceeding with and performing the intubation which in fact resulted in an esophageal tear.

My client was the first witness in the case. I am sure claimant's counsel wished he hadn't violated the 8th commandment.[3]

9. Limit Your Questioning

Don't ask "the one question too many." After you have made your point, stop and "sit down."

The best illustration of this principle is the example used by Irving Younger himself when discussing this commandment:

The prosecutor sits down after completing his direct-examination of the eyewitness to an incident that gave rise to the defendant being charged with assault and battery and mayhem. The defense lawyer in cross-examining the witness gets to a point in the cross when the witness concedes that he never observed the defendant bite the nose off of the victim. At this point Irving Younger suggests that the defense lawyer "sit down." Instead, feeling good about his cross-examination to this point, he asks the witness the following question and elicited the following response:

Q: If you never saw my client bite the nose off of the victim, then why are you here today claiming that my client committed mayhem?

A: I saw him spit it out.

Another example of the danger in violating this principle occurred when I was trying an accident case where speed was critical to the determination of liability. I had just completed the direct testimony of my accident reconstructionist who concluded that my client was traveling at a speed of 10 m.p.h. at the time of the accident. His testimony was in contrast to the plaintiff's expert, who had testified that my client had been traveling at a speed of 20 m.p.h.

On cross, the plaintiff's lawyer got my expert to concede that his formula to ascertain the speed of the vehicle relied, in part, on the weight of the vehicle. He was able to show that my

[3] Thanks to John Nishimoto of Ayabe, Chong, Nishimoto, Sia & Nakamura LLP in Honolulu, Hawaii for sharing his story.

expert didn't actually weigh my client's vehicle, but relied instead on the vehicle manufacturer's specifications. He then proceeded to ask the following questions:

Q: So you didn't account for the two spare tires and luggage that were in the defendant's trunk at the time of the accident, did you?

A: I did not.

Q: And if the defendant's car were heavier, that would change your estimate of the speed?

A: Yes, it would.

Editorial note: At this point, the lawyer should have quit and "sat down." Had he done so, I do not know that I would have been able to rehabilitate this witness because I did not know how the speed would change. As I was trying to think of a reason to take a break, my opponent then asked:

Q: How would that change your estimate:

A: I would have to conclude that the defendant was traveling even slower.

So the next time you're tempted to ask that one final question to tie it all together, just "SIT DOWN!"

10. Save The Ultimate Point of Your Cross for Summation

This is a fairly simple principle. The purpose of cross is to elicit the favorable testimony that you will use to support your argument to the jury during closing. The purpose of closing is not to rehash the testimony, but to explain what the testimony means and persuade the jury that your client should win.

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Finally … Alabama Makes the Change from *Frye* to *Daubert*

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1992

Hey Stan, you're in Ala*^#-Bama. You come from New York …
There is no way this is not going to trial.

- Vinny Gambini (Joe Pesci), *My Cousin Vinny*

2011

Alabama is open for business—open for new business and new jobs—and is no longer a haven for lawsuits.

- William W. Brooke, Chairman of the Board, Business Council of Alabama

I. Introduction

In the 1980's and 1990's, Alabama earned the nickname "tort hell" for its "headline-grabbing" jury verdicts.[1] In 2002, Alabama was listed on the American Tort Reform Association's ("ATRA") "Dishonorable Mention" list.[2] After hosting back-to-back jury verdicts that ranked among the nation's highest—$11.9 billion in 2003, and $1.3 billion in 2004—Alabama returned to ATRA's list of "Judicial Hellholes," although down-graded to the "Watch List."[3]

However, with the passage of five legal reform bills on June 9, 2011, Alabama is now "open for business … and is no longer a haven for lawsuits."[4] Of particular importance to trial lawyers and their clients is the momentous shift implemented by the all-Republican Alabama legislature and signed into law by Alabama's Republican Governor. In rejecting outright the *Frye* "general

[1] P. Rawls, "Alabama in Spotlight for Record Lawsuits," *Anniston Star*, Dec. 20, 2005.
[2] Id.
[3] Id.
[4] http://www.bcatoday.org/news_detail.aspx?id=37402.

acceptance" standard—the long-standing standard in Alabama,[5] the legislature formally adopted the well-settled standard for the admissibility of expert testimony set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[6] Beginning January 1, 2012, Alabama joins the majority of states that rely on *Daubert* as the standard for determining the admissibility of expert witness testimony.[7]

II. Reluctance to Change

For years, Alabama litigants in civil cases have repeatedly urged the Alabama Supreme Court to formally adopt the more rigorous *Daubert* standard, but at every turn, the Court has declined to do so. Among the most common reasons for declining change is the Court's outcome determinative view: applying *Daubert* to the particular cases before it would not have changed the end result.[8] Likewise, the Court has cited a reluctance to legislate or render advisory opinions and parties' failure to present the issue to the Court as additional reasons to retain the outdated *Frye* standard.[9]

III. Implications of Change

Not surprisingly, the new legislation has far-reaching implications.

For trial court's in each of Alabama's sixty-seven counties, the new statute imposes upon them the role of "gatekeeper," responsible for determining the scientific relevance and reliability of proffered expert testimony, as well as an almost certain increase in motion practice over the admissibility of parties' disclosed experts' testimony. For experts seeking to testify in Alabama, *Daubert* ensures accountability by requiring that they employ reliable scientific methodologies in developing their opinions.

For litigants and trial lawyers, application of *Daubert* means more consistency and predictability in the admission—or exclusion—of scientific opinion evidence. Indeed, as the GOP stated, "[a] stricter standard for admitting expert testimony helps business, and indeed all litigants, in insuring valid scientific and other technical expert testimony has a solid foundation and basis."[10]

IV. Conclusion

At long last, Alabama has made the change from *Frye* to *Daubert.* In so doing, Alabama may no longer have a near-permanent place on the list of "Judicial Hellholes," and is indeed, "open for business."

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[5] *Courtalds Fibers, Inc. v. Long,* 779 So. 2d 198, 202 (Ala. 2000); *Southern Energy Homes, Inc. v. Washington,* 774 So. 2d 505 (Ala. 2000).
[6] 509 U.S. 579 (1993).
[7] *See* Alabama Senate Bill 187; Ala. Code § 12-21-160, as amended.
[8] *See, e.g., Vesta Fire Ins. Co. v. Milam & Co. Constr., Inc.*, 901 So. 2d 84, 106 (Ala. 2004); *Martin v. Dyas*, 896 So. 2d 436, 441 (Ala. 2004); *General Motors Corp. v. Jernigan*, 883 So.2d 646, 661-62 (Ala.2003); *Slay v. Keller Industries*, 823 So.2d 623, 626 . 2 (Ala.2001).
[9] *See, Southern Energy Homes, Inc. v. Washington*, 774 So.2d 505, 517 n. 5 (Ala.2000); *Chestang v. IPSCO Steel*, 50 So.3d 418, 438 (Ala.2010).
[10] http://www.algop.org/node/1283.

THE ONE MINUTE TRIAL TIP

The brain child of IADC Past President Rob Hunter, each of our newsletters features a quick, practical trial tip.

I was recently retained as trial counsel on the eve of trial by an insurance carrier. Plaintiff claimed that she slipped in the insured's premises while going up stairs leading from the rest room, which allegedly was flooded with 1/2 inch of water due to an overflowing toilet. It was claimed the water on the steps had been tracked up the steps from the restroom. The insured denied the existence of water on the steps or, for that matter, that the restroom was flooded.

As is my practice, I went to meet and prepare the insured at his place of business, which was the location of the trip-and-fall accident. Rather than rely on the investigation, I wanted to visualize the scene. Although the steps and the area around the accident scene were as photographed, the investigator hadn't gone into the restroom where plaintiff claimed the water had come from. Had this been done, the investigator would have discovered (and hopefully photographed) two drains built into the floor! Although I didn't have photos to introduce into evidence at trial, I was able to elicit testimony concerning the drains, raising further doubt about the "flood" and plaintiff's claim.

In my mind, where there is any question about the manner in which an accident is alleged to have occurred, there is no substitute for an attorney's accident scene inspection early on in the handling of a file. There is no telling what the eyes of an attorney might observe that can sharpen the focus of the defense of an action. By the way, the jury returned a unanimous verdict for my client.

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Glenn Jacobson is a founding member of Abrams, Gorelick, Friedman & Jacobson, P.C. in New York City. Mr. Jacobson has been litigating and trying cases to verdict in the New York and New Jersey state and federal courts for more than 30 years. He has successfully briefed and argued appeals in the New York Appellate Division, First and Second Departments, as well as the United States Courts of Appeals for the Second and Third Circuits. Mr. Jacobson regularly defends products liability, liquor law liability, premises liability, legal malpractice, transportation and significant property damage and first-party actions.

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