Burying the Ten Commandments of Cross-Examination

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The famed ten commandments of cross-examination were handed down on tablets from Mount Justice by renowned law lecturer Irving Younger. He in turn had received them from other trial-lawyering scribes down through the ages. Here they are:

1. Be brief.
2. Use short questions, plain words.
3. Ask only leading questions.
4. Don't ask if you don't 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.
8. Don't allow the witness to explain.
9. Don't ask one question too many.
10. Save the ultimate point for closing.

Whatever religion promulgated these commandments is a joyless, repressive, down-at-the-mouth faith. To the budding cross-examiner, the message is clear: Kid, shut up and sit down, before you make a fool of yourself.

And because they are written not as advice but as commandments, they have hobbled whole generations of trial lawyers with the fearful message they impart. It's time to bury these commandments in favor of ideas that lean toward a more free-wheeling, analytical, and effective way of cross-examination.

First, let's look at what is not just wrong but actually dangerous about these commandments. Then I will rewrite them in a way that I think will be more helpful.

Be brief. Insecure lawyers want firm advice. They hate "it all depends." But the admonition to be brief in cross-examining witnesses is a good example of advice that is occasionally correct but often is not.

Younger's brevity tip started with an inarguable truth: Juries can absorb only so much detail. So he advised cross-examiners to limit their questioning to no more than three points to undermine the witness's testimony. Why three? Well, it's as good a number as any, and for those of us who grew up with tripartite intonations like "mea culpa, mea culpa, mea maxima culpa," it sounds good.

Roy Black tells a story about Younger that shows how wrong *Be brief* can be. Black is a renowned Miami criminal defense lawyer who writes an excellent blog on trial practice. Black remembers attending one of Younger's lectures years ago and being dazzled by the professor's showmanship. Younger, with his horn-rimmed glasses, bow tie, and multiple voices, was an A-plus lecturer. Here was Younger's story about the virtues of being brief, as remembered by Roy Black:

> Younger represented the *Washington Post* when it was sued for libel by the president of the Mobil Oil Corporation. The

plaintiff called a trucking executive to the stand. The trucking executive gave testimony helpful to the plaintiff. Younger's cross-examination consisted of four questions:

Q: Mr. Hoffman, did you just get into Washington just about an hour ago?
A: About an hour and a half, I would think.
Q: Did you come up from Florida?
A: No, I did not.
Q: Where did you come from?
A: Indianapolis.
Q: How did you get from Indianapolis to Washington?
A: On the Mobil corporate jet.

"It was a hand grenade in the courtroom," Younger enthused, "the kind of moment a trial lawyer savors for the rest of his life."

Black's reaction, after pointedly noting that the jury went on to hand down a sizable verdict against Younger's client:

Okay, so the plaintiff had the witness flown on its private jet to testify. This was one of the world's richest corporations and no doubt this is how they did business, especially when a witness was needed quickly. This was not a great benefit to the witness since he probably didn't want to testify anyway. So the point is dubious, but to make it the only impeachment of a major witness? Bizarre at best.

Be brief should be rewritten to *Be proportional*. Mete out your cross as the testimony deserves. If the witness hasn't hurt your case, "No questions" might be the best cross. If the witness is the mother of the opposing party, then maybe one question: "You love your son and want him to win this case?" But if it is an expert witness who has just consumed most of a day telling the jury why you have no case, then you must join battle.

Use short questions, plain words. This is good advice. Short questions have fewer escape hatches for the witness than long ones. They're also easier on the ear. Plain words are good words—which leaves one to wonder why lawyers have such trouble with the plain parts of the English language. Why say "directing your attention to the night of . . ." instead of "let's talk about the night of . . ."? Our questions need not be littered with all the "pursuant to" and "contemporaneously" and "with respect to" that happen in too many courtrooms.

My theory involves nudity—and fear thereof. Plain is naked. Plain puts us right in front of judge, jury, and witness without our protective lawyer garb. We went to law school to sound educated, right? In our defense, we're far from the only profession that uses a professional patois to distance ourselves from the lay public and justify high fees. The doctor who intones, "The patient went into cardiac arrest, with an idiopathic etiology," sounds so much finer than the one who says, "The poor guy's heart stopped, and we have no idea why." A Rutgers University group studied the persuasiveness of expert witnesses with mock jurors and found that technical jargon was a real turnoff for the jurors. When jurors cannot understand what someone is saying, they judge credibility on what they can see and measure, and that is when side traits like timber of voice and sculpt of chin come to the fore. Jurors have a hunger to understand what the witness is saying. When they can't, they judge solely on the person before them.

So no rewrite on this one: *Use short questions, plain words* stays as it is.

Ask only leading questions. This is one of those hoary maxims of trial law passed down through so many generations that its paternity has been lost. Which is good, because it is self-evidently wrong, and I don't want to be sued for libel by the parent of the idea. A leading question is not simply a yes/no question. A leading question technically is one that suggests an answer. It's a declarative statement, followed by a variation of the following:

- "True?"
- "Correct?"
- "Am I right?"
- "Is that fair?"
- Or silence, coupled with a gesture or a voice inflection that tells the witness this statement has a question mark at the end.

This last type of leading question—a plain statement without the "true/correct/right/fair" add-on—is probably the best way to ask a leading question: the most controlling and least annoying of the variations. And to be clear, I have no objection to leading questions. It's just that using them constantly and exclusively is counterproductive and impossible to achieve.

Any lawyer who tries to ask only leading questions on cross will drive everyone in the courtroom crazy. It is not a normal method of asking questions. If you doubt me, try it at home sometime with your spouse. After five minutes of leading questions from you, followed by increasingly gape-jawed responses, you will be prostrate on the floor, and your only rejoinder then will be "But you still love me, right?" And your spouse, if he or she is the forgiving type, will say, with flared nostrils, "Yeah. But never do that again."

Here is another problem with an all-leading menu of questions: At least in the courtrooms where I practice, generally the judge gives preliminary instructions before the first witness. One such instruction is invariably that *questions from lawyers* are not evidence; only the *answers from the witness stand* are

evidence. Any juror trying to follow this has a mighty struggle with all-leading questions because the judge instructed that the only evidence is the one-word response from the witness stand. And how memorable can any string of "yeses" and "trues" and "corrects" ever be?

Now, there is a kernel of truth in this so-called commandment. Leading questions help keep the witness under control. That's true at least until the witness sees an opening for a more expansive answer. Of course, this expansive answer will tend to flummox and irritate any lawyer who has not considered why it is nearly impossible to confine the witness with a series of leading questions. The better solution is to be prepared for the witness's predictable dodges and to have the next question ready.

Controlling the witness is a good, essential tool, of course. But leading questions cannot and should not be the sole means of exercising control. In fact, read any trial transcript and you will see nary a page with only leading questions. My point is this: The advice to ask *only* leading questions is akin to telling a lawyer to walk on water. It would be great if you could pull it off but pretty much impossible for ordinary mortals.

If this chestnut was rewritten to say *Ask simple questions with narrow answers*, it would be correct, most of the time. That means the lawyer should mostly be eliciting facts, one at a time. Yes, you can use leading questions but never exclusively.

Asking questions with only narrow answers still keeps the lawyer in charge of the back-and-forth. But it has the added advantage of making the witness speak facts and not merely agree with the lawyer over and over. A witness impeached with his or her own words, and not merely by agreement with the lawyer's words, is disposed of more effectively.

Here's an example: You're cross-examining a professional damages expert whose mission is to minimize the dollars needed to provide lifelong care for your paralyzed client. You want to show this is a lawsuit expert, not someone with substantial real-life experience helping paralyzed people. So how do you ask the question?

The old, leading-only way: "Isn't it true you have very little experience working with paralyzed people outside litigation?"

The better, simple and narrow way: "In the last _____ years, tell us how many paralyzed people you have worked with to line up medical and rehab care?"

The first, leading question is merely going to buy you an argument. The second, non-leading question is going to get you a fact you can work with. Let's say the answer is "none," or "I cannot recall at this time." Now, you could have shoved the same answer down the witness's throat with a leading version, like "Isn't it true that in the last ___ years, you haven't helped a single paralyzed person get resources for their care needs?" But isn't it much better hearing that word "none" come from the witness's mouth?

A last thought on this one: The maxim "Ask simple questions with narrow answers" is so close to the prior point, to use short questions, plain words, that we ought to combine them.

The Rewrite: *Ask only leading questi*ons becomes *Ask simple, plain questions with narrow answers.*

Don't ask if you don't know the answer. Here is another wrong piece of advice that has a kernel of truth. The kernel is that it is risky to venture into areas where you have no idea what the witness is going to say. But the advice as phrased is wrong on several levels.

The corollary to "Don't ask if you don't know" is to obsessively learn in discovery everything that the witness will say. This approach is responsible for the all-day depositions in civil cases that exhaust and bewilder witnesses. By the end of these marathons, everyone in the deposition room can see what is coming and will then busily set about preparing their answers to outwit the lawyer's script.

The other thing that makes this piece of advice wrong is something that, late in the game, dawns on every lawyer preparing for trial in any case of consequence: *There are questions I wish I knew the answer to, but I don't. And the opposing witness might know.*

So what do you do?

The safe, Younger-esque thing to do is surrender. Don't ask the question. It's too risky.

The better approach, which talented cross-examiners know, is to analyze the issue and figure out what the answer must be, based on logic, common sense, and everything else you know about the case. Or work out a series of questions that lead the witness to a place where his or her answer to the next question is fine, no matter what, because you have a good retort whichever way the witness goes. Doing it this way takes courage and persistence and, most of all, a close study of the facts so you can be ready for whatever answers you get.

The Rewrite: *Ask only questions that you know the answer to.* Or *Know what the answer should be.* Or *Have a good response to no matter what the witness says.* Or more simply: *Ask only questions whose answers you can deal with.*

Listen to the witness's answers. I like this one. But doesn't it almost contradict the one right before it? Why do we need to listen, if we already know the answer to every question we're posing? True, if the witness blatantly contradicts what we know the correct answer to be, we must be ready to impeach the new answer. But that's not the best reason why we should listen intently to the witness's answers. The best reason is that answers given in the heat of the moment can provide the best fodder for new lines of questions.

Some lawyers mute their listen button as soon as the witness has strayed beyond the one-word answer the lawyer wanted to hear. Then they turn sour on the witness or whine to the judge for help. Then they are embarrassed when it turns out all the

witness was doing was agreeing with the question, albeit in a narrative style instead of a narrow yes/no. They are also missing great fruit for follow-up.

Or, if the witness has dodged a sharp-edged question, it may be more important to follow up on the dodge and deflate it, than to pummel the witness with a failure to answer the yes/no. Denver attorney Jim Leventhal did that in this exchange with a defendant doctor who had just testified that if the patient had told him the chest pain had come on suddenly, he would have ordered different tests that could have found the heart problem that killed him. When the doctor tried to blame the patient for the missing detail, Leventhal asked:

Q: But you're the doctor. You're the one that understands the significance. He comes in and says: I got this pain this morning, and I'm here, and I'm concerned. That's basically what he said, right?
A: Yes.
Q: And you're the doctor. You're saying that if he had told you it was a sudden onset, that it would have made a big difference. What stopped you from asking him whether it was sudden?
A: In getting the history, I asked: When did it start? I asked the severity of it. That's where the eight out of ten came from. I asked: Does it go anywhere? In that, the patient will usually elicit—if it is there, they will tell me it was a sudden onset.
Q: I understand you don't have that written down, and you don't know whether he said sudden or not; but what stopped you from asking him anything?
A: I just knew it started that morning.
Q: But there was no reason that you couldn't have asked him: Was this sudden?
A: I could have asked him, yes.

See what happens when a good cross-examiner listens carefully to each answer? The witness did not directly answer the question, so asking it again kept the witness on the hook, and finally the witness admitted the key fact: *I could have asked him*.

So, yes, listening to each answer is vitally important. The entire answer. And what goes with that is to follow up when the answer hands you something unexpected and worthy of follow-up. The rewrite here is *Listen to the entire answer, and follow up.*

Don't quarrel with the witness. Another good one. We have a trend going here! But why is this a good rule? More important, when does this rule need to be broken?

A quarrelsome style with the witness, especially with a polite witness, usually signals to jurors that you feel as though you are losing the match. Also, fighting with the witness—especially, trying to cut off answers that seem responsive to everyone but you—makes you look like you're trying to hide stuff from the jury. But if you maintain your cool composure and the witness shows clear bias or evasiveness, you can be justified in removing the white gloves. After all, juries expect a certain degree of combat in cross-examination. So turning up the emotional heat at judicious intervals can be very effective, especially if you have a strong point to make for the ultimate truth of your side. Still, elaborate courtesy can destroy an evasive witness just as well as indignation, maybe better.

Miami attorney Gary Fox tried to get a straight answer from a professional witness about his total fees for the case on trial, as shown in the questioning below. Fox pursues his point with courtesy, but persistence, and in the end wins something even better than a responsive answer: This is a witness who wants to hide what he's paid.

Q: Now, Dr. Radetsky, how much are you being paid in this case? I know what your hourly rate is. I want to know how much—by the time you get back to New Mexico—what the total bill for the defendants is going to be for your work in this case?
A: Are you asking me what my bill will be for coming here to Tallahassee?
Q: No, sir. I'm sorry. I didn't ask the question right. What I thought I asked—well, I'll try to ask better—is what is your total bill going to be, what—for all of the work that you've done in this case?
A: I don't know, sir. I don't have that information.
Q: Well, I understand you may not know it to the nickel, but give our jury the best estimate as to what your charges are going to be.
A: You know, I just don't know. I've sent in invoices in the past and been paid for them, but I don't have that information with me today.
Q: Well, I understand that you don't, you don't have all the invoices. I'm just asking for an approximation. Give us your best approximation as to what your total charges are going to be.
A: I just don't know, sir. You know, the case was first sent to me four years ago. So, I'm sorry, I just don't have that information.
Q: So could it be 30, 40, 50,000 dollars?
A: I don't have the information, sir.

Notice how, when the witness misconstrued the first question, Fox took the blame on himself for the misunderstanding, then re-asked the same question. Then, when the witness showed he didn't want to answer, Fox gave him several other chances to respond. Many cross-examiners would have turned sarcastic or biting at the very first sign of evasion. That's a mistake born

of the questioner knowing the witness a lot better than do the jurors, who have just met the witness for the first time and have not read dozens of his depositions. What's better than quarreling is just trying different but polite ways to get an answer. The old saying that you catch more flies with honey than vinegar applies to cross-examination most of the time.

> The Rewrite: *Don't quarrel with the witness* becomes *Don't quarrel with the witness, except when it's obvious the witness really deserves it*.

And when I say "obvious," that means obvious to others on your side, not just you. You cannot trust your own sense of umbrage in the thick of combat.

Don't allow the witness to repeat. This is a truism of cross-examination but one that amateurs violate. A lawyer who earnestly takes copious notes of the witness's direct testimony and then goes over those notes with the witness on all the points that puzzled the cross-examiner is allowing the witness to repeat. The witness is only too happy to both repeat and elaborate. The apparent tactic here is to hope that some weakness in the testimony will turn up on its own. Fat chance.

Every witness will repeat what was said on direct if you give the witness half a chance, and many cross-examiners have rued a line of questions that, they realized too late, gave the witness a platform to say more than the cross-examiner intended.

> The Rewrite: *Don't allow the witness to repeat* becomes *Stick with narrow, simple questions that avoid giving the witness an opportunity to repeat the witness's core message*.

Don't allow the witness to explain. This goes with the no-repeat rule, but it is easier said than done. Just what exactly does this commandment teach the cross-examiner to do when the witness responds to what you thought was a carefully narrow question with a cheerful "I disagree with you, counselor, and here's why"? Interrupt the response and say, "I don't want your explanation; save it for when your lawyer does redirect"? Even if the judge allows your interruption, over the heated cry of opposing counsel, and allows the witness's explanation to be squashed, you haven't won that exchange in the eyes of the jury. More often, the judge will allow the witness to explain the answer. And you will stand by, grinding your teeth.

The "Don't allow the witness to explain" rule also is wrong, dangerously so, to the extent it suggests you should never ask a witness to explain anything. On the contrary, some of the strongest cross sets up a conflict between the witness and common sense. Then you ask the witness to explain, which, if it is a genuine weakness, the witness cannot do. A great fictional version of this scenario is the grits scene from *My Cousin Vinny*, discussed below in connection with the tenth commandment.

> The Rewrite: *Don't allow the witness to repeat* becomes *Stick with narrow, simple questions that avoid giving the witness a chance to explain or repeat the witness's core message. If the witness insists on explaining anyway, then join battle*.

Don't ask one question too many. This tidbit might be the best known of the commandments, and it is, in my opinion, the most wrong-headed. It has ruined many cross-examinations and squelched the good instincts of far too many lawyers.

The idea behind the advice is that with careful and delicate questioning, the cross-examiner could set up a good argument for why the jury should discount the witness's testimony, only to see it blow up in his face by asking that famous one question too many, and the whole construct collapses.

Two stories, one true and one apocryphal, are often trotted out to illustrate the advice.

True story: The artist Whistler was under cross-examination in his London libel trial against the art critic John Ruskin, who had written of two of Whistler's *Nocturne* paintings, "I . . . never expected to hear a cockscomb ask 200 guineas for flinging a pot of paint in the public's face." Ruskin's lawyer to Whistler:

Q: Can you tell me how long it took you to knock off that Nocturne?

A: Two days.

Q: The labor of two days then is that for which you ask 200 guineas?

A: No, *I ask it for the knowledge of a lifetime*.

Ouch. Good answer, Mr. Whistler!

Whistler went on to win the jury's verdict, for a symbolic one farthing, and Ruskin resigned his art professorship in disgust. The *Nocturne* in question subsequently sold for 10 times Whistler's asking price and was given to London's National Gallery, where it hung in honor. So much for two days' labor.

Apocryphal story: Lawyer defending a man for allegedly biting off someone's ear has just established that the witness didn't actually see the defendant bite off the ear. But then the lawyer asks the fatal question:

Q: So then, how can you be so sure my client bit off the victim's ear?

A: Because I saw him spit it out.

Clever and funny, but what do these anecdotes prove? Not much. The advice against asking the one question too many suffers from at least three fatal flaws:

First, the givers of this advice forget about the right of redirect examination. If you don't ask that next fatal cross-examination question, your opponent certainly will on redirect, and then you will look even lamer than if you had asked it yourself.

Second, they are hindsight sages. Sure, they can see the fatal misstep reading the transcript in their lounge chairs long after the fact, but what about in real time, when you can't peek ahead to the answer to see if it was one too many?

Third, they confuse poor strategic planning for a mere tactical error. The point of these two examples is not that the cross-examiner asked one question too many, but that the cross-examiner made a poor choice of subjects to put to the witness, trying to make a clever point whose premise was so fragile a single question could blow it up. So all the questions along that line were one too many.

And there's the heart of the issue. When we decide what to ask in our cross-examinations, we need to plan it through. We need to select only those subjects on which the witness is most vulnerable, on which the witness lacks the killing retort, and on which the other side can't easily patch the hole on redirect. Then it doesn't matter how many questions we ask, as long as we are pounding home that one weakness.

The worst thing about one too many is it casts a pall over the entire work of any cross-examiner. It suggests we're always about to mess up, always about to lose the exchange in some disastrous way. And so we hesitate, we stop, we leave points undeveloped. Cross-examiners need to be self-confident, not hesitant. We need to finish the point, not leave it dangling.

I am far from the first trial lawyer to wonder at the staying power of Younger's commandments, especially this one. Among the most cogent critiques, Los Angeles lawyer Michael Doyen wrote:

> Time and again, Younger brings us face to face with the same unintelligible and wrong lesson: that your job as cross-examiner is, through some means Younger does not explain, to create a false appearance of weakness in the witness's testimony, and then to sit down before you inadvertently ruin it.

We need to bury once and for all the nonsense advice to not ask one question too many. A light edit cannot save this commandment. I would delete it from the list altogether.

The Rewrite: *Don't ask one question too many* becomes *Don't chase cheap points on your cross that the witness or redirecting counsel can easily crush*.

Save the ultimate point for closing. This final, tenth commandment is also a bad piece of advice, depending on what it means. And that's the trouble, because it's not clear. If this commandment means only that you should not tell the witness in so many words that his or her testimony makes no sense for the following reasons, then, yes, you don't need to argue ultimate points like that with the witness. But Younger seemed to mean much more. Just as with his admonition not to ask one question too many, Younger seemed to be saying that the clever cross-examiner scores points against the witness on an internal scoreboard that the witness and opposing counsel are too dumb to comprehend and fix, until it's too late, and that you then finally explain to the jury with a great flourish in your triumphant closing argument. Only then it's too late. Anyone who tries this method of deliberate obscurity draws yawns and looks of puzzlement from the jury in closing.

No, the time to impress the jury that this is a witness whom they should discredit is while the witness is still in the courtroom. Otherwise, the point will be lost in the tidal wave of facts that wash over any but the briefest of jury trials.

> The Rewrite: *Save the ultimate point for closing* becomes *Make sure the jury understands every important point before the witness leaves the stand*.

Although fictitious, the famous grits scene in *My Cousin Vinny* is illustrative. The setup by cross-examiner Vinny Gambini is also classic for showing how a good cross-examiner closes escape hatches before springing the trap on the witness. Recall that the witness on direct placed the defendants' car at the scene of the crime, all in the five minutes that it took him to prepare his breakfast. The cross is priceless on video but just as good here—juxtapose Vinny's Brooklyn twang with the witness's soft Southern drawl:

> Q: (By Vinny): Is it possible that two defendants enter the store, pick twenty-two specific items off of the shelves, hand the clerk money, make change, then leave, then two different men drive up in a similar—don't shake your head yet, I'm not done, wait till you hear the whole thing so you can understand—two different men drive up in a similar looking car, go in, shoot the clerk, rob him, and then leave?
> A: (Mr. Tipton): No. They didn't have enough time.
> Q: Well, how much time [was] they in the store?
> A: Five minutes.
> Q: Five minutes? Are you sure? Did you look at your watch?
> A: No.
> Q: Oh, oh, I'm sorry, you testified earlier that the boys went into the store, and you had just begun to make breakfast, you were just ready to eat, you heard a gunshot, that's right, I'm sorry. So obviously it takes you five minutes to make breakfast?
> A: That's right.

The examiner has just locked the witness into his account

requiring that everything happened in five minutes while he was fixing his breakfast. The attorney proceeds to close a couple of other escape routes on the story's plausibility.

Q: You knew that. Uh, do you remember what you had?
A: Eggs and grits.
Q: Eggs and grits. I like grits too. How do you cook your grits? Do you like 'em regular, creamy or al dente?
A: Uh, regular I guess.
Q: Regular. Instant grits?
A: No self-respecting Southerner uses instant grits. I take pride in my grits.

All doors closed now. The witness has committed to having cooked regular, non-instant grits in five minutes. Time to launch the missile.

Q: So, Mr. Tipton, how could it take you five minutes to cook your grits, when it takes the entire grit-eating world twenty minutes?
A: Um . . . I don't know. I'm a fast cook, I guess!
Professor Younger would have left the point there, or even stopped one question sooner, once the witness has committed to regular, non-instant grits. But Vinny, as any good cross-examiner would, makes sure the jury gets the point.
Q: I'm sorry. I was all the way over here. Did you just say you were a fast cook, that's it?
A: (No answer.)
Q: Are we to believe that boiling water soaks into a grit faster in your kitchen than any place on the face of the earth?
A: I don't know.
Q: Or perhaps the laws of physics cease to exist on your stove? Were these magic grits? I mean, did you buy them from the same guy who sold Jack his beanstalk beans?
Prosecutor: Objection.
Judge: Objection sustained.

OK, the sarcasm is a bit much here—hilarious on screen, not a great idea in real life. But hammering the point home with a series of questions exposing the witness's vulnerability is the commandment-violating point here, and a real-life cross-examiner could have done the same with milder, yet still pointed questions. All the same, notice how, as soon as the objection is sustained, the cross-examiner asks a new question and drills until he gets his answer.

Q (By Vinny): Are you sure about that five minutes?
A: I don't know.
Q: Are you sure about that five minutes?
A: I don't know.
Judge: I think you've made your point. (Rapping gavel.)
Q: Are you sure about that five minutes?
A: I may have been mistaken.

Fiction, yes, but written by someone who knows what good cross-examination looks like.

Let's compare this cross-examination with Younger's list. The only commandment Cousin Vinny followed was short questions with plain words. Vinny violated every other one. All of them! He asked non-leading questions and questions he didn't know the answer to, let the witness repeat direct exam testimony, let the witness explain (in fact, insisted that the witness explain), and, most spectacularly, didn't save his killer point for closing argument.

Is it time to bury these ten commandments? I rest my case.

Let's look at a list of our rewritten commandments:

1. Be proportional to the harm caused to your case.
2. Ask simple, plain questions with narrow answers.
3. Ask only questions whose answers you can deal with.
4. Listen to the entire answer, and follow up.
5. Don't quarrel with the witness, except when it's obvious the witness really deserves it.
6. Stick with narrow, simple questions that avoid giving the witness a chance to explain or repeat the witness's core message. And if the witness insists on explaining anyway, then join battle.
7. Don't chase cheap points on your cross that the witness or redirecting counsel can easily crush.
8. Make sure the jury understands every important point before the witness leaves the stand.

There is no easy, memorable formula that will turn you into Clarence Darrow.

The list does not roll off the tongue. In fact, this list does not capture what it takes to be a good cross-examiner. It doesn't even come close. Yes, this is good tactical advice (but not a full list of all the important tactical points), and lawyers who follow this list will start doing far more vigorous, effective cross-examinations than those stuck in Younger's hyper-cautious school of cross. But tactics are far less important than the substance of what you choose to cross-examine about and how you go about it and how you prepare yourself.

So why spend the effort tearing down the old regime? That's my final lesson: Learning why the old commandments deserve to be broken is a great beginning step in liberating you, the cross-examiner, to be the courtroom advocate you deserve to be: smart, effective, and honest. ■