

## **LESSONS IN CROSS-EXAMINATION FROM MY COUSIN VINNY**

Professor Wigmore, in his treaty on evidence, famously said “Cross-examination is beyond any doubt the greatest legal engine ever invented for the discovery of truth ...”

No experience trial attorney would disagree with this maxim, but for it to be true the cross-examination has to be effective. It is as easy to lose a case on cross as it is to win it.

Most attorneys, in preparing cross-examination, follow Irving Younger’s famous ten commandments on cross-examining:

1. Be Brief
2. Use Plain Words
3. Use only Leading Questions
4. Be Prepared
5. Listen
6. Do Not Quarrel
7. Avoid Repetition
8. Disallow Witness Explanation
9. Limit Questioning
10. Save your Ultimate Point for Summation

However, in 1992 the hit movie “My Cousin Vinny” was released. I’m guessing that in all likelihood every one of you has seen this hysterical film. Vinny is an inexperienced New York attorney who failed the bar numerous times. His nephew and a buddy are college students passing through Alabama when they are mistakenly identified as robbers who knocked over the “sack of suds” and murdered the clerk. There are numerous eye witnesses, and Vinny arrives to assume their representation. What follows in a hysterical and monumental culture clash between the brash New Yorker and the Alabama Judge who

doesn't appreciate this interloper showing up in his courtroom. Let's look at an example:

[The two utes... - Bing video](#)

As the movie plays out, however, the inexperienced and brash New Yorker turns out to be a brilliant cross-examiner and in doing so calls into question some of Professor Younger's maxims. Let's see:

[My Cousin Vinny 1992 \(Your Witness\) Part 3 - YouTube](#)

So let's talk about what Vinny did that was effective with this witness? Well, first if you saw the movie you also will remember that before trial he went and personally visited all of the witnesses. In doing so, he was able to unearth the information he needed to call into question their testimony. So he did follow Younger's advice to be prepared. Second, having met this woman before, he knew that she was a kindly woman who would have tremendous jury appeal. Knowing this, he treated her with kid gloves, although he still found a way to use gentle sarcasm to undermine her ability to make the observations she testified to on direct. However, we have to say that Vinny does one thing here that would make Irving Younger crazy. Anyone know what it is? He asked a question without knowing what the answer was that he would get when he held up those two fingers and took a chance, she would get it wrong. Now, think about it. It was a risk but in this case, it was a calculated risk. He knew her problem was her eyesight. He had to remind her where he was before he even left the counsel table, and he had met her before. I think it calls into question whether some risks are worth taking. One more thing. The old rule is supposed to be to use only leading questions, but Vinny would have come off as a jerk if he said to the older lady something like, "I'm holding up three fingers, aren't I?" Instead, he asked the question in an open-ended fashion, "Now Mrs. Reilly, how many fingers am I holding up?"

Let's look at another cross:

[My Cousin Vinny - Magic Grits - YouTube](#)

Okay, so here we see a completely different kind of cross-examination. Where he went easy on the elderly woman, he sensed (again having met him) that in undermining this witnesses' credibility he would have to go after him much more aggressively. He had done his homework and knew the man had been making breakfast, and that fact could undermine the estimate of the time. Instead of asking only short questions, as Younger would advise, he started off by using a long question to state his whole theory of the case. It is a great reminder that there are times when the question may be more important than the answer. Most importantly, he found an error in the witnesses' testimony, in this case the time to cook grits. When the witness makes the classic witness error in failing to give up the incorrect testimony, he goes after him hard by sarcastically making fun of the time estimate, again making his point with the structure of his questions. Of course, you have to be prepared for the inevitable objection that you are being argumentative in such a situation.

Okay, next witness:

7 Bushes - YouTube

So now, once again, Vinny shakes up his style a third time. This witness is a little timid and soft spoken, but also clearly a simple man. In order to undermine the witness, he uses photos from the scene to show that the man could not possibly make the observations he claims. In doing so, though, note again that Vinny uses non-leading questions, such as "what are these things here between you and the sack of suds? (trees!) and what are these thousands of things on the trees (leaves!), and how about these bushy things (bushes!). Then he wraps it up by asking a long-winded question recapping all of the testimony the man just admitted to on cross to once again have he may not have been able to make the identification he had claimed on direct.

Now, although not strictly cross-examination, no examination of this movie can leave out the beautiful and talented Marisa Tomei, who won the Academy Award for her portrayal of Mona Lisa Davito, Vinny's girlfriend, who ended up being an expert witness at the murder trial:

[The defense is wrong - YouTube](#)

So, without spending a lot of time going off subject and delving in to expert witnesses, the one thing that strikes me here is that if you have a good expert, sometimes it's better just to wind them up and let them do their thing, instead of a normal back and forth examination.

So what are our take-aways. Well, number one is the only way to do an effective cross-examination is to be prepared. Vinny was the very essence of a completely prepared attorney. He knew what the witnesses would say on direct, and he had developed a theory on how he could undermine their effectiveness. Remember, of course, that sometimes you are not going to be able to completely decimate the direct, like Vinny did here. But if you can just ding them up, partially undermine the damage done on direct, it may give you the opening you need to hammer home your theory of the case.

Second, I am not hear to say that Irving Younger was wrong. Instead, my point is that his "Commandments" should be taken as guidelines and not absolutes. The majority of the time, it is likely better to ask short questions, make them leading questions, and be brief. But as an effective attorney, you have to consider whether there are times, based on the facts and the witness on the bench, to take a calculated risk.

At the end of the day, we have to remember that what we do is not science, but a combination of art and science. The courtroom will never be mistaken for a laboratory. Every experienced knows that the case NEVER goes in like you think it is going to go in. However, by

following Professor Younger's guidelines and not being afraid to go a little "Cousin Vinny" on a witness, you can have great success.