

State Bar of Michigan
Alternative Dispute Resolution Section
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Spring-Board

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TIPS FOR EFFECTIVE ARBITRATION--AN ARBITRATOR'S PERSPECTIVE

- I. **Organize**--Come in with a game plan, know your documents and witnesses and be prepared.
- II. **Don't be afraid to ask**--If you have questions regarding arbitrator style or preferences, do not hesitate to ask for pre-hearing conference to discuss issues with respect to evidentiary rulings or any other issues.
- III. **Work with your opponent**--Cooperate with opposing counsel to make things understandable and efficient. For example, a joint exhibit book is essential and avoid using the same document already introduced by the other side as a separate number since this only confuses matters.
- IV. **Opening statement is essential**--Avoid tendency to be less formal because it is an arbitration and to make either a cursory opening statement or none at all. Don't say "it's in my pre-hearing brief" since the arbitrator might have read this some time in advance and it's good to refresh key issues.
- V. **Pick your themes carefully and develop them** – Determine a select number of key themes which should be addressed in your pre-hearing brief, in your opening statement and throughout the course of presentation of all of your evidence. Each witness and document must tie into that theme, or else there is no reason to introduce them.
- VI. **Stipulate**--Stipulations are good, whether with respect to evidence or pre-hearing stipulations of fact, especially if a reasoned award is required. Even if not suggested by the arbitrator, be creative with potential stipulations, e.g., providing expert testimony through written direct, followed by oral cross-examination and re-direct.
- VII. **Objections**--Lighten up on the objections, but don't disregard all together.
- VIII. **Order of Witnesses**--Be open with the arbitrator and opposing counsel regarding your anticipated order of witnesses, length of witnesses and any such details. When you give estimates on length of witnesses, be correct or don't estimate at all.

- IX. **Be professional**--Assure your clients and witnesses act professionally. It is difficult not to react emotionally to certain testimony, but make sure to address this issue with clients in advance.
- X. **Time lines and charts**--Time lines are very helpful, whether or not stipulated to. Concise charts are good, but don't overdo it with a chart for every minor issue.
- XI. **Cross Examination**--Limit your cross-examination of your opponent's key witnesses. Again, pick your themes and make a limited number of points on cross. All rules of cross-examination apply and should be followed carefully. This is perhaps the weakest area of advocacy with a tendency to keep key opposing witnesses on seemingly forever without direction. Also, don't be afraid to waive cross-examination if appropriate. See attached "Irving Younger's 10 Commandments of Cross Examination."
- XII. **Provide alternatives for results**--Consider offering alternative, compromise results, for example, through your damages expert. Don't assume that the arbitrator is ruling in your favor. A compromise which is acceptable to your client may help, especially if there is a three-person arbitration panel.

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IRVING YOUNGER'S 10 COMMANDMENTS OF CROSS EXAMINATION

1. Be Brief

Be brief, short and succinct. Why? Reason 1: chances are you are screwing up. The shorter the time spent, the less you will screw up. Reason 2: A simple cross that restates the important part of the story in your terms is more easily absorbed and understood by the jury. 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.

2. Use Plain Words

The jury can understand short questions and plain words. Drop the 50 dollar word in favor of the 2 dollar word. "Drive you car" instead of "operate your vehicle."

3. Use Only Leading Questions

The law forbids questions on direct examination that suggest the answer. The lawyer is not competent to testify. On cross-examination the law permits questions that suggest the answer and allows the attorney to put his words in the witnesses' mouth. Cross-examination, therefore, specifically permits you to take control of the witness, take him where you want to go, and tell your important point to the jury through the witness.

Not asking controlled leading questions leaves too much wiggle room. What happened next? I would like to clear up a couple of points you made on direct? These questions are the antithesis of an effective cross-examination. Any questions which permit the witness to restate, explain or clarify the direct examination is a mistake.

You should put the witness on autopilot so that all of the answers are series of yes, yes, yes!

4. Be Prepared

Never ask a question that you do not know the answer to. Cross is not a fishing expedition in which you uncover new facts or new surprises at the trial.

5. Listen

Listen to the answer. For some, cross-examination of an important witness causes stage fright; it confuses the mind and panic sets in. You have a hard time just getting the first question out, and you're generally thinking about the next question and not listening to the answer.

6. Do Not Quarrel

Do not quarrel with the witness on cross-examination. When the answer to your question is absurd, false, irrational contradictory or the like; Stop, sit down. Resist the temptation to respond with "how can you say that, or how dare you make such an outrageous claim?" The answer to the question often elicits a response, which explains away the absurdity and rehabilitates the witness.

7. Avoid Repetition

Never allow a witness to repeat on cross-examination what he said on direct examination. Why? The more times it is repeated, the more likely the jury is to believe it. Cross-examination should involve questions that have nothing to do with the direct examination. The examination should not follow the script of the direct examination.

8. Disallow Witness Explanation

Never permit the witness to explain anything on cross-examination. That is for your adversary to do.

9. Limit Questioning

Don't ask the one question too many. Stop when you have made your point. Leave the argument for the jury.

10. Save for Summation

Save the ultimate point for summation. A prepared, clear and simple leading cross-examination that does not argue the case can best be brought together in final summation.

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.