

THE TEN COMMANDMENTS OF CROSS-EXAMINATION[†]

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I.

INTRODUCTION

Much has been written about the “art” of cross-examination. Not all of it, though, involves art. Some of it involves natural talent, but most of it involves hard work. In truth, three factors combine to create this “artistic” success -- personality, presence and persuasion. These traits are often manifest in the ability to think and react quickly. But something else is involved as well -- something that trial lawyers often hold in short capacity. That something is humility, and the ability to know when to quit. The art of cross-examination involves all of these traits, and more than a little luck.

This article is intended to provide yet another iteration of the Ten Commandments of cross-examination.ⁱ Here is the caveat, however -- one does not learn to be good at cross-examination by reading papers. The successful artist learns by doing it, or watching others do it well; by reading trial and deposition transcripts or, better yet, by conducting the examination personally. In this era, when there are too few trials to satisfy so many eager trial lawyers, cross-examination techniques can be practiced in depositions. The trial lawyer must learn to get the “feel” of a good cross-examination; to develop a personal cadence and style. The trial lawyer must learn as well to adapt to particular witnesses and different cases. But he or she learns by doing. In all this, of course, having some general rules in mind will not hurt. Hence, the “Ten Commandments.”

II.

THE COMMANDMENTS

A. The First Commandment: Thou Shalt Prepare

Of course, preparation is essential, but it would be surprising to learn how many trial lawyers fail to observe this basic principle. A lawyer must prepare in order to know what topics to cover. A lawyer must prepare because the jury will assess his or her depth of knowledge and commitment to the case by the demonstrated ability to handle the details of cross-examination. If the lawyer appears vague on the details, the jurors may conclude that they, too, should be unconcerned about the finer points of the case. Thorough preparation also will ensure that the witness appreciates the lawyer's competence. Under such circumstances, the witness will be less willing to take advantage of the lawyer's lack of first-hand knowledge. It takes hard work, but dividends flow.

For a plaintiff's cross-examination, preparation involves digging into every relevant background fact. This includes employment history, medical history, prior statements, and every other important detail. The cross-examination of the plaintiff can be a pivotal point at trial. Jurors tend to pay special attention to this encounter because they recognize that it focuses the essential controversy of the case -- a battle between the plaintiff and the defendant. A prepared and effectively accomplished cross-examination of the plaintiff, perhaps more than any other event at trial, can increase significantly the chances of a defense verdict. Unfortunately, an unprepared and poorly accomplished cross-examination can produce the opposite result.ⁱⁱ

Because many cases are decided by expert testimony, an attorney should prepare thoroughly for the cross-examination of an opposing expert. Generally, significant amounts of information must be gathered in advance of cross-examination. As a starting point, it is important to master the deposition taken in the case at hand because that deposition represents the greatest opportunity for impeachment. However, one should review depositions of the expert taken in other cases and be prepared to use them as well. Experts sometimes forget what they say from deposition to deposition; this is particularly true for the professional witness. In addition, expert witness databases are available from which to gather background information on a particular expert. It is also a good idea to contact lawyers who have encountered the expert. This creates an opportunity to build upon the good efforts of others. Finally, it is important to obtain all of the expert's prior writings and to subpoena the expert's entire case file, including

correspondence and other materials exchanged with opposing counsel or third parties. In this regard, check for advertisements or expert listings and carefully review all aspects of the expert's curriculum vitae to ensure that he or she has been accurate in every material respect.

One of the new and critical resources for information on an expert is the internet. Many experts maintain their own web pages. Several, for example, will list numerous areas of "expertise" to advertise their availability -- a fact that may diminish their credibility before the jury. Several have questionnaires that can be completed by attorneys or potential plaintiffs to allow them to "evaluate" a case. If the expert is employed by an academic institution, the institution's web pages can be searched to learn what courses the expert may be teaching. Many experts also are listed in internet expert databases. Some even participate in newsgroup discussions.ⁱⁱⁱ

In the example cited below, use of the internet proved to be dispositive. The particular case involved a plaintiff who was suffering from a rare form of cancer (T-cell lymphoma). She argued that her cancer was caused by the defendant's product. Although there was virtually no science to support a causative link, the plaintiff was able to enlist an advocate from the M.D. Anderson Cancer Hospital in Houston. That physician was willing to state that, within a reasonable degree of medical probability, the defendant's product caused the plaintiff's cancer. In reality, however, T-cell lymphoma is a rare cancer whose cause remains unknown. On cross-examination, the exchange between the expert witness and defense counsel took the following course:

Q. You are on staff at M.D. Anderson Cancer Hospital?

A. Yes.

Q. Isn't it true that M.D. Anderson Cancer Hospital has a web page?

A. Yes.

Q. Have you ever had any articles published on the M.D. Anderson web page?

A. A few.

Q. Do you remember one of your articles that appeared on the web page just three months ago?

- A. I think so.
- Q. In that article, you talked about T-cell lymphoma, the very type of cancer involved in this case?
- A. I believe so.
- Q. Let's be sure. Is this the article that was published on the web page?
- A. Yes, that's my article; it has my name on it.
- Q. I assume you knew that physicians and others might read this article?
- A. Yes, I assume so.
- Q. And, therefore, you wanted to be as accurate as possible?
- A. Of course.
- Q. Turn to page four of the article.
- A. Okay.
- Q. In this article, which you published on the web page just three months ago, you talk about what is known regarding the cause of T-cell lymphoma, isn't that right?
- A. Yes.
- Q. Isn't it true that you said the following: "No one knows what causes T-cell lymphoma." Is that what you wrote just three months ago?
- A. That's what it says.

This testimony not only discredited the witness, it also led the trial judge to conclude that the physician lacked reliable scientific support for her opinions. Judgment subsequently was entered for the defendant.^{iv} Preparation: the first and most important commandment.

B. The Second Commandment: Thou Shalt Know Thy Objective

Irving Younger, an advocate of short cross-examination, often stated that the lawyer should “make three points and sit down.” Sometimes, that is the way to go. Often, however, one needs to spend time with the witness to develop several critical points to counter the impact of the direct examination. Before initiating a cross-examination of any witness, the lawyer should clearly bear in mind those points he or she wishes to make with that witness. And then, he or she should write them down. These points also should be discussed with those who are assisting at trial. Effective cross-examination cannot be accomplished without a clear understanding of which points are critical to the case, and which ones can be extracted most appropriately from each witness. Only when understanding how to make these points and how to package them for the jury can a lawyer effectively communicate with the jury. If the jurors are sitting in the box wondering where the cross-examination is headed, it is likely that the lawyer does not know where the cross-examination is headed. Therefore, it is critical to make a list of what should be accomplished on cross. Near the end of that cross-examination, it is a good idea to return to the list to ensure that all points were covered.

C. The Third Commandment: Thou Shalt Take Baby Steps

Patience is a virtue in cross-examination. Delivery of key points is not just a destination, it is a journey on which the jurors should accompany the lawyer. They must understand step-by-step where the cross-examination is headed. It is called pacing; it is called communication.

Here is an example. Assume the case is being tried with an expert who has developed opinions, but has never submitted those opinions for peer review. One way to handle the situation at trial is simply to ask the following question:

Q. Have your opinions ever been submitted for peer review?

A. No.

This exchange gets right to the point. However, if the jury is to journey with the lawyer and understand the point, the following series of questions might be posed, to which the witness will likely answer “yes”:

- Q. You have heard about the peer review process?
- Q. And, by peers, we are talking about people in your area of science?
- Q. So, the peer review process involves a review of one's opinions by his/her scientific peers or colleagues?
- Q. It allows one to get valuable feedback from other scientists about what they think of your opinions?
- Q. It can provide a sense of whether your opinions are generally regarded as supportable and reliable by other experts in your field?
- Q. Can this be very valuable in the scientific process?
- Q. Does one form of peer review involve standing up at meetings and sharing your views with peers or fellow scientists?
- Q. You are letting them know your opinions?
- Q. And you are discussing with them the basis of those opinions?
- Q. This allows your peers to comment on the strengths or weaknesses of your opinions?
- Q. You have been involved in this litigation for five years?
- Q. You have, for the last five years, been expressing these opinions in courtrooms around the country?
- Q. Have you ever stood in front of a group of your fellow scientists to share with them the opinions you have just shared with this jury on direct examination?
- Q. Have you ever, at any scientific meetings, sought feedback from your fellow scientists on whether they think you are right or wrong?
- Q. Is another form of peer review the publication of articles?
- Q. When you submit an article to a good journal, the article is peer-reviewed before it is published?

- Q. By that, I mean that the editor of the journal circulates the article to various scientists for their comments?
- Q. By this process, can the editor be more comfortable that the opinions expressed in the article are valid and supported by the evidence?
- Q. This, too, can be a valuable part of the scientific process?
- Q. Can it be a way of weeding out bad science?
- Q. Have you ever submitted a manuscript stating your opinions to a journal for publication?
- Q. Have you even prepared a manuscript stating the opinions you have expressed to this jury?
- Q. Have you in any form ever sought feedback from the publication peer-review process concerning your opinions in this case?
- Q. So, sitting here today, after five years of involvement in litigation, you have never taken the time to prepare a manuscript and submit it to a journal so that your fellow scientists can determine whether it is even worthy of publication?

This journey takes time. That is not to suggest, however, that an enormous amount of time should be spent on every point. That will become ponderous and the jurors will become bored. The lawyer must gauge the importance of a particular point and assess what it will take to deliver that point effectively to the jury. Above all, don't hurry. Make the jury understand the point since a misunderstood point is no point at all.

D. The Fourth Commandment: Thou Shalt Lead the Witness (Usually)

Asking only leading questions is perhaps the oldest rule of cross-examination. It is an old rule because it is a good one. Leading questions are most effective because they essentially allow the cross-examiner to testify and the witness to ratify. The technique advances one of the important dynamics of the

courtroom -- control. Asking leading questions allows the cross-examiner to be forceful, fearless, knowledgeable and informative. Good things come from leading questions. So, when permitted, lead, lead, and lead. Usually.

Be aware that leading questions also can grow tiresome. No one likes to hear a hundred questions in a row that end with, "is that correct?" The staccato questioning of a witness can sometimes make the cross-examiner appear overbearing and cold. Thus, when implementing this ironclad rule of leading a witness on cross-examination, keep a few qualifying rules in mind as well.

First, learn *how* to lead the witness. Firing questions that begin with, "isn't it correct," may remind the jurors of an FBI interrogation from an old movie. A trial lawyer must search for ways to vary the routine. For example, in an intersection collision case, a fact witness might be called by the plaintiff to testify on several key points that favor the plaintiff. Yet, the one point that favors the defendant is the witness's recollection that the stoplight was red. On cross-examination, therefore, defense counsel might do the following:

Q. Isn't it correct that you were in a position to see whether the light was red or green?

A. Yes.

Q. And the light was red, isn't that correct?

A. Yes.

In isolation, these questions could effectively make the point. To make the point more casually, however, and to bring the jury along for the ride, the cross-examiner might do the following:

Q. As you were driving down the road, I guess you were paying attention to the lights ahead?

A. Yes.

Q. I mean, as a careful driver, I assume one of the most important things you do is look to see whether the light ahead is red or green?

A. Yes.

Q. And, as you were heading down Grand Street that Friday afternoon, and I'm talking especially about that afternoon, weren't you paying attention as to whether the lights ahead were red or green?

A. Yes.

Q. And as you were driving down the road that day, was the light red or was it green?

A. It was red.

Q. Is there any doubt in your mind that the light was red on that day?

A. No.

Q. Pardon me?

A. No, there is no doubt in my mind.

These are all leading questions, but not a single one contained the phrase, "is that correct," or the lawyer-like introduction, "isn't it a fact . . ." Often, when questioning witnesses who are not experienced testifiers, a kinder and gentler style of asking leading questions is the most effective.

A second caution or qualifying rule requires judgment in knowing when not to ask leading questions. Sometimes a lawyer becomes so obsessed with controlling the witness that every question becomes a leading question. This may not be required. For example, when questioning a professional expert on the stand, leading questions in certain areas are absolutely unnecessary. Examples:

Q. Why don't you just tell the jury how many times you have testified in a court of law?

Q. How much money did you make last year testifying for plaintiffs' attorneys around the country?

Q. Of the thousands of medical journals published around the world, tell the jury how many you have asked to publish the opinions you have expressed in this courtroom?

Q. How long has it been since you last treated a patient?

And so on. Often, it is best to have the answer come from the mouth of the witness. A lawyer asks these non-leading questions because he or she knows the answer and, if the witness waffles, the witness can be impeached.^v The point is not that every question must be leading, but that the expert is never afforded an opportunity to expound on a question of critical importance. When reaching this goal, look for the opportunity to use non-leading questions to break the monotony of repetitive leading questions.

E. The Fifth Commandment: Thou Shalt Know Thy Style and Adapt It to the Occasion

Good trial lawyers develop their own comfortable styles. In this regard, it is important to observe other trial lawyers; good trial lawyers are impressive. It is a mistake, however, to mimic them. Excellent trial lawyers come in many different packages. Some are funny; some are very serious. Some have booming voices; some speak softly. Some move around the courtroom; some never become detached from the podium. Each trial lawyer must do what is comfortable for him or her, following the old adage: Be true to thyself.

Just as there are effective points of style, however, there are also the negative. It is effective to be aggressive on cross-examination; just don't be a jerk. Getting angry or losing one's temper sometimes will imply that the witness got the best of the cross-examination. Know the difference between tough and mean, between confidence and arrogance, and between control and dominance. The jury will know the difference if the lawyer does not.

F. The Sixth Commandment: Thou Shalt Know When to Quit

All lawyers have experienced situations where they realize, half way through a cross-examination outline, that the battle is over -- either everything has been done with a particular witness, or there is little more that can be done. It is either recognition of victory or acknowledgement of defeat. One of the most difficult things for lawyers to do is to quit – to step away from the limelight. Yet, effective counsel will stay attuned to how the cross-examination is going as it is progressing. Adaptability is the key. Things may go better than hoped, or things may grow hopelessly worse. As the cross-examination proceeds, it is critical to stay attuned to the courtroom atmosphere. How is the jury responding to the performance? How is the judge responding? The best-laid plans of even the best cross-examination should be modified as circumstances dictate – even to the point of quitting.

Generally, there are two times to quit. The first occurs when the witness has been discredited or has made a monumental concession. There is no need for overkill, and the jury may resent counsel if he or she maintains the charge against the witness. Even worse, the witness may negotiate a remarkable comeback. The second time to quit is when the witness is killing the case or counsel. Trial lawyers generally are not steeped in humility, and defeat ill becomes them. The tendency is to keep fighting against all odds. Nevertheless, trial counsel should have the judgment to admit defeat at the hands of a witness. Occasionally, this result can be calculated before trial, if the reputation or deposition performance of the witness suggests that few points can be scored on cross-examination. Sometimes, unfortunately, one learns this lesson under the bright lights of the courtroom.

This does not mean, however, that the lawyer staggers to counsel table and sinks into the chair. Recall the scene in the movie, “My Cousin Vinnie,” when one of the defense counsel inartfully attempted to cross-examine a witness about his eyesight. Failing in the effort, counsel retired to counsel table only to proclaim: “Whew, he is a tough one.” Trial lawyers often engage illusion. Make it appear that this witness actually can support the case in some respect. Find some common ground with the witness so that the witness can conclude the examination by agreeing with counsel.

In this regard, imagine a case where a prescription drug is alleged to have caused injury to the plaintiff. An extraordinarily qualified medical expert has provided an opinion that the plaintiff's injury was caused by the medicine, and the expert cannot be moved from that causation opinion. Within the limits of whatever latitude a judge might allow on cross-examination, try to commit the expert to the following general points:

- You will agree that prescription drugs are important to the health of Americans
- All medicines have side effects
- Just because a medicine has side effects does not mean it should not be marketed
- The FDA balances the risks and benefits of every prescription medicine in determining whether it should be marketed
- Once the prescription medicine is marketed, the physician also balances the risks and benefits in determining whether to prescribe the medicine for a patient
- The [prescription medicine at issue in the case] continues to be available on the market
- The FDA has never ordered it to be removed from the market
- The FDA has never determined that this medicine should be unavailable to patients in America
- Indeed, physicians all over the country prescribe this medicine for patients who need it

In this fashion, the lawyer is driving home themes that support a defense of the pharmaceutical manufacturer and getting an effective witness to make these points. The cross-examination will conclude on a high note. Be careful, however, so as not to allow a good witness to further damage the case on re-direct by opening new avenues of inquiry on cross-examination.

G. The Seventh Commandment: Thou Shalt Know What to Take to the Podium

Preparation is a good thing, and developing a good cross-examination outline is very useful. Yet, in the heat of the battle, being organized, effective and quick to the point is critical. Some attorneys take volumes of materials to the podium for cross-examination. Some come armed with fifty-page cross-examination outlines. All of this is acceptable, if the volume of materials is manageable. No matter how hard the lawyer works on preparing cross-examination, however, surprise is inevitable. The lawyer may want or need to pursue a line of questioning that is out of order in the outline. An article, document or transcript may be needed unexpectedly for impeachment. All of these items must be accessible immediately. Fumbling around, shuffling papers or searching for one's place in an outline while the courtroom remains eerily silent does not convey a positive image.

There are many solutions to this problem, but the most important one is economy. Streamline the cross-examination outline in order to move around easily, making those points that are the most effective for the moment. Not every question need be written out. This is cross-examination, not an oratory contest. The jury will be able to tell the difference. Have the confidence to work from a shorter outline, knowing that additional points can be made to fill the gaps. If a lengthy cross-examination is anticipated, divide the outline into discrete parts, using a three-ring binder and a tabbing system. This will allow for a focus on the details within single topics, minimizing the risk of getting lost.

Handling the impeachment material also requires preparation and organization. Again, economy is the key. Know the materials and have them readily available. Combining these key materials into a collection of "maybe" documents will interfere with the ability to find what is needed when it is needed. Key materials should be cross-referenced within the outline and organized in a series of folders to retrieve them quickly. Having an assistant who thinks two steps ahead and follows the outline may be the most efficient way to handle these materials.

Impeaching with prior testimony also can be tricky since this requires some knowledge that an impeachment opportunity exists. One must locate the impeaching material and lay the foundation for use of that material. Finally, the impeaching material must be used effectively. The paramount rule on impeachment is this: use impeachment sparingly and only for telling points. If an expert testifies at trial

that he has been deposed sixty-one times, but in his deposition he acknowledged sixty-two times, the inconsistency usually is not worth the impeachment effort. With that rule in mind, preparation for cross-examination should focus on those concessions made by the witness in prior transcripts that are essential to the case. Include these points in the outline and be sure the outline tracks the precise question asked in the prior transcript. Then, have the transcripts marked in order to access the impeaching portion easily. Not every witness transcript needs to be at the podium, however -- only those that will be used. The same rules apply for any other impeaching material -- whether published articles, statements on a web site, letters or reports.

Now, a word about paperless trials. Most trial lawyers are heeding the trend to place materials in electronic form and eliminate paper in the courtroom. That trend is likely to continue. With judges forcing parties to use electronic media in the courtroom, defendants should be concerned no longer about presenting a “high tech” case in most venues. All parties will be required to do so. However, the use of electronic media can be a blessing and a curse. It is a blessing because it allows ready access to materials that are needed to cross-examine a witness. Pushing the right button or waving a wand over the right bar code produces what is needed. Yet the curse involves learning how to handle this technology. All the necessary software must be learned and loaded for every witness; the right materials must be available instantly for the witness and the jury. This requires practice. Once mastered, the presentation can be powerful and even intimidating to an opposing witness. Find the software that is “friendliest” and learn it. Use outside consultants if necessary. Once the process is familiar and its utility realized, lawyers will be inclined to use technology even if not required by the trial judge.

H. The Eighth Commandment: Thou Shalt Know Thy Audience

Consider a situation where the examiner is masterful, the witness is bested on technical points, and impeachment is accomplished with scientific journals. The entire direct examination is facing destruction with laser-like precision as the examiner bombards the witness with technical questions. The

problem? The jury has no idea what is going on. This situation sometimes makes for a good appellate record, but it makes for a bad trial result.

A gifted trial attorney is able to reduce the technical to the simple without appearing to patronize the jury. This is important in all phases of the trial, but it is most important in cross-examination when counsel is attempting to undermine the case of an opponent through the testimony of the opponent's witnesses. If the jury does not understand that an opponent has been bested, time has been wasted. If counsel is moving laboriously through technical points and boring the jury in the process, both time and substance are lost. The jury will grow angry. There are few truisms in the business of trying cases, but there is one: if the jury is mad at counsel, the case is lost.

Effective trial lawyers remember that the important audience is seated in the jury box. The jury must understand the case. In particular, jurors must understand the points being made on cross-examination. Yet again, this starts with preparation. Decide beforehand what points are important to the cause and whether they can be made effectively during cross-examination. Sometimes it is simply not worth investing the time and energy or invoking the jury's tolerance to make technical points with an adverse witness. Some of these points can be deferred until a party's own witness is on the stand.

If a point is worth making on cross-examination, decide how best to make it. The jury must understand the context of a given point. Use simple words in simple sentences and reinforce points that are conceded by a witness: "You said that it is standard practice to perform x-rays under those circumstances. Is this something you learned in your medical training?"

Be sure that when the witness concedes a point, the jury understands the advantage. Perhaps that involves some dramatic flair, if that is counsel's style -- a change in tone of voice, or movement from the podium. Perhaps counsel did not hear the answer, or fears that the jury did not, and asks the witness to repeat it. All of this involves style and judgment. Most of all, however, it involves telling the simple story to the jury.

Another effective way to make points is to highlight them for the jury. Some judges will allow counsel to enumerate key concessions on a flip chart or an Elmo. (Though keep in mind that some judges

do not). This can be an important way for jurors to remember the points made. They hear the points, then they see the points. Any time a point can be visually made or recorded, do so. It allows counsel to relate back to this visual point during closing argument, and it creates a more enduring cross-examination memory for the jury. Demonstrative exhibits or other visual aids generally make cross-examination more interesting, and the more interesting the cross-examination, the more attention the jury will give it.

I. The Ninth Commandment: Thou Shalt Know the Rules of Evidence

Much of cross-examination is style and technique, but that is only veneer. It is the substantive content that holds the case together. Counsel must introduce EVIDENCE during cross-examination. The admission of evidence requires a keen understanding of the rules of evidence and how to argue them. The best-planned cross-examination will be ineffective if counsel cannot navigate the rules of evidence.

The starting point is to know the rules of evidence. That does not involve reviewing law school notes from Evidence 101, or skimming through Wigmore's LAW OF EVIDENCE. It means, however, that the rules of evidence must be read again. It means that cases and articles must be reviewed. Generally, lawyers who are not also law professors do not maintain encyclopedic recollection of the rules of evidence. Yet these rules must be refreshed so that they can be argued usefully.

In addition to this general re-acquaintance, be sure to identify those rules that hold particular importance to the trial. Different rules come into play in different trials. Know well the ones that count. Anticipate problems with the authenticity and admissibility of documents needed for cross-examination. Be sure to contemplate an argument supporting the admissibility of evidence important to every aspect of cross-examination. Prepare trial briefs or motions in limine, and raise problem areas in advance of cross-examination. Be sure the cross-examination moves as seamlessly as possible. All of this increases the chances of winning at trial. Failing that, it makes for a good appellate record.

Not all judges are created equal. Some know the rules of evidence, but some do not. Some are courteous and patient, and some are not. Some will impose restrictions on cross-examination; some will not. Before trying a case to an unfamiliar judge, find out about that judge. Better yet, if there is time, observe the judge during a jury trial. Talk to attorneys who have tried cases in front of the particular judge, and otherwise gather information from every conceivable source, seeking out detail.^{vi} Find out how the judge enforces the rules of evidence, how documents can be used during cross-examination, whether there are time restrictions, where counsel must stand during cross-examination, whether the judge requires the witness to answer specific questions with no elaboration, how documents are used with the witness, and so forth. Knowing the peccadilloes of a particular judge will provide a measure of comfort, allowing counsel to focus on important substantive issues. If one's cross-examination is disrupted by a judge who is critical of perceived infractions, the pace and content of the cross-examination will be disrupted. For defense lawyers, this is a lesson that must be learned early in trial since cross-examination is one of the more immediate events.

III.

CONCLUSION

Reverting to lessons learned at the outset: Practice. Practice. Practice. Keep these commandments in mind until they become second nature. Once comfortable with the technique of cross-examination, it is easier to relax. Counsel will appear more confident, and the jury will sense this confidence. Such confidence will make counsel more effective in every phase of the trial and increase the chances of winning the case which, after all, is the reason for this business.
