THE TEN COMMANDMENTS OF CROSS-EXAMINATION: THE TOOLS FOR EFFECTIVE ADVOCACY

BY: MAXWELL OPOKU-AGYEMANG[1]

ABSTRACT

Introduction

There is no short cut, no royal road to proficiency in the art of advocacy. It is experience, and one might almost say experience alone, that brings success. I am not speaking of that small minority of men and women in all walks of life, who have been touched by the magic wand of genius, but of men and women of average endowments and even special aptitude for the calling of advocacy; with them it is a race of experience.

Cross-examination, which simply means the questioning of a witness immediately after his examination in chief by the opponent of the party who called him as a witness, is one of, if not the most important tool in legal advocacy. As stated above, the art of effective cross-examination is but experience. That notwithstanding, there is no denying the fact that the journey to that experience requires the mastering of some of the salient rules and commandments which will serve an advocate very well.

Let us consider the following scenario in a typical case involving a witness under cross-examination who is a hard nut to crack:

Q: So you admit confirming not denying you ever said that?

A: No! I mean yes! What?

Q: You are the person who robbed the Asante Akyem Rural Bank aren't you?

A: I can't be positive, but I think or my impression or rather my belief is that, according to my best recollection, I don't remember

Q: Sir would you ever lie to keep yourself out of trouble?

[1] The author is currently a Senior Lecturer at the Ghana School of Law. He was called to the Ghana Bar in September 1994. He holds LLB (BL) from Ghana, LL.M (Queen's University, Ontario, Canada) , LL.M (Utah, USA) and a Diploma in Journalism (Distinction) Ghana Institute of Journalism. Among his academic awards are: George Heyman Prize for Best Student Political Reporting (1989); Bensti-Enchill Award for Best Graduating Law Student, University of Ghana (1992); Mensah Sarbah Award for Best Graduating Professional Law Student (1994); B.J. da Rocha Award for Best Student in Advocacy and Legal Ethics (1994) and Rulon Clark Fellowship (1996).He is the author of the following books and manuscripts: The Constitutional Law and History of Ghana (Admax Law Series 2009); Law of Contract: A Student Companion (2005); The Law of Evidence in Ghana (2010); Introduction to the Law of Torts(Manuscript 2003). The author is also a pioneer Water Law expert in Ghana and is currently an International Legal Expert for the reform of the water sector in Sierra Leone.

A: It depends on what you mean by 'trouble', counsel

Q: Are you aware that you are answering my questions with a barrage of bewildering *non-sequiturs*?

A: Huh?

As indicated above, the practice of the law is but experience and it seems to me that in the line of duty of many advocates, they had encountered situations that they might have been tempted to throw their arms in desperation and give up. Thus, many a time counsel may retort "no further questions" not because he or she has been exhaustive but rather because the witness is answering his or her questions 'with a barrage of bewildering *non-sequiturs'*. The burden of proof, especially in criminal trials, expects counsel to prove not only the act but the contents of a person's mind. But humans, as devil advocates as we are, may harbor evil intents even when exhibiting angelic traits. But seldom do we quit as we are rest assured, that though unlike a medical doctor who could dissect the brain of a patient to detect a cancerous tumour, the learned person, though without physically dissecting the mind of a witness, could still extract the intent of even a stubborn witness.

An advocate should be aware that "every witness is an editor: he tells you not everything he saw and heard: for that would be impossible, but what he saw and heard and found significant, and what he finds significant depends on his preconceptions"[2]. As an editor, a witness may not be forthcoming with nothing but the whole story, especially in his or her evidence in chief and it is therefore incumbent upon counsel to apply his skills and experience to assist him to complete his story, if even unwillingly, through cross-examination.

Cross-examination is an essential feature of adversarial procedure and it has attracted a good deal of supporting rhetoric. Wigmore famously described it as 'beyond a doubt the greatest legal engine ever invented for the discovery of truth'[3]. In Viscount Sankey's view, it was a 'powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his story'[4].

The essence of cross-examination to our adversary common law system may also be seen in referring to a statement by Wellman:

> "If all witnesses had the honesty and intelligence to come forward and scrupulously follow the letter as well as the spirit of the oath 'to tell the truth, the whole truth, and nothing but the truth' and if all advocates on either side had the necessary experience, combined with honesty and intelligence, and were similarly sworn to develop the whole truth and nothing but the truth, of course there would be no occasion for cross-examination, and the occupation of the cross-examiner would be gone. But as yet, no substitute has ever been found for cross-examination as

[2] See Patrick Devlin, The Criminal Prosecution in England, 1960 at 66
[3] Wigmore on Evidence, Chadburn Rev, 1974, Vol V, p. 32
[4] See, Mechanical and General Inventions Co and Lehwess v Austin and Austin Motor Co [1935] AC 346 at 359, HL

a means of separating truth from falsehood, and of reducing exaggerated statements to their true dimensions"[5].

Similarly, in discussing the importance of cross-examination, Borins C.C.J in ***R v Rowwbotham*** (***No5***)[6] stated that:

> "The opportunity of cross-examination is an essential safeguard of the accuracy and completeness of testimony. In general terms, one may cross-examine a witness with respect to any subject which is relevant to any of the issues in the entire case even though such issue is not opened up in the examination in chief of the witness, including facts relating solely to the cross-examiner's own case or affirmative defence. Cross-examination is recognized as fulfilling three basic functions: to shed light on the credibility of the evidence in chief; to bring out additional facts related to those elicited in examination in chief; and to bring additional facts which tend to elucidate any issue in the case".

As was also succinctly put by Cory J in ***R v Osolin***[7]:

> "There can be no question of the importance of cross-examination. It is of essential importance in determining whether a witness is credible. Even with the most honest witnesses cross-examination can provide the means to explore the frailties of the testimony. For example, it can demonstrate a witness' weakness of sight or hearing. It can establish that the existing weather conditions may have limited the ability of a witness to observe, or that medication taken by the witness would have distorted his vision or hearing. Its importance cannot be denied. It is the ultimate means of demonstrating truth and testing veracity..The opportunity to cross-examine witnesses is fundamental to providing a fair trial … This is an old and well established principle that is closely linked to the presumption of innocence".

Emphasizing the importance of cross-examination, especially in criminal trials, McLachin J in ***R v Seaboyer***[8] had this to say:

> "The right of the innocent not to be convicted is dependent on the right to present full answer and defence. This, in turn, depends on being able to call the evidence necessary to establish a defence and to challenge the evidence called by the prosecution. In short the denial of the right to call and challenge evidence is tantamount to the denial of the right to rely on a defence to which the law says one is entitled"[9].

---

[5] Francis Wellman, The Art of Cross-Examination, 4th ed (1964) at p. 27
[6] (1977) 2 C.R. (3d) 293
[7] (1994) 26 C.R. (4th) 1
[8] [1991] 2 SCR 577 at 608
[9] See, Mansa v Nimo [1963] GLR 511 where Adumoa-Bossman J treated evidence not subjected to cross-**examination** as 'improper evidence'.

Notwithstanding the fundamental nature of cross-examination, and prior to discussing the important commandments , it is imperative for an advocate, after the testimony of an opposing witness, prior to cross-examination, to consider these:

- Has the witness testified anything material against us?
- Has his testimony injured our side of the case?
- Has he made an impression with the jury against us?
- Is it necessary for us to cross-examine him at all?

Therefore, if in the view of counsel a witness is seen to be apparently truthful and candid, cross-examination can be done by asking plain, straightforward questions. If however, there is any reason to doubt the willingness of the witness to help develop the truth, it may be necessary to proceed with more caution, and possibly to put the witness in a position where it will appear to the trier of facts that he could tell a good deal if he wanted to. In the same measure, counsel may be cautioned against overly-aggressive cross-examination so as to cause a substantial miscarriage of justice.

Thus, in ***Brown and Murphy v The Queen***[10], even though the appellate court upheld the decision of the trial court, the court nonetheless criticized the manner the accused's cross-examination was conducted. Counsel was chastised by McIntyre J in the following words:

> "During the trial counsel for the Crown conducted what might be termed an overly-aggressive and improper cross-examination of Murphy. There can be no doubt that the cross-examination in many ways was objectionable and exceeded the limits which should bind Crown Counsel in cross-examination. The trial judge did not restrict Crown Counsel sufficiently".

In Ghana, the power of the court to control the mode of general interrogation of witnesses is provided in section 69 of the Evidence Act[11] which provides as follows:

> "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to-
>
> (a) Make the interrogation and presentation as rapid, as distinct, and as readily understandable as may be, and
> (b) Protect witnesses from being unduly intimidated, harassed or embarrassed".

Much as the writer is *ad idem* with the purpose of the above provision, he is opposed to an unbridled judicial interference and interjections under the guise of 'reasonable control' of interrogation. What amounts to reasonable control over the mode of cross-examination was tested in ***Adzaku v Galenku***[12]. This was an appeal to the High Court, Ho from the decision of the Kpandu District Magistrate Court II. The relevant facts were that by a judgment dated 10 April 1970, the court ordered one Kweku Adegbe, a defendant in another case to provide drinks and other items for the "redemption of the plaintiff's life

[10] [1985] 2 SCR 273
[11] [1975] Act 323
[12] [1974] 1 GLR 198

from the fetish called Golokoe". The defendant had sworn the fetish on the plaintiff because the latter had given false evidence against him. After the judgment, the plaintiff in the present case and Adegbe went to the defendant, who was the priest of the Golokoe fetish. The priest outlined certain conditions which the plaintiff should fulfill before he performed the ritual. The plaintiff failed to perform his part of the bargain and so the defendant did not abate the possible effects of the fetish. The plaintiff said as a result he was put in perpetual fear of death. He therefore brought an action against the defendant claiming an amount as 'special damage for willful refusal to set him (plaintiff) free from the wicked hands of the defendant's Golokoe fetish and for torturing him (the plaintiff) mentally" and an order to compel the defendant to perform the necessary rites. The magistrate found the defendant liable and awarded against him damages and a further order that the defendant should perform the necessary fetish redemption customary rites within a week from the date of the judgment. On appeal, the only ground argued was that the whole trial was a nullity on the ground that the magistrate was biased and that the judgment was perverse and contrary to the rules of natural justice. The appellant supported the ground by contending that the magistrate had taken an undue part in the examination of the plaintiff's witness and had also cross-examined the defendant extensively. Even though Sarkodie J dismissed the appeal, he expressed the view on the extent of the exercise of judicial discretion in controlling the mode of cross-examination when he said as follows:

> "Another argument in support of the contention that the trial was unsatisfactory was to the effect that the magistrate took undue part in the examination of the plaintiff's only witness and that he cross-examined the defendant deeply. The part which a judge or magistrate for that matter ought to take while witnesses are giving evidence, must rest with his discretion…However, a judge must not so conduct himself as to cause inconvenience to counsel by his undue participation in the examination of witnesses…The examination by the magistrate of the plaintiff's witness went to clarify the point as to where he was when the magistrate arrived from Kpandu…It seems what the magistrate did cannot be faulted. He put questions with the view to bringing out answers to questions which had not been sufficiently answered. He did not descend into the arena, so to speak. He did not take an active part in the conduct of the case…"[13].

Commenting on the behavior of the magistrate as alleged by the defendant who told the court among others that the magistrate had described his witness as a liar and also exhibited violent temper and said that fetish priests in the district were fraudulent, the learned High Court Judge had this to say:

> "It must not, however, be forgotten, by those who preside at trials that witnesses whether called by the prosecution or the defence in criminal cases or by either of the parties in a civil suit are entitled to be treated with courtesy and politeness"[14]

The author agrees with McIntyre J of the Canadian Supreme Court when he said in ***R v Fanjoy***[15] that:

[13] Ibid pp 204-205
[14] Ibid at 205
[15] [1985] 2 SCR 233

> "The discretion to intervene in a cross-examination must of course be exercised judicially. Its exercise does not rest on legal considerations alone but will depend as well on the facts and the circumstances in each case, and will not be determined by the simple application of a fixed rule of law. The decision to exercise the discretion to intervene in cross-examination, or to refrain from intervention, is one involving consideration of both law and fact and cannot be said to be a question of law alone. Each case will depend on its own circumstances, and no doubt there will frequently be difficulty in deciding from case to case whether the point has arrived in a cross-examination where the trial judge should intervene.."

In furthering this discussion, one can also support the argument on the extent to which a judge participates in cross-examination by referring to a statement by Humphrey J in ***R v Bateman***[16] that:

> "Judges are entitled, if they form the opinion that a witness is not trying to help the Court, to do what counsel cannot do, and say: 'You behave yourself and tell me the truth'. It is sometimes very useful to be able to say that. Sometimes it pulls a witness together and makes him say what is the truth, but of course, it must not be done until the witness has given some indication that he or she is not trying to tell the truth".

To assist the bench in determining whether the point of intervention has arrived, as stated by McIntyre J, and to control over-judicial activism in conducting cross-examination, as well as not jeopardizing the interest of a witness, section 148 of the Evidence Act of India has provided statutory benchmarks to serve the bench by providing among others the discretion of the court to decide when a question shall be asked and when a witness would be compelled to answer if any such question relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character. However, as a statutory benchmark, the provision states that in exercising its discretion, the court shall have regard to the following considerations:

> "(1) such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies;
>
> (2) such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness, on the matter to which he testifies;
>
> (3) such questions are improper if there is a great disproportion between the importance of the imputation made against the witness' character and the importance of his evidence[17]; and
>
> (4) the court may, if it sees fit, draw from the witness' refusal to answer the inference that the answer if given would be unfavourable".

[16] (1946) 31 Cr. App R. 106 at 111 CA

[17] This provision may be likened to sections 52 and 53 of the Evidence Act of Ghana dealing with the discretion to exclude relevant evidence and admissibility of evidence of character

It must be stated that the main purpose of section 148 of the Indian legislation is to protect witnesses against aggressive cross-examination, especially on questions relating to character and credibility. Since the character of a witness is edible in cross-examination for the purposes of ascertaining his creditworthiness, it is natural that a person would not like to appear as a witness unless he was assured of some protection against aggressive cross-examination. The statutory duty of the court was highlighted by Annand J of the Indian Supreme Court in the ***State of Punjab v Gurmit Singh***[18] as follows:

> "There has been lately a lot of criticism of the treatment of the victim of sexual assault in the court during their cross-examination some defence counsel adopt the strategy of continual questioning of the prosecutrix as to details of the incident. The court should not sit as a silent spectator. While every latitude should be given to the accused to test the veracity of the prosecutrix and credibility of her version through cross-examination, the court must also ensure that cross-examination is not made a means of harassment or causing humiliation to the victim. A victim of rape has already undergone a traumatic experience and if she is made to repeat again and again, in unfamiliar surroundings what she had been subjected to, she may be too ashamed and even nervous or confused to speak and her silence or a confused stray sentence may be wrongly interpreted as discrepancies and contradictions in her evidence"[19]

Failure to cross-examine: the legal effect

Another issue which also needs a mention is the legal effect or the consequence of failure to cross-examine a witness on a fact in issue. As required by law, any matter upon which it is proposed to contradict the evidence-in-chief by the witness must be put to him so that he may have the opportunity of explaining the contradiction. Sometimes, failure to put questions to the witness may be held to imply acceptance of the evidence-in-chief. However, this rule has been applied flexibly in some common law jurisdictions. For instance, in Canada, it has been held that failure to put such questions to a witness in cross-examination does not preclude the adduction of evidence in rebuttal[20].

However, in ***Fori v Ayirebi***[21], it was held that if a party fails to cross-examine his opponent or his witness while the opponent or the witness is in the box and he has the opportunity to react to his opponent's case, the court should not attach much weight to the evidence that party gives on his behalf on that particular issue after the opponent or his witness has left the witness box.

---

[18] (1996) 2 S.C.C. 384 at 403

[19] See the case of Queen v Holmes (1871) LR 1 CCR 334 where the prosecutrix, in a sexual assault case, was allowed to be questioned on the fact whether she had previous connections with the accused or whether she was a common prostitute

[20] See, Hamm v Metz (2002) 209 DLR (4th) 385

[21] [1966] GLR 627

Similarly, in ***Quagraine v Adams***[22], where the defendant failed to cross-examine the plaintiff on particulars of expenses during trial, the Court of Appeal in a unanimous decision held that where a party makes an averment and his opponent fails to cross-examine him on it, the opponent will be deemed to have acknowledged that averment. As stated by Mensa Boison JA, "in all probability, the defendant must have demanded and was presented with particulars of the expenses. The conversion of the ¢3,000 to ¢8,000 at the time was in proper terminology, 'an account stated'. The plaintiff was not consequently obliged to re-open the account by way of giving the particulars; which state of affairs was acknowledged sub *silento* by the defendant in not cross-examining on the point".

It must be emphasized however that the rule on the consequences of failure to cross-examine is not applied strictly in the case of illiterate litigants not represented by counsel. In ***Mante v Botwe***[23], the plaintiff in an action for declaration of title to land as family property averred that under a land transaction entered into in 1922 between her deceased father and the grandfathers of the defendants, the grandfathers were granted leave and licence by her father to farm on the land and that transaction was not an outright sale as contended by the defendants. The parties submitted the dispute to arbitration. The arbitrators after hearing the evidence from the parties, their witnesses and their families, made an award in favour of the defendants on the ground that the plaintiff had slept on her rights.

The plaintiff then brought an action for a declaration of title before a district court. The defendants pleaded that she was *estopped* by the arbitral award. At the hearing a representative of the plaintiff testified, *inter alia*, that at the arbitration her 'witness was not invited to give evidence'. The magistrate however held that the defendants were in permissive and not adverse possession and therefore gave judgment for the plaintiffs. On appeal by the defendants from that decision, the High Court held that the magistrate was not competent to reject the arbitration award but nonetheless affirmed the decision on the ground that since the plaintiff's allegation that she was not allowed to call her witness was not challenged, there had not been a proper arbitration and therefore the arbitral award was null and void.

On a further appeal by the defendants, the court found that, the magistrate did not make any finding on the plaintiff's allegation that she was not allowed to call a witness; that all the parties were

[22] [1981] GLR 599
[23] [1989-90] 1 GLR 479

illiterates; and that the evidence established conclusively that the defendants' evidence amounted to a clear cut denial of the plaintiff's allegations.

On the issue of the effect of non cross-examination of a witness on an issue, the Court of Appeal held that a strict application of the rule of evidence that the failure to challenge in cross-examination evidence of material fact on oath would amount to its admission, might work injustice if accepted without caution or safeguards such as that the evidence so given must have been within the personal knowledge of the party against whom it was offered or that the personal make-up of the person expected to deny the allegation, e.g. being illiterate (such as the parties in the instant case) might disable him from appreciating the act of cross-examination.

However, if a person's total response in the witness-box added up to a clear cut denial of what his opponent had alleged either against him or to bolster up his case, the rule of implied admission for failure to deny by cross-examination would not be applicable.

As stated by Osei-Hwere JA:

> "It is true that the plaintiff's representative was …not directly challenged in cross-examination on her allegation that the arbitrators denied her witness the right of audience. It must, however, be borne in mind that the parties were not represented by counsel at the district court and the defendants appear to be ordinary illiterate farmers. That being so the court must accord such parties some indulgence".

On his part, Taylor JSC said:

> "I do not see how the evidence given that the witness of the plaintiff was in effect not called can be controverted now on appeal when no suggestion whatsoever was put to the witness who gave this piece of evidence for the plaintiff that her version of the matter is not true…The plaintiff was apparently illiterate and I am therefore prepared in accordance with the practice of our courts to take a generous view on her behalf that the witness she took along with her was not called to testify at the arbitration"[24].

In the case of illiterates therefore, it can be said that the proper test to adopt "is to find out whether there is positive admission of a fact in issue and if not whether there is contrary evidence from the

[24] See also Kombat v Lambim [1989-90] 1GLR 324, HC

opposing party's side. Where there is an issue joined, this becomes an issue of fact to be decided on the credibility of the parties and their witnesses"[25]

Collateral questions and finality

The discussions above have clearly established the fundamental importance of cross-examination, the extent to which judges may intervene or control the mode of cross-examination and the legal effect of the failure to cross-examine a witness on an averment. Another area of the subject of cross-examination is the issue of collateral questions and finality of answers. The general notion is that a party eliciting from a witness under cross-examination evidence unfavourable to his cause, may understandably seek evidence *ad infinitum* in rebuttal. However, to allow such a party to adduce such evidence without any limitation, would in most cases, probably lead to a multiplicity of issues, some of which might be of minimal importance or relevance to the facts in issue. It may also prolong a trial and therefore defeating one of the cardinal principles that litigation must have an end. It is to curtail this problem that the rule was developed that answers given by a witness under cross-examination to questions concerning collateral matters, that is, matters which are irrelevant to the issues in the proceedings, must be treated as final[26].

It must be emphasized that the issue whether a question is collateral or relevant to the case is not easy to determine. However, as was stated by Pollock CB in ***AG v Hitchcook***[27] if the witness' answer is a matter on which the cross-examining party would be allowed to introduce fresh evidence-in-chief, because of its connection with the issues in the case, then the matter is not collateral and may be rebutted. However, questions which go merely to the credit of the witness, with some exceptions, are clearly collateral and answers given are final. This is succintly explained in section 153 of the Evidence Act of India as follows:

> "When a witness has been asked and has answered any question which is relevant to the inquiry in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him; but if he answers falsely, he may afterwards be charged with giving false evidence".

Among the purposes for this rule is that the court has to find the facts of the case, not the character of a witness and therefore the inquiry about character need not be prolonged. The matter should end with whatever answer the witness has given bearing in mind however that if he knowingly gives false evidence, he may be prosecuted afterwards

It must be noted that the issue as to the distinction between cross-examination as to credit (collateral) and cross-examination as to matters in issue occur mostly in rape and sexual offences. In sexual

[25] Refer to Gyan alias Amoah v Dabrah [1974] 2 GLR 318 at 325
[26] See, AG v Hitchcook (1847) 1 Ex Ch 91
[27] Supra

offences, it seems that the rule as to finality of answers to collateral questions has crumbled ostensibly because in most of such cases, credibility, though not an ingredient of the offence, helps in determining consent or lack of it. Thus, in ***R v Bashir and Manzur***[28], in a prosecution for rape, the complainant was cross-examined on whether she had accosted men and offered them sexual intercourse in return for money. On whether the trial judge was right in allowing a rebuttal of the complainant's denial, it was held that the evidence that she was a prostitute, being relevant not only to her character but also relevant to the issue of consent was admissible to contradict her.

Likewise, in ***R v Kraus***[29], the accused alleged that the complainant, a woman he had met for the first time in a public house agreed to sleep with him. When after intercourse he refused to give her the money she had asked for, she filed a complaint of rape. The trial judge refused to allow the accused to adduce evidence of previous similar conduct of the complainant. On appeal, it was held that the trial judge had improperly prevented the defence in adducing the evidence in rebuttal. The Court of Appeal made this profound statement by acknowledging that:

> "In an age of changing standards of sexual morality it may be harder to say where promiscuity ends and prostitution begins…Evidence which proves that a woman is in the habit of submitting her body to different men without discrimination, whether for pay or not, would seem to be admissible"[30].

Notwithstanding the rule on collateral questions, it is not out of place in practice for a cross-examiner to ignore the testimony given by the witness in chief and confine his efforts almost entirely to destroying the witness, if possible, by attacking his integrity in connection with entirely collateral matters. As discussed above, the credibility of a witness may not be a fact in issue in the sense of a fact that must be proved in order to ground a civil claim or establish the element of a criminal offence. It may be indirectly relevant to the determination of those facts that give rise to legal consequences, albeit essentially a side or collateral issue.

Even though such method may be employed by a cross-examiner, we should always be mindful of the statement by Sopinka J in ***Fouzi Merchand*** *Meddoui v* ***Queen***[31] to the effect that "where the proposed line of questioning related to a collateral matter and where its relevance was extremely tenuous then notwithstanding the wide latitude permitted in cross-examination in a criminal case, a judge may be right to exclude the cross-examination".

Haven delved into some collateral issues in discussing cross-examination, the question then is what should be the ten basic cardinal commandments that should be employed in an effective cross-examination. It must be stated that much has been written[32] about the 'art' of cross-examination but not all of it involves art. There is some element of natural talent but most of it involves hard work. Honestly, three basic ingredients combine to create a good cross-examiner, namely personality,

[28] [1969] 1 WLR 1303
[29] [1973] 57 Cr App R 466
[30] Ibid at p 475
[31] [1991] 3 SCR 320
[32] See Francis L. Wellman, The Art of Cross-Examination, op cit

presence and persuasion. These characteristics are often manifested in the ability to think and react quickly and the ability to know when to quit. In all these however, having some general mosaic rules in mind will not hurt at all, hence the following 'Ten Commandments'.

1. The First Commandment: Thou Shalt Prepare

Preparation is essential and therefore a lawyer must prepare in order to know what topics to cover in a cross-examination. A cross-examiner should prepare because the judge or jury will assess his or her depth of knowledge and commitment to the case by the demonstrated ability to handle the details of the cross-examination. Thorough preparation also ensures that the witness appreciates the lawyer's competence. In cases involving expert witnesses, the cross-examiner should prepare thoroughly for the cross-examination of an opposing expert without exhibiting any complex. Expert sometimes forget what they say from case to case; this is particularly true for the professional witness.

Let us consider this scenario involving a plaintiff who was suffering from a rare form of cancer called T-cell lymphoma. The plaintiff sued on products liability arguing that her cancer was caused by the defendants' product. Even though there was no conclusive medical research to support a causative link, the expert witness of the plaintiff was willing to state that within a reasonable degree of medical probability, the defendants' product caused the plaintiff's cancer. On cross-examination, the following ensued:

Q. You are a staff of Agroyesum Cancer Hospital?

A. Yes

Q. Isn't it true that Korle-Bu Cancer Centre has a web page

A. Yes

Q. Have you ever had any articles published on the 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 is 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 said 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 is what it says

This line of cross-examination not only discredited the expert witness, but also will lead the trial judge to conclude that the expert lacked reliable scientific support for his opinion which may end up with judgment for the defendant. This is the fruits of painstaking preparation and mastering of information on the expert and the sickness. Preparation is therefore the first and most important commandment

2. The Second Commandment: Thou Shalt Know thy Objective

Knowing the objective of a particular cross-examination is very important. When the objective is known, the cross-examiner can just make three points, literally, and sit down. Thus, before commencing a cross-examination of any witness, the examiner should clearly bear in mind those points he wishes to make with that witness and those points should be put down. It must be emphasized that 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. If the court is wondering where the cross-examination is headed, it is likely that the cross-examiner does not know where the cross-examination is headed and in the final analysis the decision of the court may head somewhere. Therefore, it is very critical to make a list of what should be accomplished in cross-examination.

3. The Third Commandment: Thou Shalt take baby steps

This commandment simply extols the virtue of patience in cross-examination. It must always be remembered that the delivery of key points is not just a destination but a journey on which the court should accompany the cross-examiner. For instance in a cross-examination of an expert who express opinion which has not been subjected to a peer review, a cross-examiner who intends a killer punch may ask the following questions:

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

A. No

This exchange may get the desired answer however, if the court is to go on to that journey with the cross-examiner and understands the import of the questions, it may be better to adopt a "baby steps' approach by beginning with series of questions as follows:

Q. You have heard about the peer review process?

Q. And by peers, we are talking about people in your area of competence?

Q. So the peer review process involves a review of one's opinion by his peers or colleagues?

Q. It allows one to get valuable feedback from others about what they think of your opinions?

Q. This litigation has been going on for number of years and for these number of years you have been expressing these opinions, have you ever stood in front of your peers to share with them the opinions you have just shared with the court?

Q. When you submit articles to a good journal, the article is peer reviewed before it is published?

Q. Can it be a way of weeding out bad scientific opinion?

Q. So sitting here today and after these number of years of involvement in this area, you have never submitted these opinions to your peers so that they can determine whether it is even worthy of consideration and or publication?

This journey, obviously takes time and avoid revolutionary ends, but the journey may be worthwhile. It is not by any means being suggested that all cross-examination should take this circuitous route as in some cases the court will become bored. The cross-examiner, in all cases should gauge the importance of a particular point and assess what route it will take to deliver effectively to the court. Always remember that a misunderstood point is no point at all.

4. 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 more often is a good one. Leading questions in cross-examination are most effective because they essentially allow the cross-examiner to testify and the witness to ratify. However, be aware that leading questions can also grow tiresome. No court will like to hear a cacophonic questions all ending 'is that correct?'. Supposing a plaintiff witness in a collision case makes a point that favours the defence, for example, his recollection as to whether the traffic light was red, the defence lawyer 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

However to make the point more casually, and to bring the court along for the smooth journey, 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 to look to see whether the light ahead is green or red?

A. Yes

Q. And as you were heading down the High Street that afternoon, and I am 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 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.

5. The Fifth Commandment: Thou Shalt Know the style and adapt it to the occasion

A good cross-examiner develops his own suitable and comfortable styles. It is therefore imperative for trial lawyers to follow the trail of others and observe their mannerisms. It is however, a mistake to attempt to mimic others. Good cross-examiners appear in many forms: some are funny; others are very serious; some have booming voices; others speak softly. The command however is, an examiner must do what is comfortable for him or her; in a nutshell be natural and true to yourself. Even though it may be effective to be aggressive sometimes, a good cross-examiner should learn to control his temper as getting angry may lead to an assumption that the witness got the best out of you. A good cross-examiner should know the demarcation between tough and mean, between arrogance and confidence and between control and dominance.

6. The Sixth Commandment: Thou Shalt know when to quit

Experience has shown that there are situations where half way through a cross-examination there is a realization that the battle has ended, that is, either we are done with a particular witness, or there

is little more that can be done. In most cases it is either the recognition of victory or the acknowledgment of defeat. In all things, the good counsel is the realization that things may go better than hoped or things may grow hopelessly worse. Thus, as the cross-examination proceeds, it is critical to gauge the court room atmosphere, including the demeanour of the presiding judge and or the jury. The best laid out plans for a cross-examination should be modified if the atmosphere in the courtroom warrants it. Generally, there are two times to quit. The first occurs when the witness has been so bruised or has made a gargantuan concession. In such situations, there is no need for overkill and the jury may for instance, as humans as they are, resent the cross-examiner if he maintains the charge against the witness. Even worse, the witness, as a dead goat, may negotiate a remarkable comeback.

The second time to quit is when the witness is killing the case. As it may be difficult for counsel to eat humble pie, there is the tendency to keep fighting, even if the fight ends in futility.

7. The Seventh Commandment: Thou Shalt know what to take to the Podium

As discussed at the beginning, preparation is a good thing and developing a good cross-examination outline is extremely helpful. It must be emphasized that in the heat of the battle of cross, being organized, effective and quick to the point is also very critical. Some lawyers out to impress may come to the podium with volumes of materials. Some may even come with a 100 page cross examination outline in order to, though erroneously, to cover all blades. Experience however shows that no matter how hard a cross-examiner works on preparing for an impending cross-examination, surprise is inevitable. The element of surprise may therefore compel the examiner to pursue a line of questioning outside the voluminous outline. In all these, it should be remembered that fumbling around, shuffling papers or searching endlessly or repeatedly for documents while the court waits with baited breadth does not convey a positive image. The major lesson from this commandment is that the cross-examiner should always streamline the outline in order to move around easily, making points that are the most effective for the moment but not to please the crowd; remembering always that he is conducting a cross-examination and not an oratory contest.

8. The Eighth Commandment: Thou Shalt Know the Audience

A gifted cross-examiner is the one able to reduce technical jargons to simple terms without patronizing the court. It is pointless for a cross-examiner to attempt to meet the witness boot for boot in the use of technical terms and materials, even if well versed in those areas. The problem may be that the jury may have no idea what is going on. If the jury, for instance, does not understand that an opponent has been 'busted' then time has been wasted. If counsel is moving laboriously through technical terms and boring the jury in the process, both time and substance are lost. As the saying goes, if the jury is mad at counsel, the case is lost. Cross-examiners should always remember that the important audience is seated in the jury box but not in the gallery. The jury must therefore understand the case. The jury must understand the context in which points are raised. It is appropriate to use simple words in simple sentences and reinforce points that are conceded by a witness. This is done to ensure that the jury understands the advantage of that concession.

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

Much of what have been said in this paper seems to suggest that cross-examination is all about style and technique, but the truth is that is only veneer. It is the substantive content that holds the case together. In other words, style and technique only fulfills the rules of evidence. In simple terms, a cross-examiner must always introduce 'evidence' in cross-examination. The best-outlined cross-examination will not yield any positive results if counsel cannot navigate through the rules of evidence. The starting point thus is to know and abide in the rules of evidence. I am not in anyway inviting a cross-examiner in the heat of the battle to refer to his law of evidence notes or navigate through Opoku-Agyemang on Law of Evidence in Ghana. The command simply is this: the rules of evidence must be read over and over again. It is undeniable fact that generally lawyers who are not also law professors do not maintain encyclopedic recollection of the rules of evidence or any other area of law, as the case may be. That notwithstanding refreshing memory of these rules will better serve a practitioner in arguing usefully. In addition to the general admonition, a cross-examiner must also be sure to identify those rules that hold particular importance for the trial at hand. However, in any particular trial anticipate problems with the authenticity and admissibility of documents needed for cross-examination. In the heart of cross-examination be sure to contemplate an argument supporting the admissibility of evidence important to every aspect of the case.

10. The Tenth Commandment: Thou Shalt Know the Judge

It must be stated here that commanding counsel to 'know' a judge is different from 'seeing' the judge as usually used in Ghanaian parlance. This commandment is simply advising counsel to learn about the strength and weakness of judges they appear before. Not all judges are created equal; some may know the rules of evidence, but some may not; some are very courteous and patient, others are not; some will impose restrictions on cross-examination, some will allow it to flow. The tenth commandment therefore seeks to encourage counsel to learn about an unfamiliar judge prior to appearing before him. Where there is a time constraint, counsel may observe the judge during a trial to familiarize himself with his demeanors. Knowing the peccadilloes of a particular judge will provide a measure of comfort, allowing counsel to concentrate on important 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 may be disrupted.

Conclusion

I have in this paper attempted to share some thoughts on some rules of evidence and what I perceive to be the key commandments for effective cross-examination. Even though ten main commandments have been provided, the danger is for a reader to choose which among these is the greatest of all the commandments. To those readers I say to them: love the rules of evidence with all your heart, with all your mind and with all your soul and then love evidence as thyself. In the physical realm the lessons that are learnt are that practice, practice and practice.

Introduction