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The Ten Commandments of Cross-Examination Revisited:
Should you sin to win when the case is criminal?

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Irving Younger's lecture on cross-examination, which I first heard in the mid-1970s, is like the delivery of the slightly more famous Ten Commandments by Moses at Mt. Sinai -- accepted on faith and followed by nearly all. Many litigators keep their notes of that lecture close at hand and review them routinely in preparation for the cross-examination of important witnesses in jury trials, mindful of Younger's promise to torment those who stray from his course before they are gray-haired with experience.

Often overlooked, however, is that Professor Younger's background was primarily in academics and in civil, as opposed to criminal, litigation. His inflexible belief that great cross-examination requires substantial talent, time, and financial resources, in addition to many years of experience, means that nearly all of us who toil in the criminal defense field are doomed to failure since, in most cases, we lack at least one of the things that Younger deemed to be so essential.

Accordingly, Younger's "ten commandments" can be modified to assist criminal trial attorneys who aspire to become more effective cross-examiners in less time and under more difficult circumstances than Mr. Younger would have deemed possible or appropriate.

To review, the ten commandments are as follows:

1. Be brief
2. Ask short questions using plain words
3. Ask only leading questions
4. Do not ask a question if you do not know the answer
5. Listen to the answer
6. Do not quarrel with the witness
7. Do not allow the witness to repeat his or her direct testimony
8. Do not permit the witness to explain
9. Avoid asking the one question too many
10. Save the explanation for summation

Younger vehemently warned the young lawyer to "never! never! never!" violate these proscriptions and threatened to "haunt" those who transgressed. Rather than be intimidated by his strict set of rules, criminal trial lawyers should understand the theories that underlie the ten commandments and adhere to them rather than the literal mandates. Given the inherent limitations that criminal defense attorneys often face, Younger's ten commandments require some modification when applied in most criminal trials.

Basic principles

Be in control. Younger's commandments implicitly rely on three basic principles of cross-examination. The first is that the cross-examiner must always be in control. If you can control yourself, you can control your questions, the subject matter, the witnesses, and, finally, the outcome of the case.

Have a workable case theory. The second core principle is that the attorney should know enough about the facts and applicable law to ensure that, when it is time to cross-examine, he or she will be able to do so while keeping in mind a workable theory of the case. That is, the attorney must maintain a hypothesis that reconciles the greatest number of potential disparities in the evidence.

If your theory of the case fails to account for all of the potentially damaging evidence against your client, then you may find yourself in the untenable position of having to abandon during closing arguments the themes of the defense you set forth in your opening. Thus, in preparing for and conducting cross-examination, your primary objective must be to adduce testimony supportive of your theory of the case.

Maintain your credibility. The third unstated premise underlying the ten commandments, less obvious than the previous two, is that credibility is critical to successful cross-examination. You must do everything possible to enhance your own personal integrity with the jury, while undermining your opponent's credibility. To this end, the attorney must not make

the common mistake of interpreting "opponent" in the narrow sense; instead, a criminal defense attorney's adversaries include not only the prosecutor, but also critical witnesses, nontestifying case agents who assist the prosecutors in court, law enforcement agencies, and, quite frequently, the court itself.

Personal advocacy and sponsorship

Although trial lawyers have always, at least anectdotally, recognized the importance of personal credibility in winning cases, two recent books provide valuable insights on this issue. In Trying Cases to Win (1: 24\n\26 (Wiley, 1991), Herbert Stern, a former United States Attorney and federal district court judge, illustrates the concept of "personal advocacy" using Abraham Lincoln as a model.

Lincoln was an extremely successful trial attorney, even though he was not a polished advocate, often fumbling around in the courtroom. The reason for his success was that he had an "affidavit" quality about him, which made jurors overlook the fact that he was a lawyer--that is, a despicable hired gun who bleeds people dry and takes pleasure in causing emotional anguish. In short, Lincoln's personal integrity enabled him to appear to be objective, thereby increasing his effectiveness as a lawyer.

In Sponsorship Strategy, (Michie, 1990), Robert Klonoff and Paul Colby, two other former prosecutors, discuss the concept of "sponsorship." In their somewhat cynical but almost certainly

accurate view, jurors always believe that the lawyers on both sides of a case are extremely biased and are willing to go to any length to win for their clients. Accordingly, jurors distrust counsel from the start and automatically discount the significance and the weight of the evidence counsel elicit and the arguments they make. This concept holds true not only for testimony brought out by the attorney on direct examination but also for evidence, no matter how damaging, adduced in the first instance during cross- examination.

The Palm Beach trial of William Kennedy Smith, which because of intense media scrutiny coupled with the advent of "Court T.V." acquainted millions of citizens with the realities of a criminal trial, was a graphic example of how these concepts of personal advocacy and sponsorship play out in the courtroom.

Ann Mercer, a friend of the alleged victim, was the first major witness called by the prosecutor, Moira Lasch. When defense attorney Roy Black elicited on cross-examination that Ms. Mercer had been paid $40,000 for her "story" by a TV tabloid show, the courtroom audience (including the jurors) "erupted." The judge, Mary Lupo, had to "temporarily halt . . . the proceedings and threatened to 'clear' the courtroom if there were any more 'audible responses.'" (Washington Post, "Smith Case Witness Paid $40,000 by TV," December 4, 1991 at p.A3).

In my view, the prosecutor made a critical error in failing to elicit Mercer's "baggage" on direct examination. In the process, the prosecutor so seriously damaged her own credibility

with the jury that the trial was effectively over before the alleged victim had even testified. Indeed, this fiasco reportedly caused the prosecutor to revise her entire order of presentation and to call the victim as the next witness despite having planned to call her last.

It was particularly difficult for the prosecutor to regain her credibility because she was facing an attorney whose personal advocacy skills are legendary. ("[Roy Black has] swept the floor with many proud prosecutors. . . . The jury believes every word he says." ("Willie Smith's Dogged Defender", Washington Post at B1, 8 (Dec. 2, 1991) (emphasis added)).)

I. Be brief

Younger's first commandment -- "Be brief" -- is, as a general matter, good advice. It is premised on the recognition that, unlike the trial lawyer, jurors have only one chance to pick up aurally all the information they need to decide the case, a very difficult thing for anyone to do.

The theory here is that less is more; however, Younger inflexibly limited this rule by commanding that the attorney never elicit more than three points from a witness on cross-examination. In practice, this proposition is difficult if not patently wrong. Four examples of when you should consider breaking this commandment are 1) when questioning a drug kingpin who has been running a nationwide criminal enterprise for many years and who has testified for days on direct examination; 2) when you continue to "strike gold" in area after area of cross-

examination; 3) when you have very little with which to impeach an important witness and therefore has to probe deeply to try to find something damaging in order to make some argument about his or her testimony at closing; or 4) where it is essential that the jury have an adequate opportunity to "get to know" a witness, so they can see through the carefully coached veneer that was presented during the prosecution's direct examination.

Younger's maxim would seem to preclude the use of effective repetition during cross-examination. In fact, making an important point in five, six, or even ten different ways is an indispensable psychological tool to enhance juror recollection. Naturally, the attorney must craft the examination to avoid creating the impression that a lengthy, complicated cross was necessary to make inroads with the witness. However, this first Commandment should be modified to read, Be as brief as you can under the circumstances; and the only absolute corollary is Never prolong an unproductive cross-examination.

II. Ask short questions

Observing the second commandment, "Ask short questions using plain words," will enhance both control of the witness and juror comprehension insofar as one-word answers will most likely be elicited. This is a sound rule. If counsel breaks down the subject of the inquiry into its component parts in order to permit questions no longer than a line of transcript and uses words that everyone understands, the jury will be less likely to dismiss the attorney as some pompous fool who reads a thesaurus

at night before going to bed.

The use of simple language also minimizes a frequent problem that occurs in cross-examination: the distracting colloquies with the witness over "definitions." Questions from the witness such as "What do you mean by ....?" undermine your attempt to develop pace and tempo. But, if the questions are brief and comprehensible and the witness nonetheless quibbles with the attorney about what is meant by the question, the jurors' impatience will be with the witness, not with you. In fact, you should foster and highlight inappropriate "fencing" to provide the witness with a full opportunity to be obstreperous in front of the jury.

There is one major exception to the rule requiring only short questions: when the examiner intends to make a speech rather than elicit information. In this situation, the attorney is unconcerned about objections that a question is argumentative or compound, because the true aim is to sum up for the jury the reasons why the witness should not be believed by lumping them all together in the form of an inquiry. The witness will probably never have to answer the question, but the examiner hopes that the jury will do it silently for the witness. Accordingly, <u>ask only short questions using plain words, except when making a speech.</u>

III. Ask only leading questions

This third commandment will get you the answers you want instead of the responses the witness would like to give. This

principle is one of the golden rules of cross-examination, and attorneys who deviate from it are often presumed by their colleagues to be, at best, inexperienced and, at worst, incompetent.

Although there is much wisdom in this directive, it should not be followed invariably. Particularly in lengthy examinations, a constant diet of leading questions can become extremely monotonous and boring, resulting in the attorney sounding stilted and causing the jurors to think you are unfair. They will be saying to themselves: "Damn, I'm glad that lawyer is not cross-examining me. It's just relentless. He never lets up." Moreover, in the unfortunate, but not uncommon, situation where the witness has seriously hurt the defense but the attorney has no obvious impeachment, counsel may be forced to probe in an open-ended fashion in search of something to argue in summation.

Alternatively, when you are certain that a witness's explanation will be beneficial, either substantively or strategically, you may not want to ask a leading question. By deviating from the rule, counsel can also reduce the "sponsorship" costs because the evidence is not being elicited by virtue of the inquiry itself. A nonleading question also sometimes catches a witness off guard, because many witnesses are prepared by the prosecutor to expect the defense attorney to attack them. And such questions can change the tempo at a critical moment to the examiner's advantage.

It is often beneficial to lure a witness into taking a

position on which the attorney knows the witness can be impeached. If you are in possession of a signed statement from a witness that is helpful to your case, it is often very effective to offer that witness an opportunity to give testimony that differs from that statement in response to a nonleading question before cross-examining on the inconsistency.

The adept defense attorney should not blindly follow Younger's command to ask only leading questions but rather should <u>use the most profitable methods of cross-examination available given the specific situation.</u>

IV. Don't ask a question if you don't know the answer

This is a great idea in a perfect world. Once again, the attorney maintains control of the witness and subject matter by inquiring about only what the attorney chooses to hear. And, as with virtually all of Younger's teachings, counsel will be hurt far less by following this commandment than by disregarding it. However, there are situations which "sinning" is appropriate.

Sometimes, as noted above, sometimes you do not care what answer the witness gives because you have a sworn statement with which to impeach the witness. Other times, you may have considered all possible answers that the witness could give to a question and know that no matter which way the witness tries to squirm, you can use the answer to emphasize the points you want to make.

Younger's theory about this particular commandment is that the trial is not the time for discovery. Unfortunately, unlike

their civil counterparts, criminal defense attorneys do not have depositions, interrogatories, requests for admission, and other civil discovery tools available to them.

Compliance with this commandment is easier when the client has substantial resources for investigation, where the jurisdiction permits pre-trial depositions in criminal cases, and when the witnesses cooperate instead of dialing 911 when the defense attorney or the private investigator knocks on their door. If you are without these advantages and if the witness has critically damaged your client on direct examination, you cannot afford to adhere slavishly to this mandate.

V. Listen to the answer

It is obviously senseless to argue with the proposition that when one asks a question, one should listen to the answer. However, this fifth commandment does require some expansion: Listen to and watch the answer and then follow up on what you hear and see.

The attorney must not only aurally observe what the witness says but must also observe the facial expressions and body language of the witness as well as the reaction to the answer by the jurors, clerks, marshals, court reporter, judge, and spectators. Then the follow-up questions must take into account all of these responses.

Frequently, witnesses may reveal much to the attorney and jury through subtle gestures and postures. David Mamet, in his movie House of Games, describes the psychological concept of the

"tell." By closely watching the actions of a witness, an attorney can identify a gesture, the "tell", which gives away that person's thoughts. If someone constantly looks towards the prosecutor during cross-examination, it may indicate that the witness is looking for coaching or support. The witness should be questioned about those gestures. In short, if you only listen to the witness's answer and do not carefully watch the witness as well, you may miss valuable "tells" that could lead to a more fruitful cross-examination.

VI. Don't quarrel with the witness

Younger, obviously unaccustomed to representing criminal defendants with whom he would not want to socialize, thought it "inelegant" and "unurbane" to argue with a witness and, moreover, felt that doing so detracts from the impact of a stupid answer.

However, it is not exactly elegant to be accused of rape, murder, or dealing "crack", and questioning a witness in a criminal case may require a strong approach. My own view is that <u>the attorney should argue with a witness whenever the jury would deem it to be appropriate.</u> If the point of the examination is that the witness is a liar, or if the witness is acting slick, arrogant, or hostile, counsel can often highlight these qualities by prodding the witness to display them more fully to the jury. Then, the attorney can confront the witness directly with his or her inappropriate behavior.

Although such confrontation might technically violate Younger's rule against arguing, this technique often is

invaluable, particularly where the witness's testimony is extremely damaging and the examiner is doomed to failure in attempting to get the witness to vary from it.

Never forget the examiner is entitled to answers to questions and should politely--but if necessary firmly and rudely--insist on them. A good example of this type of "argument" occurred during Roy Black's cross-examination of Ann Mercer during the Smith trial.

Black: You walked into the house where the rapist is, right?

Mercer: Yes.

Black: It was dark in there, right?

Mercer: Yes.

Black: You met with a man who your friend says is a rapist, right?

Mercer: I was not afraid of him.

Black: That's not my question. You asked a rapist to find her shoes?

Mercer: Yes.

Black: In a dark house, right?

Mercer: Yes.

Roy Black continued this line of questioning: "Onto a dark patio? Down a dark stairway? With a door at the bottom? On a dark beach? With a man who raped your friend?" Then, he asked: "Did you tell this man, I'm sorry we've met under these circumstances?" Prosecutor Lasch objected that Mr. Black was being too argumentative, but Judge Lupo directed Mercer to

respond. "Yes," she answered; and it was then clear to the jury that either Mercer had doubts about her friend's story or that she had her own agenda on the evening of the alleged attack.

Roy Black quarrelled with Mercer. However, he did so with a tainted witness in as kind a manner as possible under the circumstances. His intent was to preserve his credibility with the jury while not backing off.

This is not to suggest that attacking every government witness is appropriate. Sometimes such an approach is warranted, however, and the jury will understand and approve if the examiner has achieved his or her personal advocacy goals and, as a result, obtains credibility with the jury. If the witness's lying is apparent to everyone in the courtroom, or if the testimony is so damning that you are left with no choice, you may be forced to approach the witness in a confrontational way.

In such instances, counsel should begin the examination with the last outrageous statement by the witness on direct examination and then work backwards to the beginning of the testimony. This technique primes the jury to accept further attacks and dovetails with the psychological principles of primacy and recency with respect to a juror's ability to remember.

An example of a successful confrontational cross-examination occurred in a recent murder trial where the government's chief witness testified that my client shot the victim with an Uzi at point blank range. I was impeaching the

witness with the fact he had just denied under oath he was a drug abuser, but in a sentencing hearing in another case about a year before he had testified he had dealt drugs to support his habit in order to invoke an "addict exception" to a mandatory minimum sentence. He was surprised to learn I had obtained a transcript of his prior sentencing hearing and responded by becoming evasive.

I went through the standard impeachment drill beginning with the witness having been under oath at the prior proceeding. Anticipating where I was heading, he quickly became hostile and defensive and blurted out that he had not understood the oath when he testified at the prior hearing. I feigned being flabbergasted at the response and stepped back for a minute to ponder his answer. Then, I bluntly questioned the witness for about ten minutes. "What didn't you understand about the oath? Let's break it down. 'God?' Do you want me to explain that one to you? How about the word 'Truth?'" I continued going through the oath, word by word, probing the witness in a loud voice the entire time. The jury thought it was appropriate, as did the judge who made only minimal efforts to curb my conduct, and my client was acquitted after a very short deliberation.

Do not quarrel with the witness? Maybe that is a good rule for English barristers, but it does not always work in the street-fight arena of criminal trials.

VII. Don't allow the witness to repeat direct testimony

The seventh commandment is based on a very important psychological principle: The more the jurors hear the testimony, the more likely they are to remember it. However, the key question is whether what jury is going to hear repeated is good or bad for your client.

Younger assumes that on direct examination the attorney will elicit only information that negatively impacts his or her adversary. In fact, this is often not the case. The more appropriate formulation of the commandment would be: Do not rehash damaging direct without a good reason. Furthermore, this commandment should be ignored altogether if by doing so the examiner gains an important tactical advantage.

In his lecture, Younger acknowledged that the legendary Max Steuer, the early 20th century New York City trial lawyer who was supposedly the greatest courtroom advocate of all time, successfully violated this commandment. In the Triangle Shirtwaist Fire case, Steuer had the key eyewitness to the fire repeat her direct testimony on cross-examination three times in a row so he could argue to the jury in closing that her being able to do so verbatim demonstrated that her story had been memorized and that she was not in fact a witness to anything. (Francis Wellman, The Art of Cross-Examination, 69\n\72 (MacMillan: 1936).)

In like fashion, the skilled examiner may have a witness repeat certain parts of the direct that are consistent with the defense theory of the case, that sound stupid or implausible, or

that are key gems in terms of the tone or the choice of words which the examiner will want to highlight during the closing argument.

In a trial in which I participated, one of the government's "snitch" witnesses had initially lied to the police when he was arrested. When the prosecutor attempted to preempt cross-examination on this subject during direct examination, the witness hedged and said he had "sort of 'tap-danced' with the agents," but claimed that he was now being "completely honest." One of my co-counsel went back to the witness's description of himself as a "tap dancer" several times during cross-examination so that the witness would be known to the jury by that appellation. Then, in closing, there was little more that needed to be said about this witness other than he is still tap dancing around the truth.

In addition to the risks cited by Younger, there is also a chance that letting the witness repeat direct examination will give the witness an opportunity to correct a mistake or to expand on something that he or she said before. It also gives the witness an opportunity to accuse the examiner of twisting his or her words. Counsel may be able to minimize this risk by being scrupulously careful to characterize the direct fairly and, where it cannot be quoted verbatim, being humble about that fact. Thus, while care should be exercised, you should disregard this commandment where it will serve your client's ends.

VIII. Do not permit the witness to explain

Younger argues that the attorney should not cede control to the witness. Instead, the examiner should make the opposing attorney "sponsor" the explanations, unless it seriously damages the examiner's credibility if he or she fails to elicit crucial information.

To avoid receiving an unwanted explanation, Younger advises the practitioner to avoid complex questions. Ask simple ones that call for a "yes" or "no" response. He further suggests that counsel instruct the witness to ask that a question be rephrased if he or she cannot respond with a "yes" or "no" answer. Younger further states that if the judge (for some strange reason because it is certainly not a valid legal principle) thinks that it is totally improper to insist upon "yes" or "no" answers to questions that demand them and allows every witness to explain everything no matter what the question is, well "that's just one of life's little misfortunes."

By maintaining that explanations elicited on redirect examination would be discounted by the jury as having a false ring or appearance as an afterthought, Younger was an early proponent of the sponsorship theory; however, he apparently did not take into account the personal advocacy theory, which is relevant because the examiner's credibility will be diminished if he or she appears to mislead the jury by failing to elicit critical information that becomes obvious after the redirect examination.

Without expressly propounding the personal advocacy theory, Younger noted that Abraham Lincoln was able to ignore this commandment and still be successful. In the course of cross-examination in People v. Armstrong, Lincoln elicited that the witness was in the middle of a field, at night, without a lantern, and 150 feet away from the event he was supposedly observing. Then, violating Younger's eighth commandment (but enhanced his personal advocacy), Lincoln asked the witness to explain how under these circumstances he could see the event. The witness responded, as Lincoln knew he would, that the bright light of the moon illuminated the scene. Lincoln was then able to destroy the witness' credibility by showing, through another witness, that there was no moon on the night in question. (Wellman, The Art of Cross-Examination at 74\n\75.)

If you know what the explanation will be (or that a different explanation will expose the witness to impeachment), you can further your personal advocacy objectives without sacrificing the quality of the cross-examination. Sometimes it is even worth letting the witness explain, no matter what comes out of his or her mouth, just to have the jury believe that the examiner is going to provide witnesses with a fair chance to say what they want to say.

If you are unable to prevent the witness from explaining every single point, then you should consider employing "cross-examination judo." The examiner takes what initially appears to be an obstacle to an effective cross-examination and turns it

into an advantage. In this type of situation, there are two possibilities: one involves the examiner subtly encouraging and highlighting the witness's conduct to demonstrate the witness's "slippery" nature; the other involves becoming confrontational with the witness to show more vividly the witness's character.

The attorney can ask whether the witness understands the question; whether the witness feels compelled to explain everything no matter what answer the question calls for; or whether the witness has been coached by the prosecutor to engage in this tactic. The witness's unwillingness to provide an appropriate response may alone serve as an excellent impeachment. Jurors tend to dislike witnesses whom they perceive as being evasive and who prolong the examination unnecessarily.

In practice, Younger's eighth commandment is a very difficult mandate to observe. In all of the jury trials in which I have participated over the past nineteen years, I cannot recall a single case in which I was totally successful in preventing a key witness from explaining at least one thing that I did not want explained. If the witness is a worthy adversary (or gets enough help from the judge or prosecutor), he or she is going to get in some blows. Do not worry about getting hit a few times, as long as you throw the hardest and, hopefully, the last punches.

IX. Avoid asking one question too many

This mandate is one that I have always enjoyed, not because it contains profound advice but because of the "war stories,"

which, while undoubtedly largely apocryphal, are nonetheless extremely entertaining.

One of my favorites is the famous assault case cited by Younger (from Wellman's book on cross-examination). After setting the stage by questioning the witness on his lack of opportunity to observe, and his inattentiveness to the fight between the defendant and the alleged victim, the defense attorney concludes, "How can you say my client bit off the victim's nose if you did not see him do it?" The bullet-to-the-heart response is, "because I saw him spit it out."

Although Younger attempted to provide some guidance on how to avoid this problem, his advice was not particularly enlightening. He observed that the examiner should rely on <u>instinct</u> to comply with this commandment: Ask an especially good question, get an especially good answer, and then stop.

The problem with this facile solution is that it is difficult to implement. An easier way to effectuate this mandate is simply to follow the other commandments with the revisions I have suggested. If you know the answers to all of the questions you ask and use only nonleading questions, this problem will never arise.

However, the real way to avoid this problem is to <u>learn the facts of the case well enough to develop a plausible theory of the defense.</u> Armed with knowledge and a workable defense view of the evidence, the examiner would never ask a question such as how the witness knew that the defendant bit off the victim's nose,

because the examiner's theory of the case would never be that nobody saw the nose being bitten off. And, if that were not the theory, then the attorney should never have been cross-examining along those lines to begin with.

In short, if you find yourself in case after case asking the proverbial one question too many, you should thoroughly review the three basic principles--control, a workable theory of the case, and credibility--that underlie the ten commandments.

X. Save the explanation for summation

Finally, Younger directs us to save the explanation for closing. The thesis is that it is a lot harder for the witness to answer you in a damaging way if he or she is not on the stand when you ask your (rhetorical) questions. This avoids the problem of asking one question too many and recognizes that human nature loves unsatisfied curiosity. Where jurors are faced with a mystery, they stay alert and interested in the case because they are awaiting an explanation about who did what to whom and why.

This commandment, too, is about control. More so than the others, however, it is primarily about self-control -- not getting so overly confident that you think, "I can really drive this point home, right here and now, and win the trial in my cross-examination, and I am going to do it." Avoiding this temptation is what this rule is all about.

<u>Get only what you need, and then stop and sit down.</u> The jurors do not have to see your point during the cross-

examination. All they have to do is see it before they return a verdict. It is okay to be a little obscure. If they perceive you to be fair and competent, they will know that you have a defense that ultimately will be explained fully during closing argument.

The only reason I can think of to violate this rule is in the case of a very long trial where discrete evidence of discrete offenses is presented in sequence. In that circumstance, because the jury might not be able to remember the testimony until the end of the trial, you may need to sum up occasionally during cross-examination. But be very careful when you do.

Sometimes you need to sin to win

Cross-examination is a highly personal skill. There are a lot of wrong ways of going about it, there are many different right ways as well. There are very few absolute proscriptions; it is much more a case of situational ethics.

While it is imprudent to ignore traditional wisdom without a good reason, it is similarly unwise to follow Professor Younger or anybody else blindly on this subject. The key to successful cross-examination is to be thoughtful, creative, focused, resilient, mysterious, and, when things look particularly bad, to find a way to turn the witness's strength into a weakness. Do not be afraid to fail. Be willing to take a few shots to the head. Then go forth and sin some more.