CROSS EXAMINATION

TEN COMMANDMENTS FOR PROSECUTORS (with apologies to Irving Younger)

I. Thou shalt prepare.

- Preparation is the First Commandment for almost every trial subject, and it should be. Know the rules of evidence, learn the tendencies of the judge, have impeachment material handy and organized, etc.
- But even for the all-too-common scenario in which the only witness for you to cross is the defendant, and without any prior statements to use, you can still prepare.
  - During plea negotiations, always, always, always ask defense counsel about the defendant's version of the events, and record the answer somewhere handy in the case file.
  - Police, friends, relatives, witnesses, friends of friends and anyone else with even the most fleeting contacts to the defendant or the case can have an idea of what the defense might be.

II. Thou shalt not commit adultery against thy case theory.

- Three steps to organize your cross:
  - Confine cross to the theory of your case.
  - Confine each main point into a separate category or series of questions.
  - Use undisputed facts as home base for your guerrilla raids to capture concessions and admissions from the witness.

III. Thou shalt be patient.

- Irving Younger said to be brief. Timothy Pratt says take baby steps.
  - Ask for one fact in each question.
  - Work towards one point in each series of questions.
  - When you get the facts from the witness that support that point, stop there, move on to the next point and save the conclusions for your closing.

IV. Thou shalt lead into the valley of the shadow of whatever.

- Leading questions are the foundation of cross.
  - You testify, they just verify.
  - You control the general subject, the specific point and suggest an answer.
  - Control is the goal.
  - When the witness is explaining, you are losing.

V. Thou shalt not ask the ultimate point.

- Easy to learn, difficult to master.
  - Think of it this way: Don't you enjoy having the last word on closing arguments against the defense attorney? 'Cause you get the last word, and he can't respond to your argument, right? Why in the world would you *choose* to give a defendant the same opportunity to respond or explain?

VI. Thou shalt listen.

- Yes, of course, you should listen. Each question should build on the concessions gained by the previous question. But it takes focus:
  - It's hard enough to get your own witnesses to say what you expect.
  - The answer you are seeking is often buried in other, less helpful, rhetoric.
  - You have to somehow file away the good answers for use later at the same time you are formulating the next question.

VII. Thou shalt not quarrel.

- If you quarrel with the witness, only bad things will happen.
  - Usually, you will not convince the witness you are right. Their opinion is not the prize, anyway.
  - You lessen your status as a professional with the jury (and everyone else listening).
  - You are only giving the witness more opportunity to explain, which violates most of the other commandments, too.

VIII. Thou shalt not ask why.

- Irving Younger said to "disallow witness explanation."
  - Ask simple questions that should be answered yes or no.
  - Ask for just one fact per question.
  - In the best of all possible worlds, the witness will admit facts that help you case or discredit his, and the only explanations will be heard when you are giving your closing.

IX. Thou shalt covet thy audience.

- You are a trial lawyer.
  - You must learn to communicate on the level of the jurors that decide your cases.
  - Impressing the jury with your vast knowledge of anything will not help if it detracts from your case or it's theme.

X. Thou shalt practice.

- Cross examination is a skill that can be learned, and your opportunity to do so is unparalleled in the legal arena.
  - Probation revocations, preliminary hearings, motions, even pleas involving just one co-defendant can be opportunities to cross-examine witnesses, and these opportunities are readily available for the willing in most offices.