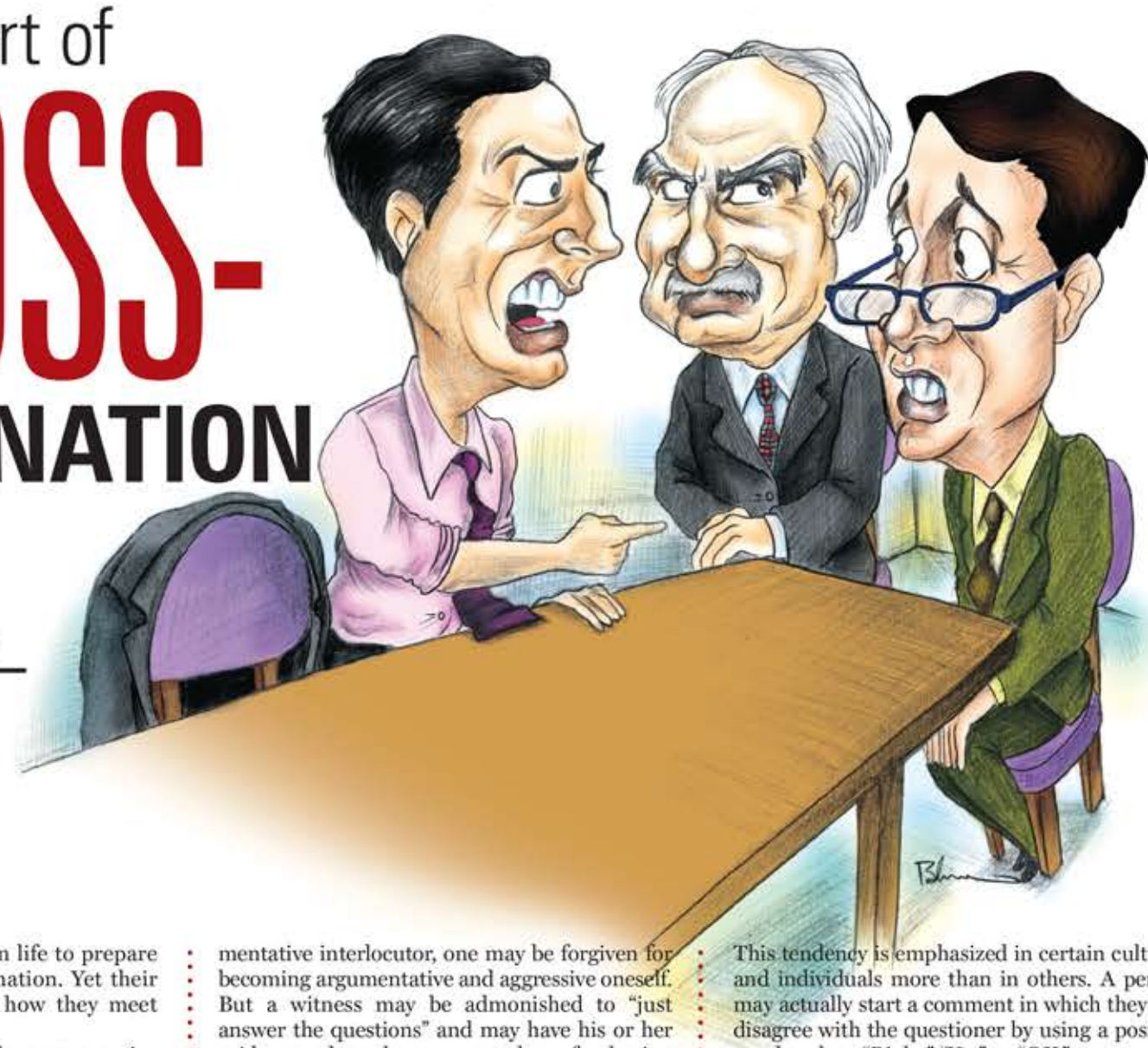
FOCUS
ON
Alternative Dispute Resolution

The dark art of CROSS-EXAMINATION

WILLIAM G. HORTON



There is little in life to prepare lay witnesses for cross-examination. Yet their credibility will be judged by how they meet that challenge.

When a witness is prepared for cross-examination, however simply or elaborately, the main point of the exercise is to help the witness to unlearn, for the occasion, most of the rules that apply to normal conversation and to prepare the witness to combat the dark arts which will be practised by opposing counsel.

Except in the most dysfunctional moments of our relationships with others, we have little experience of being aggressively questioned by another individual with the clear purpose of subverting, discrediting or misinterpreting what we are trying to say. Few of us would want to be judged by how we behaved under those circumstances when they arise in normal life, but a witness is expected to meet very high standards under similar conditions.

When confronted by an aggressive and argumentative interlocutor, one may be forgiven for becoming argumentative and aggressive oneself. But a witness may be admonished to "just answer the questions" and may have his or her evidence adversely commented on for having been "argumentative," without reference to the nature of the questioning to which he or she was responding at the time.

In normal conversations, a person may be asked by a friend "How are you?" on two or more different occasions in the same conversation. It is generally understood that more information is required and the person who is asked the repeated question will usually oblige by being more forthcoming, or at least by slightly varying the answer to provide better insight. In a cross-examination setting, variations in answers to the same question will often be pursued by the cross-examiner as the wavering of a dishonest witness.

In normal conversation, it is rude to disagree too often or too vociferously with the other party. This tendency is emphasized in certain cultures and individuals more than in others. A person may actually start a comment in which they will disagree with the questioner by using a positive word such as "Right," "Yes" or "OK."

Often cross-examination questions are "loaded" by asking questions or phrases that have precise legal meanings that would not be known to the average person. Such words may include: trust, partner, right and obligated — and countless others that arise in specific legal contexts.

In normal conversation, people do not clearly or explicitly distinguish between things they know from first-hand knowledge and things they know by other means. In other words, the rules of evidence are learned rather than innate. Witnesses can readily become confused and disoriented when presented with these distinctions as challenges to their veracity or to their desire to tell the truth.

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BAHAR NASIRZADEH FOR THE LAWYERS WEEKLY

Is it time to arbitrate class proceedings?

'The process by which we seek to discover truth may skew the result'

Cross-examination

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As a final example, the fact that witness evidence is presented orally, but is often evaluated in written form, creates an additional layer of artificiality which removes the testimony of witnesses from the real world of conversational norms.

John Henry Wigmore, the original author of the leading American text on evidence, wrote "Cross-examination is the greatest legal engine ever invented for the discovery of truth." However, the rest of that famous quote presents an important qualification: "You can do anything with a bayonet except sit on it. A lawyer can do anything with cross-examination if he is skilful enough not to impale his own cause upon it."

It is generally understood, although it is not often said, that the skill of the cross-examiner is not actually directed at finding the objective truth. Rules of cross-examination that are taught in most advocacy courses, such as "don't ask a question to which you do not already know the answer" and "beware of asking one question too many," would not have taken humanity very far if applied to any of the arts or sciences that are associated with the quest for truth.

Obviously, no party to a dispute should be obliged to accept the accuracy or truthfulness of any evidence provided against him or her in a legal proceeding. The opportunity to challenge such evidence is an essential part of any legal process. Witnesses often are untruthful, documents lie and today's scientific and historic verities

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will be the follies of another age. But it is well for us to remember that the process by which we seek to discover truth may skew the result and defeat the very purpose of the enterprise.

Our system of justice is based on the belief, not shared by all legal cultures, that the truth will emerge from adversarial interaction between two or more self-interested parties when judged by a relatively passive neutral observer. Any parent who has settled a dispute between quarrelling children will be aware that this technique has its limitations.

An arbitrator needs to be aware of these limitations if he or she is to judge the case, as opposed to judging the lawyering. Hopefully, an arbitrator who is selected for his or her background in a particular kind of dispute will be less prone to being swayed by technically superb cross-examination that is at odds with what the witness is actually, and truthfully, trying to say. ■

William G. Horton is an independent arbitrator and mediator of commercial disputes. He practises in Toronto.