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CROSS-EXAMINATION

LLOYD PAUL STRYKER*

The only legitimate object of a trial is the ascertainment of truth. To achieve this end, the instrumentality of cross-examination is the most potent weapon in the lawyer's arsenal. "For two centuries past," Professor Wigmore writes, "the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience."¹

And this great writer, whose discussion of this subject, to my mind, is more fundamental than anything that has been written, further wrote:²

"Not even the abuses, the mishandlings, and the puerilities which are so often found associated with cross-examination have availed to nullify its value. It may be that in more than one sense it takes the place in our system which torture occupied in the mediaeval system of the civilians. Nevertheless, it is beyond any doubt the greatest legal engine ever invented for the discovery of truth. However difficult it may be for the layman, the scientist, or the foreign jurist to appreciate this its wonderful power, there has probably never been a moment's doubt upon this point in the mind of a lawyer of experience. 'You can do anything,' said Wendell Phillips, 'with a bayonet—except sit upon it.' A lawyer can do anything with a cross-examination,—if he is skilful enough not to impale his own cause upon it. He may, it is true, do more than he ought to do; he may 'make the worse appear the better reason, to perplex and dash maturest counsels,'—may make the truth appear like falsehood. But this abuse of its power is able to be remedied by proper control."

"The fact of this unique and irresistible power remains," he went on, "and is the reason for our faith in its merits. If we omit political considerations of broader range, then cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial-procedure."³

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1. 5 WIGMORE, EVIDENCE § 1367 (3d ed. 1940).

2. *Ibid.*

3. *Ibid.*

Cross-examination often has been referred to as a weapon. It may be a stiletto, a broad sword, a modern rifle, or perhaps it will turn out to be a blunderbuss that explodes in the hands of an unskilled marksman. Cross-examination, Emory Buckner once said, is frequently more suicidal than homicidal.

It is a subject of infinite interest even to the layman and is usually the high point, though alas, sometimes the low point of a trial. It should never be wielded by the unwary or the inexperienced. A good cross-examiner is the product of a generation of witnesses. The "art of cross-examination," Mr. Wellman has well written, "requires the greatest ingenuity; a habit of logical thought; clearness of perception in general; infinite patience and self-control; power to read men's minds intuitively, to judge of their characters by their faces, to appreciate their motives; ability to act with force and precision; a masterful knowledge of the subject-matter itself; an extreme caution; and, above all, the *instinct to discover the weak point* in the witness under examination. One has to deal with a prodigious variety of witnesses testifying under an infinite number of differing circumstances. It involves all shades and complexions of human morals, human passions, and human intelligence. It is a mental duel between counsel and witness."⁴

It has been observed that those who attend trials, especially criminal trials, are, says Sir James Fitzjames Stephen, "usually tempted to forget their real character. Cool, unexcited, bystanders often demand that a criminal trial should be conducted as quietly as a scientific inquiry, and are disgusted if any course is allowed to be taken which compromises the interests or character of third parties, or which leads to any sort of unseemly discussion. The truth is that litigation of all sorts, and especially litigation which assumes the form of a criminal trial, is a substitute for private war, and is, and must be, conducted in a spirit of hostility which is often fervent and even passionate. No man will allow himself to be deprived of character, or liberty, or possibly of life, without offering the most strenuous resistance in his power, or without seeking, in many cases, to retaliate on his opponent and his opponent's supporters. A trial of any importance is always more or less of a battle"⁵

There is nothing that more sharply presents the nature of our Anglo-American cross-examination than a consideration of the way in which it is conducted in the French courts. There the

4. WELLMAN, THE ART OF CROSS EXAMINATION 8 (4th ed. 1936).

5. 1 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 432.

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prisoner is cross-examined by the judge who is permitted to engage in rebukes, sarcasms and exhortations which would never be permitted in an English or American court. The real function of a judge, as we understand it, is to preside over the trial, to enforce the rules of evidence and in general to be an impartial umpire. After performing that duty patiently and fully, he is, says Stephen, "in a position to give a jury the full benefit of his thoughts on the subject, but if he takes the leading and principal part in the conflict—and every criminal trial is as essentially a conflict and struggle for life, liberty from imprisonment, or character, as the ancient trials by combat were—he cannot possibly perform properly his own special duty."⁶

In France, he goes on, "The parties, and especially the prisoner, have to cross-examine through him [the judge], and to cross-examine a witness through a third person, who may probably be hostile or at least indifferent to the cross-examiner, is as ineffectual as it would be to carry on a fight by telling a proxy where to strike. The fact that a trial is a combat must be realized and carried out in every detail if the fight is to be fair. The witnesses called against either side are for the time being the enemies of that side, and its representative should be allowed to attack them hand to hand."⁷

The history of cross-examination in England throws a flood of light upon the course of its development. From the civil wars to the Revolution of 1688, prisoners in cases of treason and felony had no counsel. And, says the same author,⁸

"So long as prisoners were really undefended by counsel in serious cases, their cross-examination of the witnesses against them was trifling and of little or no importance, though they did cross-examine to a greater or less extent. When they were allowed to have counsel to cross-examine, but not to speak for them, the cross-examination tended to become a speech thrown into the form of questions, and it has ever since retained this character to a greater or less extent."

This is indeed an interesting observation and tends to explain why a good cross-examination so often resembles a good speech. A speech is uttered in order to persuade; it has no other legitimate function. Persuasion may also be achieved through the form

6. *Id.* at 544.

7. *Id.* at 547.

8. *Id.* at 431.

of the cross-examiner's questions and may thus serve, long before the time of summing up arrives, to achieve persuasion, which is or should be the sole object of the lawyer in the courtroom.

Small wonder then, that cross-examination is so highly and so justly prized in our legal system. It is indeed guaranteed by our federal Constitution, by the Sixth Amendment, which provides that "in all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him" But confrontation, says Professor Wigmore, "is, in its main aspect, merely another term for the test of Cross-examination. . . . It is merely another name for the opportunity of cross-examination."⁹ For the observation by the tribunal of the witness' demeanor on the stand is a subordinate and incidental advantage of confrontation. The deportment of the witness while testifying is "a result accidentally associated with the process of confrontation, whose original and fundamental object is the opponent's cross-examination."¹⁰

The objects of cross-examination may be divided into four main categories:

1. To have the witness modify his assertions;
2. To elicit something in your favor;
3. To discredit the witness through discrediting his testimony by showing among other things, that he himself has been mistaken, or that possibly he has himself been deceived; or
4. To discredit the witness himself.

Of these, the first three are most frequently employed. I suppose that there have been few cross-examinations indeed where the witness cross-examined then and there repudiates all that he has said upon direct examination. But he may be made to modify some, at least, of the assertions that he has there made or there may be something in his story which has blunted or blurred other facts which may be favorable to the client of the cross-examiner; or it may be that the witness can be shown honestly to have been mistaken or really to have been himself deceived.

To try to illustrate by examples under these three heads would require a long treatise and would be impossible in the space at my disposal. Opportunities for good cross-examination under these three categories will occur to the zealous, industrious and highly attentive lawyer, especially to one of long experience who has

9. WIGMORE, *op. cit.* § 1365.

10. *Id.* § 1395.

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seen hundreds of witnesses on the stand. Perhaps I might here observe that in my opinion, at least, the cross-examiner would use his time to most advantage during a direct examination by observing the witness, by listening not only to what he says but by watching how he says it, the way he moistens his lips, or hesitates, or perhaps colors, and especially by observing the effect that every word is making on the jury. A look of skepticism on some juror's face upon some point may furnish the clue to the cross-examiner—the weak point where he may drive in. Some lawyers sit with yellow pads and try to take down everything a witness says on his direct examination. Unless he is a shorthand reporter, he will not do as well as the official court stenographer and his ever-writing will deflect him from the attention he should give. Jot down a phrase or a word or a date or a fact, but do not spend your time making notes when your energies might better be employed in watching and in listening.

The fourth category above mentioned, namely, the discrediting of the witness himself, is the most interesting and it may be the most effective or disastrous undertaking. Never seek to discredit the witness himself unless you have sound reasons for believing that the assay will be successful. The old adage "Do not strike a king unless you kill him" is in point. For you must remember that not only the case and the witness, but you yourself, are on trial. A verdict often goes in accordance with the jurors' like or dislike of the advocate. Lawyers as a class are not popular; they are suspected of being over-cunning, disingenuous or sometimes of being downright dishonest. A good lawyer is a strong man with a strong mind and with real integrity of purpose. Let the jury suspect that you are engaged in the employment of a trick or a device, or that you are less than fair, and the jury, with one mind, will seek to visit their displeasure by an adverse verdict.

Then, too, juries look at witnesses with sympathy. They see a person sitting aloft in the courtroom and wonder how they would feel were they in the same position. They feel that the witness is at a disadvantage with the lawyer. They soon learn that he cannot talk out but that he is strictly confined to the questions which the judge allows. Bad manners, harsh conduct and insulting tone of voice may work the direct opposite of that which you are striving for. If your aim then, is to discredit the witness, you must carry the jury along with you at each point, making it feel that no other alternative is open to you and that the operation, however distasteful, is one that you must perform.

Never forget that the sympathies of the jury are with the witness, not with the cross-examiner. They are willing to excuse a man on the ground that he may be embarrassed because of all the

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courtroom limelight, or because he is a nervous or timid man. Lead up then, slowly to your frontal attack; carry the jury with you step by step. Then, if you can explode your bomb, explode it so that he is torn to fragments before the jury's very eyes. Do not be afraid of being called dramatic, for whether you would or not, a trial is drama. It is a combat and combats inevitably are dramatic. Do not try to be dramatic. Avoid any artificiality which may justify the charge against you, but if you are engaged in the destruction of the perjured witness, forget everything except your main objective.

Never forget the importance of detail. If you know the witness has been convicted of crime, do not merely ask whether on a certain day he had been convicted. Resurrect every circumstance of the charge on which he was found guilty; resurrect his appearance in that trial and if he committed perjury, then make him admit it now before your jury. If the witness is a despicable character, handle him in such a way as to make the jury properly despise him. If he has been guilty of loathsome acts, develop these so that your jury cannot fail to loathe him. If he has committed perjury before, draw out that perjury in detail, reconstruct the oath which he then took and make him admit that it is the same oath which he has just taken and under which he pretends at last to tell the truth.

If you are able in a later stage of the trial, by independent evidence, to establish an important fact, how much more explosive will be the establishment of that fact on cross-examination. The principal virtue of cross-examination, said a Minnesota court, "is in its immediate application of the testing process. Its strokes fall while the iron is hot."¹¹

Suppose you have a letter or an affidavit or a pleading or a bit of previous testimony in direct conflict with what the witness testified to on his direct examination. You could, no doubt, later prove this by another witness, but how much more effective it would be to establish it through the testimony of the man you are now cross-examining.

The "dramatic contrast" between this evidence and that to which the witness previously has sworn, says Wigmore, "may multiply and even exaggerate the concrete probative effect of the facts extracted. The difference between getting the same fact from other witnesses and from cross-examination is the difference between slow-burning sulphurous gunpowder and quick-flashing

11. *State v. Saporen*, 205 Minn. 358, 362, 285 N. W. 898, 901 (1939).

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dynamite; each does its appointed work, but the one bursts along the weakest line only, the other rends in all directions."¹²

But once more let me emphasize that if you intend to attack the witness rather than his testimony, be sure that you can do so with success. If you can, then without fear advance boldly to charge with bayonet poised, ready to tear through his heart.

Jurors, like other men, admire a brave, a resolute and a fearless fighter. But let me stress again that this kind of a contest, like any fight, has its hazards and sheer disaster waits for him who fails. "It not infrequently happens," we read in Brown's Golden Rules for the Examination of Witnesses, "that a charge of perjury against the witnesses on the other side, induces the jury to make the trial a question of the honor of the witnesses, instead of the issue on the record. They say, 'If we find for the defendant, after what has been said by his counsel against the plaintiff's witnesses, we shall be confirming his assertion that they are perjured, which we do not believe': and so, to save the characters of their neighbors, whom they believe to be unjustly impugned, they give a verdict against the assailant."¹³

If there is any doubt about your ability to destroy the witness himself, avoid trying to do so. How much further you will get by a tactful, quiet approach if through conciliation you seek to remove the fear "which the most truthful witness feels when about to be subjected to the ordeal of cross-examination. Let him understand, as soon as possible, that you are not about to insult him nor to entrap him into falsehood, nor to take unfair advantages of him"¹⁴ In a cross-examination of this kind you should proceed at once to discover the probabilities of mistake by eliciting all the circumstances under which it was formed. "It is in this operation," says Ram, "that the faculties of the skillful Advocate are displayed; this it is that calls into play his acquaintance with mental physiology, his experience of men and things"¹⁵

In a cross-examination of this kind it may be wise not to induce the witness to acknowledge his error. You may perhaps far more effectively reveal this in your summing up when you yourself, from the admissions made, can construct a lucid story. But above all else, avoid as much as possible a repetition of the facts to which the witness testified on his direct examination. He knows or has learned these facts well and will enjoy repeating or em-

12. *Op. cit.* § 1368.

13. RAM ON FACTS 333.

14. *Id.* at 335.

15. *Ibid.*

bellishing them. If on his direct he has said something favorable to your side, do not call this to his attention lest he seize upon the opportunity of modifying previous assertions. Confine yourself rather to associated circumstances as to which he is not likely to have prepared himself. Dislocate his train of ideas and you will disturb the memory of his lesson. Begin your cross-examination in the middle of his narrative (if you touch it at all), then jump to one end, then to some other part, remote from the subject of the previous question. If he is lying he will betray himself, for if he speaks from memory alone you will disturb the association of his ideas and break all his inventions down.

But perhaps you will be confronted with a witness from whom, if deftly handled, you may elicit much in your favor but whom you wish ultimately to destroy. In such a case save all your ammunition for the main assault and treat him gently while you tear out facts that will help you. Having done this change your tactics and proceed, if you can, to his destruction.

A cross-examination as to bias presents many challenges. No one likes to admit to prejudice or bias, least of all a witness in the courtroom. This fact it would be wise to elicit gently. If it is drawn out of him through quiet, simple questions, the jury, without hating either the witness or the cross-examiner, may come to the conclusion that the witness, though intending to be honest, has unwittingly permitted prejudice or bias to color his recollection of the facts or the way in which he states them.

Much has been said as to the manner of cross-examination. Who shall say what manner should be used in any given case? It depends upon the circumstances of the case, the particular atmosphere that pervades the courtroom, the kind of judge or jury you may face, or even the character of your opposing lawyer. In general, I would say that courtesy and good manners, politeness and a respectful demeanor are more apt to win friends in the jury box than all else put together. Unjustified sarcasm, misplaced humor, rudeness and boorishness are liabilities of vast moment. To cross-examine well you do not have to examine crossly.

Above all else remember that not many souls are saved after the first hour. Formulate in your mind a cross-examination dealing with the really high points of the case and ignore all else. Make it sharp, staccato and telling. Make your points as you go. If you fail in this it may be that weeks later you will find yourself unable to revive those points in all their stark significance before the jury's eyes. Always, if you can, conduct a short cross-examination rather than a long one. The lawyer who drones through long, weary hours of cross-examination without striking any pay dirt,

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does much to confirm the testimony which the witness gave on his direct. The jury feels that if he has not succeeded after all these hours, it must be that the witness was a truthful and reliable one.

And now a few more hints: Watch your judge. Do not, through improper questions, bring his adverse ruling down upon you. The jurors do not understand the rules of evidence. They are always much impressed by a judge's interruption of the lawyer.

One of the most effective incidents in a cross-examination is the silence of a witness. If he is so stumped that he sits there on the stand unable to reply, he will have given you a priceless benefit. This happened once to Erskine who, when the witness sat there silent, himself sat down and said: "Take plenty of time to think, don't hurry. Take all the time you want." A witness thus entangled in the net of his own silence will lose caste with the jury and make them believe that he does not speak lest he commit perjury.

But perhaps the most important problem confronting the would-be cross-examiner is whether he should cross-examine at all. If you really know your case and understand the facts in all their bearings, you can make a sound appraisal as to whether the direct examination has caused you any hurt or not; or, indeed, you may conclude that what he has just said is to your benefit and that to try to gild the lily would disfigure it. In such a case do not cross-examine at all. "To cross-examine, or not to cross-examine", Wigmore has well written, "that is the fundamental question, which springs from the essential nature of the process and arises anew for every part of every witness's testimony. The greatest cross-examiners have always stated this as the ultimate problem."¹⁶

Sometimes you will have nothing to go upon—nothing whatever—except the witness's direct examination, but even here you may make headway if you have appraised the witness and thought out logically what he or she is bound to say. I had this experience not long ago in representing a husband who had just obtained a decree of divorce against his guilty wife. The real test arose as to the custody of the two young daughters. The defendant, despite her proven adultery, claimed the custody. She was quite pretty and very bold, and seemed to exhibit no concern over what she had done. From the way she looked and acted, I thought that she would brazen out her conduct with the correspondent. I asked her:

16. *Op. cit.* §1368.

“Q. In other words, you a married woman, supported by your husband, and with growing daughters, thought that you would see how you liked living with this Frenchman who himself had a wife in France and children?

A. Well, that is one way of putting it.

Q. You think what you have done here was perfectly moral and fine?

A. I think it was moral under the circumstances, yes.”

The cross-examination then proceeded:

“Q. Do you feel at all that the inculcation of decent moral principles is important in the raising of a girl?

A. I certainly do.

.

Q. Is it one of your principles that the only way to know a man is to live with him?

A. For me, yes.

Q. And that is in your opinion a moral and ethical principle, is it; yes or no?

A. For me, yes.

Q. That, however, would not be a good principle for anyone else in the world but you?

A. I didn't say that.

.

Q. I am trying to get your standard, as the person who wants to have the custody of children. Is that principle that you expressed a principle applicable, not only to yourself, but to other women as well, yes or no?”

Seeing the dilemma in which she was thus placed and that she could not claim a principle applicable to her alone, she answered:

“To full-grown adults, yes, but not when they are young—to full-grown adults who are mature and who know something about life and who understand people. Then I think they are free; otherwise they have no right.

Q. What is your definition of a full-grown adult?

A. I feel a full-grown adult—”

She hesitated, having now to improvise. Her answer then proceeded:

“I don't think any woman is a full-grown adult until she reaches the age of over 28.

Q. Then it is your standard and moral principle that a woman over the age of 28 is following proper ethical

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standards who chooses to sleep and have intercourse with a man other than her husband; is that right?

A. If she wishes it, it is right."

A little later she swore:

"A. I think it is wrong for young girls to go out and have intercourse with men. I do."

The cross-examination then proceeded:

"Q. But not after 28?

A. You know, people vary. There are some people of 28 who never grow up and there are some people who are younger that are matured.

Q. Then for some persons it would be all right to go out and do what you did at an age considerably younger than 28?

A. I wouldn't want my children to do it, no.

Q. At any age?

A. I wouldn't want them to do that *until they were absolutely fully grown*. As a matter of fact, I wouldn't want my daughters to do that *until they reached the age that I gave you, or over*."

To my deep surprise the trial justice nevertheless awarded custody of the children to this woman, and what surprised me even more was that his decision was affirmed by the Appellate Division¹⁷ with but one dissent. However, I am able to report a happy ending. The judgment of the trial court was modified by the Court of Appeals,¹⁸ and the guilty wife was thus finally deprived of custody.

In conclusion let me say that "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."¹⁹ And let me here once more quote from *RAM ON FACTS*, a book more than a hundred years old but filled with the knowledge and wisdom that do not change with passing years. "In conclusion," says Ram, "we reiterate the caution, so often repeated, never to put a question to a witness without an aim, nor expect you expect to derive some positive advantage from it. Leave a bad matter untouched, unless you are sure that you can make it better. Where you cannot do good, you are almost certain to do harm. The Advocate's art may be shown equally in silence as in speaking."²⁰

17. *Bunin v. Bunin*, 273 App. Div. 861 (2d Dep't 1948).

18. *Id.*, 298 N. Y. 391, 83 N. E. 2d 848 (1949), *reargument denied*, 298 N. Y. 923, 85 N. E. 2d 66 (1949).

19. *WELLMAN*, *op. cit.* 5.

20. *RAM ON FACTS* 351.