The fundamental principles of cross-examination in American trial practice: Part 1

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'Cross-Examination – the rarest, the most useful, and the most difficult to be acquired of all the accomplishments of the advocate...It has always been deemed the surest test of truth and a better security than the oath.' – Francis Wellman

Cross-examination

The term itself commands respect and even generates fear among seasoned trial lawyers. Certainly, no other area of trial work generates as much uncertainty and mystery.

However, for all its difficulty and inherent dangers, there is hardly a greater thrill at trial than doing a good cross-examination. It is unavoidably etched in your memory. You constantly relive in your mind’s eye the hostile witness writhing in dismay, shifting in his seat, his mouth going dry, beads of perspiration forming on his forehead as you draw the noose tighter and tighter with each question, narrowing the room for equivocation and closing off the avenues of escape one by one.

'The Greatest Legal Engine Ever Invented'

Cross-examination occupies an exalted place in American trial practice. Professor Wigmore, in his seminal treatise on the law of evidence, said of cross-examination: ‘...it takes the place in our system which torture occupied in the mediaeval system of the civilians. [It is beyond any doubt the greatest legal engine ever invented for the discovery of truth.]’

In the United States, the right to cross-examine was considered so essential that it was incorporated into the confrontation clause of the Sixth Amendment to the United States Constitution. It is inherently embodied in the right to a fair trial. The Supreme Court has repeatedly emphasised the fundamental role of cross-examination in criminal cases and has insisted that the trial lawyer be given the tools to do it and the arena in which to perform it. Likewise, innumerable civil cases insist that for a fair trial, a litigant must be afforded the right to cross-examine.

Art or science?

For the past century, the leading writers and speakers on cross-examination have debated whether it is an art or a science. From the perspective of trial advocacy training, the answer to this question is fundamental, because if cross-examination is a science, its precepts can be taught; if it is an art, they cannot.

The author of the most widely read book on cross-examination in the United States, Francis Wellman, left little doubt about where he stood in this debate. In the preface to his The Art of Cross-Examination, first published in 1903, Wellman cautions: ‘...I have not attempted to treat the subject in any scientific, elaborative or exhaustive way; but merely to make some suggestions upon the art of cross-examination.’

In Wellman’s view, excellent cross-examination was the purview of a chosen few, of those courtroom ‘artists’ who possessed innate, almost godlike qualities: ‘It 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 character by their faces; to appreciate their motives; the 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 of the witness under examination.’

Thankfully for us mere mortals who have to face witnesses in cross-examination every day, the narrow and self-congratulatory thinking of the Wellman school has largely been rejected. Modern leading authorities on cross-examination, chief among them Larry Pozner and Roger Dodd, firmly believe that, although cross-examination – especially when done well – may seem ‘artistic,’ it is not ‘art’ that wins the day. Thorough preparation and mastery of technique underlie many more courtroom victories than all the flashes of oratory brilliance and strokes of genius combined.

Learning by example – Edward Bennett Williams

For generations, novice American trial lawyers were faced with a grim prospect. Conventional wisdom, mostly handed down by their more experienced brethren at the trial Bar, held that they could not even hope to become decent cross-examiners without at least twenty-five jury trials under their belt. In those bygone days – before systematic, simulated trial advocacy training began in earnest with the work of the National Institute of Trial Advocacy in the 1970s – he skills of the trial advocate were acquired, it would seem, largely by osmosis.

Apart from trial and error, and listening to courthouse gossip and lore, watching more experienced trial lawyers in action constituted a large part of the learning process. Whenever a well-known trial lawyer appeared in a local court, the word would spread like wild fire, and newspaper reporters quickly found themselves competing for seats in the gallery with young lawyers feverishly scribbling notes.

If ever there was a trial lawyer who could ‘pack the house,’ it was Edward Bennett Williams. From the early 1950s until his death in 1988, every ambitious young trial lawyer in the United States wanted to try cases with him so that they could learn from him, or, failing that, at least see him in action.

Williams was the founding partner of the Washington, D.C. litigation powerhouse firm of Williams & Connolly. His roster of clients read like a ‘Who’s Who’ of crime and political intrigue in post-War America, and it included mafia don Frank Costello (who said of Williams: ‘I’ve had forty lawyers, but Ed’s the champ!’), President Gerald Ford, Texas Governor John Connally, Senators Joseph McCarthy and Thomas Dodd, CIA Director Richard Helms, the Teamsters Union boss Jimmy Hoffa, singer Frank Sinatra, Soviet spy Igor Melekh, Playboy owner Hugh Hefner, Chrysler Motors chairman Lee Iacocca, and junk bond king Michael Milken.
In addition to being a Washington insider of unprecedented influence, Edward Bennett Williams was arguably the best American trial lawyer ever to practise. His cross-examinations were the stuff of legend. In 1965, in an antitrust case between two large movie companies, Williams’s cross-examination of Paramount Pictures chairman Barley Balaban was so gruelling and so effective that Balaban literally wet his pants in the witness box!

Amusing war stories were not Williams’s most enduring legacy, however. Edward Bennett Williams shattered the myth that cross-examination was an art or an intuitive skill. He firmly believed that cross-examination was predominantly a set of techniques that could be learned, and then be honed and perfected through practice. He passed along to hundreds of young trial lawyers — those trying cases with him, those who snuck away from their offices to watch him in court, and those who attended his trial advocacy classes at Georgetown University Law School — the fundamental principles of cross-examination that served him so well.

Preparation, Preparation, Preparation

‘There is no substitute for knowing everything,’ Williams was fond of saying. The key to successful cross-examination is to know, through thorough preparation and planning, where the cross-examination should lead, and how it could be used to support the cross-examiner’s theory of the case.

Williams disdained cross-examiners he called ‘truth seekers’ — they just shake the Christmas tree and hope something good falls off. Usually, more bad stuff comes off than good.6 Rather, Williams believed in controlling the witness to get the results that he knew ahead of time that he must achieve.

Never ask a question to which you do not know the answer

According to Williams, the most effective cross-examinations are reined so tightly that the witness never has a chance to go his or her own way. ‘The bridle must be so taut that all the witness can do is follow your lead, answering your questions “yes” or “no”.’

One of the greatest sins a cross-examiner could commit in Williams’s mind was to ask ‘why’ or ‘how,’ since these questions ceded all control to the witness by allowing him or her to explain. Williams himself learned this lesson the hard way. Early in his career, Williams worked as an associate at Washington DC’s Hogan & Hartson, where he represented insurance companies. In one case, Williams wanted to show that a pedestrian run down by a streetcar was not an innocent victim, but an irresponsible drunk. The man’s son had been seen at the scene of the accident, bending over the body of his father. Williams felt confident that the boy was removing a bottle from his father’s back pocket. On cross-examination, he closed in on the boy:

Q: You leaned over him, didn’t you?
A: Yes.

Q: You were sniffing his breath for alcohol, weren’t you?
A: No, Sir.

Q: You were reaching into his pocket for a bottle, weren’t you?
A: No, Sir.

Q: Other witnesses have testified that they saw you bending over your father. Now, why were you bending over him?
A: Because he was my father, and I wanted to kiss him goodbye.8

Williams immediately asked the judge for a recess, went to a phone booth in the hall, and recommended that the insurance company settle the case.

The Ten Commandments

The late Judge Irving Younger’s revolutionary lecture, The Ten Commandments of Cross-Examination (1972), stands as the first attempt to codify some of the rules of successful cross-examination. Since it is virtually impossible to find any American trial advocacy text, lecture, or course on cross-examination that does not refer, at least in passing, to Younger’s Ten Commandments, they bear repeating:

1 Be brief.
2 Short questions, plain words.
3 Ask only leading questions.
4 Never ask a question to which you do not already know the answer.
5 Listen to the answer.
6 Do not quarrel with the witness.
7 Do not permit the witness to explain.
8 Do not ask the witness to repeat testimony he gave on direct examination.
9 Avoid one question too many.
10 Save the explanation for closing arguments.9

Although this superb and entertaining lecture had at last awakened interest in the science of cross-examination, as a teaching tool, The Ten Commandments had severe limitations. They contain many admonitions that the cross-examiner would realise that he or she has violated only after she had actually violated the commandment. More significantly, even on their own terms, The Ten Commandments do not instruct us how to cross-examine. Like the original Ten Commandments, they are largely negative warnings about the pitfalls to avoid.

Minor points of criticisms aside, however, their value to trial advocacy training in the United States cannot be overstated. Whatever their limitations, The Ten Commandments clearly established, once and for all, that successful cross-examination could be achieved by learning and practising identifiable guidelines and techniques.

They were a good beginning.

(To be continued in the August issue.)

Endnotes

1 J Wigmore, Evidence § 1367 at 32 (Chadbourn rev. 1974).
2 United States Constitution, Sixth Amendment — Rights of accused in criminal prosecutions. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.
3 F Wellman, The Art of Cross-examination at 28 (Touchstone, 1997).
5 See E Thomas, The Man to see (Touchstone, 1991).
6 Quoted in E Couric, The Trial Lawyers at 346 (St Martin’s Press, 1988).
7 Id.
8 E Thomas, supra, at 44-45.
9 I Younger, Cicero on Cross-Examination in Litigation Manual at 532.