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## Winning—Or at Least Not Losing—On Cross-Examination

Henry G. Miller\*

*Transcript of  
September 19, 2012  
Continuing Legal Education Program*

Cross-examination is, of course, the glamour topic of trial practice. You cannot get people too excited about direct examinations or openings, maybe summations, but cross-examination is the riveting topic; the stuff of which legends are made. It is not always easy, and I am going to give you a few pointers. Now for those who have not tried many cases, you cannot learn to be a cross-examiner by just listening to one person talk. But what you can do is pick up a few ideas. And as I talk, it is OK to think, “Hey you know; maybe there’s a better way to do it.” Because, what I am telling you, is my way. And, very often, like a surgeon, there are many ways to get out bad tissue, many options, so we trial lawyers have many ways to get at the same result. It is just the way I do it, but you should use your imagination now for how you would deal with the problem.

I am just going to make a series of points and illustrate them, then we will talk about them. The first thing I would suggest to you on cross-examination is there is no one way to do it. As many types of witnesses as there are, there are types of cross-examination. As many types of cross-examiners as there are, there are different ways of getting a cross-examination. For example, a lot of trial lawyers started out in prosecutor’s offices and they develop the habit of being “District Attorney.” Well, you cannot always be Mr. or Mrs. District Attorney and go after every witness. You may have a child witness, the jury will look at you like you are nuts if you try to pull that off. I had a case out in Nassau County years ago, where I had to cross-examine lots of children. It was a sex abuse case, which supposedly happened in kindergarten, when they were five or six, and I did not get around to asking them questions about it until they were ten or eleven. So, obviously it had to be, “Well, now what happened?” I knew the testimony the police had put forward was preposterous, that Bob had committed sex abuse, of a

serious nature, that went on for many months and not one mother suspected anything, and that it went on at lunch. But still, the children had to be cross-examined. “What did Bob the school bus driver do?” So, don’t always be the district attorney.

Sometimes the witness may help you. I remember having a doctor on the stand, a neurosurgeon, that was extremely supportive of our position in a plaintiff’s malpractice case. So I did everything I could to love that doctor up: “Are you then saying doctor that this would have alerted the surgeon to this?”

“Yes, of course,” and I led him to exactly what I wanted to prove. I did everything I could to thank the doctor for coming and for giving us his time. This was cross-examination—very kindly. Keep that in mind.

Sometimes, not too often, maybe the best cross is no cross. If you have gotten everything fine—there were some landmines you were afraid of, but they did not go off—then do not take the chance. Sometimes you are better off with the question not asked. If you did not get hurt, and there was some possibility of you getting hurt, and the witness did alright for you, just stand up very triumphantly and say, “Well thank you very much. We have no questions Your Honor.”

Now, there are many books and articles that can be written. I am going to mention a few to you, because there is a lot to be learned if you are really interested in the topic of cross-examination. One of my favorites is *The Art of Cross-Examination*<sup>1</sup> by Francis Wellman. This has been around a long time and what Mr. Wellman did—he was an Assistant District Attorney in Manhattan many years ago—he took from very prominent lawyers very famous cross-examinations they did in different cases. And you will see how there are so many styles of cross-examination and, in fact, one of the partners in my own firm many years before even I was born, by the name of Lee Parsons Davis, had a famous case, called the *Rhineland* case, which is in that book.<sup>2</sup> That is a book very worth reading.

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1. FRANCIS L. WELLMAN, *THE ART OF CROSS-EXAMINATION* (1997).

2. See *id.* at 254; *Rhineland v. Rhineland*, 219 N.Y.S. 548 (App. Div. 1927), *aff’d*, 157 N.E. 838 (N.Y. 1927).

Then there was Louis Nizer, who was a senior partner in the Phillips Nizer LLP firm down in Manhattan—a very impressive firm still around—he describes his life in court.<sup>3</sup> When I started out, he was maybe the biggest lawyer in New York—everybody knew Nizer—he was very popular with the movie industry people and celebrity people and he has a very famous course in there that you might find very enjoyable.

Quentin Reynolds was a man that I happened to know. He was a newscaster from World War II that made a big name for himself. Very popular, very nice person, not as big as Edward R. Murrow, but he still made his name. Now at the same time there was a yellow journalist for the Hearst paper by the name of Westbrook Pegler and Pegler was really a hater—the grey heads will remember this—you younger people, when I see the grey heads laughing with me, he was really a mad dog journalist. He hated everybody and he would not give anybody a civil answer and he wrote some scurrilous things about Quentin Reynolds. And Quentin went to Nizer and said, “I’d like to sue.”

Nizer replied, “Have you lost any money over this?”

Quentin responded, “Well, not really. If anything, I’ve been bigger than ever. But it was just terrible what he said about me, hinting that I’m a left-wing Commie kind of a guy, which is untrue.”

So, Nizer took the case, and Nizer then got Pegler at a deposition and asked him some questions at a pretrial deposition, which as you all know, is under oath. And he would read Pegler certain things: “Do you agree with that?”

Pegler, just out of pure instinct, “No.”

“Do you agree with this?”

“No.”

“Do you agree with that?”

“No.”

Fine. End of that. The deposition gets signed, sent in. At the trial, Pegler’s on the stand. “Did you say . . . ?” And he starts reading one after another. “Did you say? . . . Do you agree with that?”

“No, I don’t agree with that.”

Then Nizer hit him:

“Did you know that you wrote that?”

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3. See LOUIS NIZER, *MY LIFE IN COURT* (1961).

What Nizer had done was quote from various articles and columns of Pegler and this was Pegler saying he did not agree. I think this went a long way on cross-examination to destroying Pegler. Pegler lost the case. It was in the Federal court in the Southern District of New York. And of course, Reynolds had not lost any money. So the jury gave him one dollar in compensatory, but they gave him seventy-five thousand in punitive, which in those days way back then, was a goodly amount. And Quentin and Louis were not really interested so much in the money, but they made the point. And they brought Pegler down. So that is something well worth reading.

Max Steuer, trial lawyer, had a son, Aron Steuer, who became a very well-regarded judge who was on the Appellate Division, First Department. And Aron wrote a book about his father, the famous trial lawyer Max.<sup>4</sup> How many of you have heard of the Triangle Shirtwaist Factory fire down in Lower Manhattan where all the immigrant women—they were all the Jewish and Italian women—had to jump out of the windows, mostly to their death, because the doors were locked? It was said that the owners locked them in so that they would not be able to sneak out and take excessive breaks or leave early. So they put the owners on trial criminally and Max Steuer—that was one of his great defenses—got them off, he got them acquitted. I do not know how, but stories like that are there.

Max used to be considered quite the trial lawyer, quite the cross-examiner, and his way was always to rivet his cross-examinations around the law of the case. He was in it—even though he was a trial lawyer, he in many ways was a bookish man—do not ever think that a trial lawyer does not read a book, because a trial lawyer better read a few books if you want to know what you are talking about. I think that also might be worth your time.

Well, another book which has got a lot more in it than cross-examination—this will be the last one I mention—is *Final Verdict* by Adela Rogers-St Johns.<sup>5</sup> Adela Rogers St. Johns was a rather famous journalist thirty, forty years ago, but her father was the great trial lawyer from California, Earl Rogers. Earl Rogers was a dandy—dressed beautifully—would go to all the great events and all that, and one of his clients along the way was Clarence Darrow, because they accused Darrow out in California of bribing a jury. If there ever was a picture of

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4. ARON STEUER, MAX D. STEUER: TRIAL LAWYER (1950).

5. ADELA ROGERS-ST. JOHNS, FINAL VERDICT (2007).

opposites, they were it, because Darrow was kind of slovenly and Darrow used to say of himself, “Clarence has nice clothes but he just sleeps in them.” So that was Darrow and on the other side was Earl Rogers, the dandy, and Darrow was more involved in the cause and believing the cause and Rogers was not like that. For Rogers it was more of a game and he was very good at the game. And his daughter describes him and some of his cross-examinations which were very famous. Unfortunately, her father took to drink at the end and sort of finished his life parodying himself, going around to gin mills and saloons, and doing parodies of his best work, but it is a very interesting book.

So there is a lot of stuff that can be read but let us get back to us, the mere mortals. How do we approach a cross-examination? Now remember, a trial is going to be about many, many facts, OK? Frankly, I am trying to get ready on a case now, a little different from some of the cases I usually handle, commercial, underlying commercial activity, a lot of money involved, and then involving a law firm that did not get paid, and my client then having a lawsuit with this law firm over this, so it is all complicated. The facts are all over the place and it went on for years and a lot of money and I have to tell you, I am really working to subdue this, looking forward to cross-examinations and generally how to present the case. So I always tell the young lawyers—when I do that whole one day seminar—basically one of the main things we trial lawyers do is compress. We take this [large amount of information] and make it into this [smaller, digestible amount of information]. No jury can handle all those facts. No jury can resolve every little ipso pipsy issue in those cases. You have to pick your facts and you have to pick your issues. He or she who defines the issue may win the case. If you can define the issue, you win the case. I always remember when they came out with how bad cigarettes were, the cigarette companies of course fought back with misinformation. And I remember Old Gold was a cigarette and they said one of their slogans was—it makes me laugh—“Have a treat-not a treatment,” they were trying to change the issue. You deserve a little treat. It is not about your health and all that. And that is the form of advocacy. I could go on and on.

So remember that: I say “CBS.” C: Compression. B: Brevity. S: Simplicity. Can you be a trial lawyer and long-winded? Yes. But is it a disadvantage? Absolutely. If you cannot get to the point, you are in trouble. I will relate this to cross-examination in a minute. I always tell the young lawyers our patron saint among comedians is a comedian by the name of Henny Youngman. Henny had a four-word joke—how many

four-word jokes are there? Are you ready? Do you want to hear it? “Take my wife—please.” I did not say it is great hilarity. But does he get to his point? Have you ever listened to some friend tell you a joke? Blablabla. You are looking at the clock. You are waiting to have a drink or something. And finally he gets to the punchline, mildly amusing, you laugh politely. And that is what we cannot be. You have got to be Henny Youngman. “Take my wife—please.” Get there.

Same thing on cross-examination. You have got to do what we do with every other aspect of the trial and the two words I use all the time, and keep this in mind, because we are very close to the writers, the literary artists, in this regard: selection and arrangement. Selection and arrangement. Not such big words. Selection: here is the case. Five thousand facts. What facts are you going to use? What claims are you going to use? You cannot present all of them. You have got to pick out that which you think is most meaningful and indeed most helpful. Including sometimes those facts which are not all that favorable, but you have got to deal with them and work them in. That is selection.

Arrangement is very simply: what order do you put them in? How do you bring it up? What are you going to talk about first? What are you going to talk about last? There is no rule which governs you as to how you do it. It is not always easy and therein there are a lot of choices to be made. There was an acting teacher that I once knew who said your talent is in your choices. Same case: two different people, both equally intelligent, but some people make better choices. I do not know, one has better judgment or something like that. Selection and arrangement.

Now, cross-examination. How do we relate all that to cross-examination? You have to select what topics you are going to cover. You know, I mean, there are all kind of cases: pick any kind of a case. The training center for this golf course for children did a terrible job of supervising and we claim that, through lack of supervision, one boy lost his eye when the other kid hit him with a golf club, that is roughly your claim. Well, there are an untold number of facts now that you know. Maybe the first fact: they had rules about supervision. That is one fact that you are going to use. What was the specific rule? They had to have one adult for every three or four children. OK. On this particular day, what did they have? They did not have that many. Oh. On this particular day, in one of these under-supervised groups, did this one child get hurt? Yes or no. You are well on your way. You have picked out the salient facts—see it does not have to be complicated—it can be simple. Do not make it more complicated than it is. Then you put them in an effective

order. You do not have to be Clarence Darrow to cross-examine.

In cross-examining, one of the owners from the camp, “Well sir, you had a rule, did you not, that there had to be four, for every four children there, you wanted an adult supervisor, wasn’t that your rule?”

“Well, I’m not sure.”

“You’re not sure? Is this a copy of your rules?”

“Oh, yeah, yeah, yeah, yeah. That’s right. Yeah.”

“On this particular day, did you have that many adults for those children?”

“Well, I’m not sure.”

“You’re not sure? Look at this. Didn’t you see what the count was that day? Now you didn’t, did you?”

“Well, I guess I didn’t.”

“And you know that this particular group, in which little Johnny was, had eight children in it, didn’t you? And you had one teenager trying to watch them all. Right? Now, you tell this jury you know you didn’t have enough supervision, isn’t that right?”

And etc. Get the idea? You do not have to be Clarence Darrow to do that. You have selected your facts and you arranged them. And so you do that when you are thinking about how you are going to do your cross. You know the case, whatever it is. You organize it by topics and you write it down. And you make a decision as to the best way you think you are going to present those topics. And of course when the witness comes on for direct examination, you are going to listen and you might say, “Oh yeah. That goes in here.” And you put it in there. You cannot be too wedded to your notes. You have got to keep contact with the witness, with the jurors, or with the judge, whatever it is. But that is what you do. OK. You come down prepared. Now, continuing on.

What about when you are cross-examining certain people, like experts? You have to be very careful, and this requires a certain amount of experience to handle this, because this is definitely upping the ante. But the basic rule is you want to ask pin-down questions. You do not want to ask questions that allow the witness to elaborate forever. You almost never would say to an enemy expert witness, “Well, why do you say the power press was safe?” when your claim is that the power press is unsafe. Well, the expert will tell you. Three hours later, he will finish. He will have run over you like a steam train, “and then it is safe because of this and that . . .” No, never give them that opportunity.



Harry Gair, a famous trial lawyer, said if you ask a dumb question like that, the expert will retreat into the forest of his learning. I always thought that was a very picturesque way of saying he will never stop BS-ing you. So you do not ask. You say to him pin-down questions.

"Didn't this power press come down with a force of two tons? Doesn't it come down in one half of one second?"

"Yes."

"Doesn't it crush anything, even steel, that lies beneath it?"

Yes, no. Yes, no. Yes/no questions are called leading questions. You are not supposed to ask them on direct, but on cross they are the way to go, particularly with an expert.

Now forget the expert. What happens if you get a witness who is a runaway talker? Blah, blah, blah, blah. Well, let me tell you about that. You do not want that. You want answers to your questions. Sometimes it is very difficult to control, even for a very experienced lawyer. So learn that lesson young. Learn that lesson early. One thing you can do is say, "Your Honor, please ask the witness to answer the question. He will get a chance to elaborate later and elaborate with his own lawyer." That sort of a thing. And you be careful that you ask only yes/no questions, only those leading questions. Do not give them a chance to escape. Explain to everybody, "Sir, when your lawyer gets up, he'll give you a chance, a chance to cover that."

When I started out in Brooklyn many years ago, we used to run into certain witnesses that were impossible to cross-examine. We would call them "the old ethnic witnesses." And they would answer any damn well way they wanted. You might want to ask a question of, let us say, an opposing driver in a case, "Was the light red when you first saw it?"

And you are liable to get an answer like this: "The light? You're worried about the light? Let me tell you, that light, oh God, I never saw such a green light. And I got to tell you something, that client of your's, she's got some mouth on her." And I heard witnesses like that. One fellow told me, he asked one of those old timers a question like, "What did you do at the time of the car crash?" He answered, "A car crash? There was no car crash. Let me tell you, if there was a fly on the bumper, he wouldn't have got hurt." That was the answer. I suppose you can move to strike and ask the judge to disregard, but they will never forget.

Now, this is hard, particularly for beginners. Get your head out of your notes. First of all, you cannot look at the witness, you cannot look at the jurors, you cannot even look at the judge, if your head is in your notes. Sometimes even in the great firms, the Wall Street establishment

firms, where they have very fine lawyers, but they don't get much chance to be before jurors, they will try to compensate by preparing and writing down their cross-examination questions. It cannot work, because no witness is going to allow you the luxury of following such a tight script. Do you understand? I would suggest for your notes, put down ideas, whatever the ideas were, because, as in the simple automobile case, "What was the light?", you know what you want to cover there. "Where was the witness?", rather than just writing down the specific questions. That is never going to work. And sometimes you have a better chance of listening. Do not be worried about what is on your notes. Listen to what the witness is saying. The witness may say something which you entirely never expected. The witness may say, "Well, we were down there and well, we were at that corner for forty-five minutes on Third and Fifth."

"Third and Fifth?" You, of course, know the scene because you have been to it to prepare yourself. There is a saloon. There is a gin mill. That is why they were there for forty-five minutes. "You were there, you were down in that neighborhood for forty-five minutes. Isn't it a fact that you went into that saloon?" More often than not, it might be right. Maybe they had a few drinks that they did not want to tell you about and you only knew that opportunity because you were listening and you got your head out of your notes.

Now, some cross-examination is easy. I know you all know what a deposition is. And that is something that is gold when you are cross-examining. And if there is anything in that deposition which the witness has sworn to, very often had a chance to correct before they sign it, which is inconsistent with what they say on the stand, you can use that to impeach them. And, once again, it is very easy cross-examination. Here is the way it would go:

"Sir, you gave testimony at an examination before trial, on such and such a date?"

"Yes."

"Your lawyer was there?"

"Yes."

"You knew you were under oath?"

"Yes."

"Did you give this answer," and always tell your opponent on what page it is, "page thirty-two," because your opponent is looking for ways to interrupt you, and he surely will say, or she will say, "What page?" So you don't want to give them that chance to annoy you. You say page thirty-two.

“On page thirty-two, line fourteen, did you give this answer, ‘It was four o’clock?’”

“No, let me explain.”

“No, no. Just answer yes or no. Did you give that answer?”

“Well, yes, if it’s there.”

“Want to look; it’s there.”

“Oh yeah, I guess I gave that answer.”

Well, that is when you come in with whatever your zinger is: “Isn’t it a fact that it all happened at seven o’clock, when it was dusk and you couldn’t see, etc.?”

Whatever it is. The point is that: “Did you give this answer to this question?” They do not get a chance to explain away or tell you why there is something wrong with that answer. So it is very easy cross.

And as far as witnesses breaking down under cross like it happens on television—we used to say the Perry Mason series, there was no witness that could stand up to Perry. It does not happen, you understand? Do you know how willful and tenacious people are? Do you know how they hang onto their stories for fear of death? They never give up. I think maybe once or twice I saw a witness absolutely break down and say, “You’re right. I wasn’t telling the truth.” It happened to me once many years ago in New York Supreme Court. There was some Irish guy. He was right off the boat and he had not learned American ways yet. He spoke with something of a brogue and he was giving a guy a story and I finally said to him, “Now, young man, that isn’t so is it? You haven’t told the truth, have you?” I almost fell off my feet when he said, “No, I wasn’t. It wasn’t the truth. You’re right.” The judge looked at him, like “What?” It is like once in a career of over fifty years of trying cases, maybe once or twice more but not often; that does not happen. They hang tenaciously. You just have to show their testimony is lacking in credibility, but it is very rare they are going to break down like that, very rare.

In this day and age, particularly the young lawyers, they can find anything. They have this Google thing on the Internet. If the witnesses had any writings, that is a wonderful way to impeach that witness, particularly an expert. They have always written something and usually that is an excellent way to impeach them. Collateral cross is very good. What do I mean by collateral cross? It has nothing to do with the issues; it goes to credibility of the witness. I had this once, cross-examining an expert who was really an expert on everything. It was almost humorous. He testified all over the country. Pretty presentable in his way, but he

testified on everything. I think he testified—I am trying to think of some of the things he said he was an expert on—power presses, refrigerators, nuclear submarines. It went on and on like that.

So, my cross-examination was, “You’re an expert on this? You’re an expert on that?” I said, “Nobody can be an expert on all the things.”

He said, “I can.”

Then I went on: “You’re an expert on this? You’re an expert on that? Nah-not all those things,” and I went on and on until I had a whole string of things. And I said, “Well, nobody can.”

Again, he said, “Well, I can.”

And he sort of made a bit of a fool of himself and I said, “Can you believe this guy?” Then one day, a couple of years later, we needed an expert and we could not find one, and my partner said, “Remember that guy?” I resisted the temptation. That is impeachment and it is easy cross.

Now, pure cross is rare. Pure cross where you do not have any deposition statements or much warning of this witness coming on. It is very rare in the jurisprudence of today. Certainly in civil cases we have, if anything, hyper-discovery. So, it could only happen in rare cases. In criminal cases, maybe a little less discovery, but still you have a pretty good idea of who is coming on and what is going to be. But the old timers, like when I started out many years ago, we had less discovery by far. And very often we would be confronted with witnesses that we had almost nothing on and we were not even sure they were going to be witnesses. Now they have changed things so often that you have to exchange witness lists, and whatnot, in so many kinds of cases that you have a very good idea of who is going to testify and to what. But sometimes it still happens.

My dear friend, Roy Reardon, some of you might know Roy, he was the managing litigation partner down at Simpson Thatcher for years. He is a wonderful lawyer, he did a program for the New York City bar down in Manhattan on pure cross. And he invited a number of lawyers, he said, “You’re going to cross-examine a witness and you won’t know in advance who it is until the witness gets up.” And very amusingly, one or two prominent lawyers declined to be on the program and I could see why. I was too dumb I guess and I said, “Well, there will be an audience. It will be some fun.” I said, “Sure.” And it went OK. But I can understand the reticence of lawyers to want to do that because it is hard. And you do not have anything to back you up. It is you against that witness. What advice would I have for you in a situation like that?

Well, the advice I would have is that you know your point, whatever your case is, and if you really believe that this witness is false, in some material way, then you have got to just fall back on yourself and take that witness on. If you believe that witness really could not have been there, and did not go to that movie that night where they said they saw this and that, and that it is just clearly false, you have just got to trust yourself. You do not have any backup information.

“You went to the movie?” I am sure he prepared himself, this lying witness. “What was playing? Who did you go with? When did you get there? When did you leave? Where did you go?”

In other words, you have to press it and hope for the best. But very often, you have got to trust the jury, because sometimes when you have not had any ammunition, but the witness under questioning shows herself/himself to be a little hesitant, a little reluctant, well then, of course, you may get somewhere. You have to trust your instincts. It does not happen that often that we get a pure cross but you have to trust yourself.

Now, what about the case where you have something really delicious but you want to save it? You must not be impetuous and use it too quickly. It is just too good. You must suck the witness in, get the witness to commit, and I will give you an example of a case. The issue was if the testator of a will was in a competent state of mind to draft and sign that will or was the testator incompetent because, according to the will that was proffered, the will disinherits my client—your client—to the benefit of the other sibling who is the other side of this litigation. You have got something delicious because this will was signed at a certain time when the testator was in the hospital. You have got something great, but you want to stretch it out. You do not want to give it away too quickly. The witness in question was an attesting witness who was foolishly one of the main lawyers for the other side. Generally speaking, be careful of putting yourself in the position as a potential witness. That is a good tip to remember generally, because you can be called. So, we are cross-examining this lawyer-witness, who witnessed the will.

“And Mr. Decedent here, he was clear of mind?”

“Oh, yes.”

“He was in the hospital though?”

“Oh yeah, but he was doing fine at that particular moment.”

“What time was that that you say, it was about 3 P.M. on the afternoon of such and such?”

“Yes, yes. I was there. That’s when we did it.”

And on and on and on. Now this lawyer-witness was inexperienced in litigation and trials, so he did not know that we, on our side, had a simple device of a hospital chart. And so then we saved our zinger, which was a good zinger, and then we got to the zinger finally after we had stretched it out as long as we deliciously could, “Did you notice any cats, C-A-T-S, in the hospital room?”

“Cats? No.”

“Did you notice any dogs, D-O-G-S? Dogs?”

“In the hospital, no.”

“Did you look at the ceiling?”

“Err—I don’t know—err.”

“This hospital record’s in evidence, did you know about that?”

“No, no I don’t know about that.”

“Oh. You said this was 3 P.M. on such and such a date?”

“Yeah.”

“We’ve got a nurse’s note from 3 P.M. Mr., what Mr. Green, that was his name, the decedent?”

“Yeah.”

“This nurse’s notes—3 P.M.—Mr. Green insists that he sees cats and dogs walking on the ceiling. You didn’t see them? How come you didn’t see them? Anything wrong with your eyesight?”

That is literally a true story. But, of course, it was only effective because we had the cruelty and the sadistic nature to stretch it out. Cruelty is a helpful quality for a trial lawyer, sometimes. OK, you understand. Stretch it out like a lovely intimate experience you do not want to end.

Some lawyers preach saving a good question for last. That is very often a sensible device; you want to end on a high note. You know you have got something good because you want to sit down not defeated, not dejected. Sometimes I watch on television the lawyer gets a terrible answer and then acts like he was totally defeated, and goes, “agh” and sits down. Well, no trial lawyer of any note would do that because trial lawyers even when they are not getting anywhere, it is our job to pretend we are getting somewhere. “Oh ho. You said the light was green. Ha. Well, alright. Let’s remember that.” It might not mean a damn thing. You act very triumphant. Maybe you will fool somebody. How do I know? So, if you have got a good one, maybe save it for last.

Now, cross can also be used to paint your picture. There used to be a fellow that I knew quite well. His name was Mike Liter. He has been dead a good many years now, and he tried cases for the Transit Authority. And he would always say, "I listen to the direct, and I usually ask things that they don't go into on direct." That can be very good. There is reason a why they do not go into it. What is the big exception though? What is the big caveat? Be careful they did not plant a trap for you, knowing that you would blunder into it. With that exception, he used to ask what they did not, because he said, "I'll always get something out of the witness to support my side." And so even though, let us say this expert testifies the power press was safe, he may give you a lot of the surrounding details that you want about the power of the machine, about the fact that certain other machines have certain guards on them that this machine did not have. So just because the expert is against you, or the witness is against you on some main points, that does not mean that there may not be a lot of auxiliary points where you can build your story.

And in fact, the famous trial lawyer from out west, the mountain man there, Gerry Spence, he says the purpose of cross-examination is to tell your story. I never heard anybody say that. But it makes a lot of sense to me that you get a very good chance to tell your story through the enemy witness, whatever it might be. Think of any case. And how does he do it? He does a fact at a time, a fact at a time. Well then, an example could be a simple automobile case.

"That's a busy intersection, is it not? And there's a stop sign on all four corners, is there not?"

"Yes."

And whatever else you want, one by one by one you get. "And on this particular day it was raining very hard, was it not?" Whatever the facts you want are. One by one, just go on from there. Anyway, that is how he does it.

Now, the experts say never ask "why?" of an enemy. But I say, generally speaking as I suggested to you before, "why?" on cross-examination is a very dangerous question. But to never ask "why?" Suppose you have a claim against the physician who did not come to the hospital when he should have. You have cut off all escapes for that witness.

"You got a call from the head nurse?"

"Yes."

"Indicating the seriousness of the child's condition?"

“Yes.”

“You were at such and such an address, which is about a mile and a half from the hospital?”

“Yes.”

In other words you cover everything as to why that witness did not come to the hospital and he has no really good excuse. After you have cut off every escape hatch, what is wrong with asking, “Doctor, why didn’t you come to the hospital?” A little risky. Actually it happened and I asked it, and he really had no answer and it was devastating.

Recently, we had a panel at Pace on the O.J. case. I attended as part of the audience, and one of the criticisms made in his book, I forget the exact context, but one of Vincent Bugliosi’s criticisms was that the prosecutorial team in the O.J. case had a few opportunities to ask the “why?” question. So, if you are interested in that, Bugliosi’s got a book on that, and he is very critical of the prosecution team.<sup>6</sup> We should have had Bugliosi on the program, that would have livened it up a little bit. But in any event, a lot of these rules of “never,” you are better off saying, “almost never,” because there always can be an exception, and you do not ever want to get into pro forma habits.

If we could tell you how to be a trial lawyer by giving you a set of rules, we would do it and it would be easy. But we cannot. There is almost no absolute rule, in my opinion, on being a trial lawyer. There is a matter of your thinking about your case, getting some experience, putting it together, and hoping that you have the good judgment to make the right choices.

No lawyer in my office drinks water in front of the jury. Why? Why? You want to be a trial lawyer with juries; you have to think like that. Everything you do involves them. They are watching all the time even when you are not looking at them. You better be very conscious of them. And even when you try, you can make mistakes. Sometimes I have said things that were misinterpreted by the jury. I see somebody scowling at me. What the hell did I say? I mean, I am serious. So even when you are very careful, the jury may misinterpret you and some people are not careful.

A friend of mine cross-examining, says to a witness, “Well, you know what they say, beware of those bearing gifts.”

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6. See generally VINCENT BUGLIOSI, *OUTRAGE: THE FIVE REASONS WHY O.J. GOT AWAY WITH MURDER* (1996).



So, I said to him later, “Why didn’t you say the quotation as it is: beware of the Greeks bearing gifts?”

He said, “There’s a guy on the jury named Dimitri.”

OK. He’s smart. You need think of the jury, who is on it? I once made a crack about civil service. Forgot Juror Three. Civil service. I died for two days until we got past it. How stupid you can be. You have to be sensitive of the jury.

One question too many. If you want to be a great trial lawyer and you are cross-examining, know when to sit down. We could go on, we could have a program on “one question too many” and it could be very humorous. There was a guy, Abe. Abe Shackton. He is dead, I can say anything I want. He was very good. He was very tough. He was wild, a little mean. I think Abe was with the famous firm of Berman & Frost way back then. And he had some witness on the stand who was a lovely lady, who was the owner of this building alongside of some terrible event where something collapsed, and she was testifying in a way that was very bad for Abe. This was, I think, in the Bronx. And Abe is cross-examining this very nice lady, the owner of this house. And the cross goes something like this:

“How long have you owned that house? How many people are in that house? What kind of people are in that house? Does anybody watch who comes and goes in that house?”

Nobody knows what the hell he is doing, but in his evil way, he is trying to suggest that this is a house of ill repute. He does not have the damndest factual basis for this unethical cross-examination, but that is not stopping Abe. So, he is going on like that, and Abe, believe it or not, the scoundrel was getting somewhere. And finally, he asks this question, one question too many, Abe:

“Well, have you ever been known by any other name?”

And she says, “Oh yes, when I was in the convent.”

He quickly recovered and said something, “Oh, and they wouldn’t keep ya, huh?”

Darrow tells one on himself about one question too many. No, not on himself, the country lawyer. Some other country lawyer. Yes, Darrow started out as a country lawyer. And, in fact, I just wrote something if I may digress. I reviewed a book for the New York Law Journal, and the review is going to appear tomorrow.<sup>7</sup> A friend of mine by the name of Fred Block is federal judge in Brooklyn, and wrote a book called

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7. Henry G. Miller, *Disrobed*, N.Y. L.J., Sept. 20, 2013.

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*Disrobed*, which is very worthwhile, and I did the review for the law journal.<sup>8</sup> One of the things I mentioned is that he came from a country law firm out in Suffolk, and I praise him. And as I come to think of it, Clarence Darrow and Robert Jackson started out as, you know, country lawyers. But Darrow tells this story about a country lawyer who is dealing very nicely with the witness.

This lawyer is representing a guy accused of assaulting this other fellow, and the old country lawyer was getting somewhere and says, “Well now sir, you never saw my client actually bite that man’s ear off, did ya?”

“No, I didn’t see your client bite that man’s ear off.”

Should have sat down. Should have stopped. Asked the next question. Very triumphantly. “Why sir, if you never saw my client bite that man’s ear off, ha ha ha ha, how can you be so dang sure he did?”

“Why sir, I saw him spit the ear out.”

One question too many.

Now, one of the great issues on cross-examination is whether to go long or short. Generally speaking, I recommend getting to your points and getting out. There is a certain built-in sympathy for the witness. They are the strangers to the courtroom. We are the professionals. It is a little bit of David and Goliath, and we are Goliath. So we are not naturally the ones in the sympathetic position. Now, of course, there may be a witness who is, you know, so discredited and unpleasant that that does not hold up. But we are talking, all things being equal, that mealy-mouthed expression all things being equal, generally the witness has a little advantage. If you are not getting anywhere with that witness, you are in trouble. You want to get in and get out while it looks like you are getting somewhere. Get what you need and then forget about it. And I will give you two examples from historical cases, because I think you should know the historical cases also. The issue is to be short or to be long on cross?

There is the case of Alger Hiss and Whittaker Chambers. Some of you younger people never heard of them, I am sure. Some of you older people have heard of them. I will give you the background. Something you should know about in any event. Alger Hiss was a well-regarded employee in the State Department and other branches of government. He came from Baltimore, Maryland, from a rather genteel family. They did

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8. FRED BLOCK, *DISROBED: AN INSIDE LOOK AT THE LIFE AND WORK OF A FEDERAL TRIAL JUDGE* (2012).

not have much money, but they had a kind of a lineage going back. And he got to, I think, Johns Hopkins and then he went to Harvard Law School. And through people up there I think, no less than Felix Frankfurter (I am not sure of that), got to clerk for Oliver Wendell Holmes. The Oliver Wendell Holmes, for whom Alger said he was a paragon of virtue. And he loved Oliver Wendell Holmes. Following that, Alger went into government, went into other branches, and eventually got to the State Department. Well regarded. Befriended by the likes of Dean Acheson, who was eventually Secretary of State. Well known and highly regarded. That is Alger. They say he was very well dressed. Character out of Henry James. Somebody said, "more like the English Ambassador than the English Ambassador." That was Alger. Elegant fellow.

Another man is Whittaker Chambers. He comes from Lynbrook, Long Island. He is very different. He is rumpled and overweight. Not lean and elegant like Alger. Some might say a character out of Dostoyevsky. And Whittaker admittedly was a Communist, way back when, even before the 1930s. See, in the 1930s, it made sense as to why some people became a Communist. Big Depression; the rise of Fascism; Mussolini and Hitler; you know, and a lot of people were joining left wing organizations and some joining the Party and all that. But he was a communist in the 1920s, which as you may remember from your history, was an opulent time, you know, the "Charleston" and all that stuff following the Great War. But, that was his view. He lost, I think, his brother, if I remember correctly, I think to suicide, and said, "Now I am really a Communist." And that was Whittaker Chambers.

He left the Party though. I think he got disenchanted. Possibly the Hitler-Stalin peace pact might have broken the back of his beliefs. And anyway, he turned away from the Party. In those days, back in the late 1940s, there was the House Un-American Activities Committee, which not everybody liked, but they were on a witch hunt for Communists following World War II. Now Russia was being very aggressive, the Soviet Union was being very aggressive and we were in the Cold War, so the atmosphere was, "Oh my God, the Communists are coming."

The House Un-American Activities Committee somehow gets Whittaker Chambers reluctantly to testify. And he says, in one of his ways: "Yes, I was a Communist, and I met others, and I was a Communist, and Alger Hiss was my friend in the Communist party."

What? What? What? It was hard to believe. They are two absolutely different types, from two different backgrounds. And then, he is challenged. He says it again. He repeats it on *Meet the Press*, when *Meet the Press* was on the radio, and that is not a privileged setting. He was challenged to do that. See it might have been considered privileged when he testified to Congress, but it was not privileged when he says it on the radio like that, and people are urging Alger, "You gotta sue this bum." This guy is off the wall to say a thing like that about you, such a valuable man. You know, Oliver Wendell Holmes and the whole thing.

And Hiss decides to sue. He sues down in Baltimore for libel and whatnot. And all of a sudden, Hiss's lawyers triumphantly, confidently I should say, asked Chambers, "Do you have any documentary evidence or anything like that?"

To their amazement, he says, "Yes," backing up the charge.

And he needs an adjournment, and he goes to his nephew's house in Brooklyn, who has got stuff stored for him in some dumbwaiter that was not used, and he hauls out these documents. Low and behold these seem to be State Department documents, some things that were clearly from Alger, and seemingly incriminating, that possibly he was a Communist. And Chambers also had some papers that he hid in a pumpkin, on his farm in Maryland. So some people called the whole thing, "The Pumpkin Papers," and I can still see as a boy the headlines for this stuff, it is kind of funny in many ways. Anyway, that was the end of Alger's libel case, because these documents blew it apart. They would prosecute Alger for a crime, for saying things under oath and all that. The time to sue for espionage had passed. He was in the State Department. But they could go for perjury. And he was indicted for perjury.

And the case was in the Southern District, and all the establishment lawyers were really on Alger's side, and they said, "You gotta get a lawyer."

And one of the favorite trial lawyers of the establishment bar was a man called Lloyd Paul Stryker. He was a top lawyer. Anyways, he founded some of the firms that defend medical malpractice cases. He knew the people that started Martin Clearwater Bell, firms like that. He was an elegant lawyer, and a tough lawyer, and now they come to the trial and Whittaker Chambers is one of the big witnesses against Hiss. In many ways, a reluctant witness because he really liked Hiss, but that is neither here nor there. He also was eminently cross-examinable.

And Stryker conducts a very lengthy, devastating cross-examination of Chambers. "You find it easy to lie in all these affidavits."

“No I don’t.”

“Well you did lie.”

“I was a Communist and that’s what I had to do.”

“You lived in common law, no benefit of matrimony, with One Eyed Annie, a prostitute, didn’t you?”

“We had a common law marriage, and she was not a prostitute.”

And on and on and on, they had all this dirt on Chambers, and he would apparently be discredited. I know a person that was a spectator to part of that cross. Very eminent person, also gone, Judge Whitman Knapp, who was a judge in the Southern District. And he told me, this is a true story, he says, “Henry, I went in in the morning, as I watched this as a young guy, thinking that Chambers was a liar, and Hiss was of course innocent, which is what we all believed.”

“And by the end of the day after watching this devastating cross-examination of Chambers,” where he was shown to have been a scoundrel and all that, “I came away convinced Chambers was telling the truth, and that Hiss was indeed guilty.”

In other words, it was a long and technically effective cross-examination, but the point being, if the witness could stand up under that withering cross-examination, and the kernel of what he saying still stood tall, the withering cross-examination proved what he did not want it to prove, and seemed to vindicate Chambers’s position.

So, you might argue, that in that case, maybe and who the hell knows, but maybe a shorter cross-examination, just picking out some of the nuggets, might have been more effective. Incidentally, Stryker did manage, with his great skill, to get a hung jury, on Hiss’s behalf. Hiss was retried. Hiss foolishly changed lawyers, got rid of Stryker, got an establishment lawyer, very good lawyer, but it did not work out, and he was convicted on the next time around. And spent time in jail. Protested his innocence until his death.

His son Tony Hiss, writer for *The New Yorker*, still writes books protesting his father’s innocence. Some people, if you say to them, “Alger Hiss is guilty,” to this very day, they are liable to punch you. Watch out. Such were the passionate feelings. You know, because I wrote a play and an article about it, and I said, “It looks to me that Hiss really was guilty,” but you had to be careful who you said it to. I gave a talk to some luncheon club, they asked me to give a talk on this, some years ago, and some guy stood up and started to give it to me. And after it was over I said, “Oh, you have a very spirited opinion sir, but it’s very nice hearing you, and how are you?” But he would not shake my hand.

Because I had the nerve to say Hiss looked like he was guilty.

Anyway, there's a book for those of you interested in that by the name of *Perjury*, and I believe the author is Allen Weinstein.<sup>9</sup> Excellent book if you are really interested in that. Discusses the cross-examination and everything like that, and he concludes that the jury made no mistake when they convicted Alger, for what it is worth. So that is a historical example where you learn something about a very interesting and historic case, and also, on the other hand, shows you that going long is not necessarily always the way to go.

Oscar Wilde, you all know Oscar Wilde right? Everyone knows Oscar Wilde. When you read anthologies on humor, there is Oscar Wilde and Mark Twain; they have about half the book those two. Shaw's also got a big piece of it there. When you get by those three, there are not too many, OK? And they all have wicked humor. And you all know that. Wilde was physically a big man, Anglo-Irish, and married, I think two sons. And he tormented everybody, including the British people in charge, and they were always looking for him, and he had to be careful, because he would always have something witty to say about them in a derogatory way. And, of course you all know, he wrote plays and everything like that.

He also was known to associate, more than you would think, with young men, usually young men who were attractive, maybe not from as wealthy a class as Oscar, but be that as it may, he hung around with them. But he did hang around with one man, Lord Alfred Douglass. And he was a bit of a poet in his own right. Handsome young man. And Douglass's father was the famous Marquis of Queensberry, the guy that wrote the fighting rules, you know? And Marquis of Queensberry was evidently a real nut, and could be physically abusive and all that. And this tough guy Marquis of Queensberry is watching his son, Douglass, hanging out with big Oscar Wilde, and he suspects [a] connection [between the two].

And, so, he decides to do something about it. He delivers this note to the people at Oscar's club, which in a sense is publishing the note, and it says something like, "Dear Mr. Wilde, you're posing as a sodomite."

Why he said posing I do not know. I think we all know what he meant when he said sodomite. Put the worst meaning on it. Oscar, like Alger, was encouraged by all his friends to sue for libel. The moral of this story is, be very slow before you sue for libel. And he finally does.

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9. ALLEN WEINSTEIN, *PERJURY: THE HISS-CHAMBERS CASE* (1997).

Now in England at that time, a false sworn claim of libel can backfire. They did not play games with it.

And Wilde comes to the trial and he is cross-examined by Sir Edward Carson, who is also Anglo-Irish, and one of the highly regarded barristers of the day. And Carson is cross-examining Wilde, which is no task to envy. Wilde is devastating with his witticisms, and he has the gallery laughing with him and applauding with him.

“Was that book immoral, Mr. Wilde?”

“Oh no, it was much worse than that, it was badly written.”

Those kind of answers going back and forth. And Carson is getting beat up. He does not sit down. And he keeps going and he goes long. And finally he asks this question, do not ask me where he got it from, referring to Oscar being with this young man, some other young man. He says, “Mr. Wilde, did you kiss that young man?”

So, Wilde, instead of answering indignantly, said, “Oh no, of course not, he was too ugly.”

“He was too ugly? But if he wasn’t ugly?”

“I was just making a pleasantry.”

“Oh no, but you said it.”

And with that stupid answer, Carson did not let go, and all of a sudden Wilde became unhinged, and I think it all fell apart, as a result of that cross-examination where he went long. Then that case got dropped and he got prosecuted and convicted, I think first trial hung jury, sort of like the Alger thing. And then, after that, he was convicted on the second trial, and he did hard time.

Oscar, unlike Alger, did not have a funny experience protesting his innocence and all that stuff until the end of his days, because they really had him. When I say hard time, I think they literally had the treadmill where he had to push it around, so I mean this was very hard on this very sensitive man, and I think he went to Paris and died a broken man. So he did not have much of a good time after that. But, for our purposes in cross-examination, it always strikes me as some example. Sometimes you have to stay in there. You have to hang in there and take your lumps—like Carson did—and eventually prevail.

There was a friend of mine, Peter DeBlasio, very good trial lawyer. He tried civil cases, started out as an Assistant U.S. Attorney, and he was very good, particularly on cross. My friend Peter believed if he was in the right, he would stay with that witness until he brought them down. You know I do not think I am quite like that, but I always I admire Peter, and that is the way someone can be.

So you can see there is no easy answer. I come back to where I started, namely that I think on balance, on cross: be brief, do what you have to do, and get out. Are there times when you have to hang in there? Yes, like my friend Peter, like Sir Edward Carson did in the Wilde case, and maybe get somewhere, yes. So, how do you know which they are? Well, that is what they pay you the money for. Your talent is in your choices. You will have to figure that out yourself.

That is pretty much what I wanted to say about cross-examination. I would conclude by saying it is an art; do not fear it. In many ways, it is the least learnable. You know, pretty much you can teach people to do a good opening and summation, at least tell them what it is, but cross is so subject to the vagaries of the witness's answers, the judge's disposition, the jury's composition, that it is more elusive than other parts of the trial, and therefore in many ways more difficult, very exciting, and sometimes greatly rewarding. Do not fear it, it is an adventure. I have had my head handed to me a few times when I tried to cross-examine, and I am still here, and people even ask me to talk about it. So how bad could it be, right?