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CROSS-EXAMINATION BEFORE THE TRIAL VERSUS AT THE TRIAL†

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ON September 16, 1938, the New Federal Rules of Civil Procedure went into effect. On March 19, 1948, numerous amendments to these rules went into effect. Thus we have had ten years of experience and experimentation with this new adjective law which was designed to both improve and expedite the administration of justice. During this short period of time there has been such a plethora of decisional law that even the West Publishing Company in 1947 was compelled to add to its American Digest a completely new title — "Federal Civil Procedure." It is always a lawyer's prerogative to say (and he feels much better after he has said it) that this mass of decisional law has tended to confuse rather than to clarify. Parenthetically speaking, I should add that even the best procedural law does not assure or in any way guarantee good judicial results. Such an object can be accomplished only by improving the qualifications of Judges and increasing the standards of the Bar, for a good Bar is essential to a good Judiciary. A poor judge, even with the best of procedural rules, will not produce the desired result in the administration of justice, while a good judge, with poor procedural rules, will reach the desired mark. In my own State, we have a trial judge of twenty-four years experience, of whom it is said that he could conduct an exemplary trial even with a Montgomery Ward catalog as a rule book. Such is perhaps the finest compliment that can be paid a trial Judge.

One of the basic and underlying principles of the Federal Rules of Procedure, although it is unexpressed and concealed, is that no litigant shall have or keep any secrets from his adversary. What I have just said bears repetition, for it should be pondered by every one of you. It introduced a revolutionary principle in our adjective law. Prior to the adoption of these rules, each side, as in the art of warfare, was allowed

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to spring on his adversary all the surprises which a rich imagination on the part of counsel could contrive. This is no longer permissible. To carry into effect this principle, provision has been made for almost unlimited exploration and inquiry into the other fellow's case. Elaborate machinery is given each side to probe into and discover the claims, defenses, etc., of the other side. These amendments which have just gone into effect have broadened the scope originally contemplated, for there has been added to Rule 26-(b),

"It is not ground for objection that the testimony will be inadmissible at the trail if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."

The numerous amendments which went into effect on March 19, 1948, were adopted by order of the Supreme Court on December 27, 1946. It is significant that the only amendment proposed by the Advisory Committee, which was rejected by the Supreme Court, was the amendment to Rule 30-(b). This is understandable when we remember that the Supreme Court, at the time of the adoption of these amendments, had under consideration for decision the case of *Hickman v. Taylor,* which was decided January 13, 1947, 329 U. S. 495. Although that case indicates that there is some limitation upon the right of a litigant to probe into the file of the lawyer for the other side in order to appropriate the "work product of the lawyer," on the other hand the case announced:

"No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case."

Perhaps the greatest procedural device created by these rules for the ascertainment of your adversary's case is the right of cross-examination of your adversary and his witnesses before trial. In many states this right had existed for many years, but it was confined to the right of cross-examination of your adversary at the trial, and not before the trial. At this point it might be wise to define the expression "cross-examination," as used herein. I am not using it in the narrow, traditional sense. In using this expression, I mean the right to examine your adversary and his witnesses at any stage of the litigation — even at its inception — which is vouchsafed by the Federal Rules. A lawyer does not generally cross-examine his own client and witnesses — he merely examines

them. This can be done in his office at his convenience, without the use of procedural machinery and without notice to his adversary and without the presence of his adversary. Cross-examination before trial is conducted without any antecedent direct examination. Likewise, during the trial in the Federal Court since 1938, a party generally calls his adversary for cross-examination without any antecedent direct examination. I should here observe that cross-examination before trial is not limited to cross-examination of one's adversary, but also includes witnesses for the adversary, while cross-examination during the trial is limited to the adversary and does not include the adversary's witnesses.

There is a vast difference between cross-examination before trial and cross-examination during trial. This is so for several reasons. In the first place cross-examination before trial is not confined to matters that are admissible in evidence, while cross-examination during trial is thus confined. I have just indicated that the amendment to Rule 26 is most specific on this point. In the second place, cross-examination before the trial does not expose the cross-examiner to any hazards, risks or injuries. This is so because such cross-examination does not take place before the judge or the jury, and the results of the examination need not be submitted in evidence. Thus, if a telling blow is made against you — it is without harm. It may wound the pride of the examiner, but inasmuch as it occurs in the absence of the judge and jury, they need never know of it. Cross-examination during trial is at best a hazardous undertaking, full of risks. During the war we heard the expression, "calculated risk." This can be aptly applied to cross-examination during the trial, for there are times when the examiner must expose himself to risks. A good witness may ruin even the best of lawyers on cross-examination during trial. Then there is another difference. Generally speaking, cross-examination during the trial is limited to matters which were brought out in direct examination. Obviously this limitation cannot exist in cross-examination before the trial for discovery purposes.

This vast difference in cross-examination before the trial, as distinguished from cross-examination during the trial, has tended to breed careless cross-examination by even the best of lawyers. This was a result that never was contemplated.

In conducting cross-examination before trial, counsel acts almost in the role of a detective. He probes without knowing what will be found. That this is intriguing and alluring work cannot be denied, but in doing so the lawyer falls prey to some very faulty habits of cross-examination which unfortunately in many instances are carried over into the actual trial of the case.

It is my purpose to give expression to some well formed, well tried thoughts on cross-examination during the trial, as distinguished from cross-examination before the trial. What I shall say represents views accumulated during more than a quarter of a century of professional life devoted exclusively to the trial of cases. I can say, without being extravagant, that I have read practically everything written on the subject of cross-examination, and I have tried out practically all theories and have discarded a great many of them.

It has been said that the art of cross-examination is the art of asking the right question at the right time in the right way. I think this expression is very misleading. It emphasizes too much the element of chance. In my opinion the element of chance, or otherwise known as "the inspiration or spur of the moment," plays a very insignificant role in the art of cross-examination. The only royal road to successful cross-examination is preparation, preparation and more preparation. In one difficult case I had, I cross-examined the president of one of the leading banks in a large industrial city of Ohio. He had been a very successful trial lawyer before he became president of the bank. The cross-examination lasted for four days. I spent over a year in preparing for it. There was no element of chance involved in that cross-examination. Every lawyer once in a great while has of course an experience where the element of momentary chance plays a large part, but those are so few and far between that no lawyer can afford to depend on it.

I have on my desk a daily journal in which I have included a number of rules for cross-examination, which I have distilled from all that I know on the subject. These rules I have read and re-read many times. Whenever I have an important case to try, I again read them. They serve as my decalogue for cross-examination. Here they are:

(1) First determine whether it is necessary to cross-

examine. Has the witness done you any harm? If there is no need for cross-examination, do not cross-examine. Never cross-examine for the mere sake of cross-examination. More cross-examinations are suicidal, rather than homicidal.

(2) Prepare carefully in advance of the trial the cross-examination of each witness. Contemplate every probability which may arise. Do not rely on accidents to help you. There is no such thing as a great and skilled cross-examination on the "spur of the moment."

(3) Commit to memory your trial notes and outline of cross-examination of each witness. Do not depend upon a mass of written notes to guide you. Consider the effect produced on a court and jury when in the heat of cross-examination the lawyer has to fumble through his notes in order to find the next question to ask. Had you ever thought what would happen in a delicate surgical operation if the surgeon had his textbook perched before him and had to consult it every step he took.

(4) Cross-examine with a specific object and purpose in mind. Do not merely flounder around with the hope that something worthwhile might turn up. Be sure of a worthy legal effect of the probable answer. Do not ask any question unless you know in advance the answer, and that it will be of benefit to you. Lawyers ask this — "To what end—to what end?"

(5) Concentrate on essential and fundamental points. Do not bother at all with trivialities.

(6) Never ask a witness the question, "Why?" Never ask for an explanation. Leave that for your summation. A witness generally always has a good explanation.

(7) Never get side-tracked from your purpose. If the answer of a witness suggests another line, jot it down in your memory, and go back to it at the finish. Do not let your client or associate counsel take you away from your point of destination.

(8) Learn when to stop. Do not overdo or press your gain too far. Constantly remember the old sayings: "Stop boring when you strike oil" — "Don't overcook your goose."

(9) Under no circumstance take the witness over the same road traveled in the direct examination. Most lawyers do this, and it merely serves to emphasize the witness' story.

(10) Do not follow an orderly sequence. Do not give the witness a chance to see what you are driving at or contemplate what is coming next.

(11) Beware of the first question. Do not get off on the wrong foot. Remember that at the close of the direct examination, the jury and the judge are likely with the witness. Watch carefully the final questions under direct examination for an opening question for cross-examination. Try to either gain the confidence of the witness, or unnerve him at the very opening. The better practice is to gain his confidence so as to disarm him.

(12) Always arrange to finish the cross-examination with a climax. Dismiss the witness with certainty, and, under no circumstance, hesitate and say, "I have a few more questions to ask you," and call him back.

(13) Place yourself on the level of the jury. Use simple and good English. Be serious. Do not try to be either smart or funny. Use a modulated and firm voice. Do not browbeat or lose your patience or temper, and do not show signs of defeat when a telling blow is made against you. Maintain if possible a poker face. Do not humiliate the witness or use sarcasm or ridicule. Be courteous, enthusiastic, full of energy, but do not give the appearance of a happy-go-lucky person. Gauge your style of approach with reference to the character of the witness. If you are sure the witness is a perjurer, handle him thusly.

(14) Always assume a standing position when cross-examining so that the jury will be able to see the facial expression and mannerisms of the witness as you pursue your object.

(15) Close all avenues of escape before attempting to slaughter the witness. Never show the witness a contradictory letter until you have had him repeatedly emphasize the opposite before the jury, and until you have him repeatedly state he had not written such a document. Play your trump card only when the occasion is right.

(16) If you are convinced that the witness has testified truthfully on a subject, never cross-examine him thereon.

(17) Never try to get a witness to admit he is a liar. He will never do it.

(18) Always cross-examine your own witness before you place him on the witness stand. Prepare him for the usual trick questions:

(a) Have you talked to anyone?
(b) Were you served with subpoena?
(c) Are you being paid for your testimony?
(d) Are you friendly? etc.

(19) The object of all cross-examination is to show one or more of the following:

(a) That the witness is testifying untruthfully.
(b) That the witness is mistaken.
(c) That the witness is prejudiced either for the other side or against you.
(d) The witness' story should be discredited because of faulty memory, lack of observation, lack of knowledge, etc.
(e) That the witness' story is incomplete — not the whole picture.
(f) To attempt to weaken the adversary's case.
(g) To prove, if possible, some points in your own case.

(20) In cross-examination, you should lay the proper foundation for:

(a) Introduction of documentary proof — let the witness authenticate documents.
(b) For impeachment purposes.

(21) When representing the defendant, let your cross-examination of the plaintiff and his witnesses,

(a) Elicit as much information as you can on only such points as you are not fully informed.
(b) Procure plaintiff's commitment on certain points so as to effectively cut off an escape when he is confronted with your defense.

(22) Let your questions be searching and important, yet simple. Use questions with a single purpose. Insist on a complete, specific and responsive reply before proceeding to the next question. Never be satisfied with an evasive answer. If necessary ask the witness to repeat your question.

(23) When an objection is made to a question put by you, be ready to immediately propound the next question after the Judge's adverse ruling. Show no sign of surprise, disgust

or disappointment at an adverse ruling. Let no time intervene before propounding your next question, for it will leave an impression that a telling blow has been made against you by the Judge's adverse ruling.

Finally there will come the witness who defies the rules, whose behavior cannot be anticipated, nor cataloged. What to do in such a case calls for quick decision. Whether to slug it out or leave him alone; whether to let the fur fly or take to your heels; whether to match wits — that is the immediate problem. There is an analogy in football. When time is running out, it sometimes becomes necessary to throw caution to the winds and pass on the fourth down, even though deep in your own territory. So, when thus confronted with the extraordinary witness, it is sometimes necessary to scrap all rules and play the hunch. Sometimes it will work, and, if it does not, it is safe to say that you will be a wiser and sadder man.

It should always be remembered that the primary function of a lawsuit is to ascertain the truth. No vehicle has yet been devised which excels cross-examination in the attainment of that fundamental purpose. Let not this instrument be used to pervert the accomplishment of that goal.