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## The Limits of Cross-Examination

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## The Limits of Cross-Examination

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# The Limits of Cross-Examination

Richard H. Underwood†

*Credibility*: noun. The quality said to be possessed by one who is obviously lying, but whose views correspond with those of the listener.<sup>1</sup>

[*Cross-examination*: noun.] . . . [T]he most powerful instrument known to the law in eliciting truth.<sup>2</sup>

## I. The History and Mythology of Cross-Examination

The system is as old as the history of nations. Indeed, to this day, the account given by Plato of Socrates's cross-examination of his accuser, Miletus [sic], while defending himself against the capital charge of corrupting the youth of Athens, may be quoted as a masterpiece in the art of cross-questioning.<sup>3</sup>

Francis Wellman's allusion is to *The Apology*, which reports the trial of Socrates.<sup>4</sup> In the course of his opening statement, Socrates complained of an inability to confront certain of his accusers.<sup>5</sup> In fact, cross-examination does seem to have been somewhat limited in Athenian law courts.<sup>6</sup> More-

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This Article is one in a continuing series, which will comprise chapters of a book styled *FALSE WITNESS: THE LAW AND LORE OF PERJURY AND OTHER FORENSIC MISCONDUCT*.

1. PATRICK SCRIVENOR, *EGG ON YOUR INTERFACE: A DICTIONARY OF MODERN NONSENSE* 61 (1989).

2. 5 WIGMORE ON EVIDENCE § 1362, at 4 n.1 (Chadbourn rev. 1970).

3. FRANCIS WELLMAN, *THE ART OF CROSS-EXAMINATION* 27 (1903).

4. See F. J. CHURCH (TRANS.), *THE TRIAL AND DEATH OF SOCRATES* (1908); R. W. LIVINGSTONE, *PORTRAIT OF SOCRATES* (1963).

5. See CHURCH, *supra* note 4, at 37-38.

6. ROBERT J. BONNER, *LAWYERS AND LITIGANTS IN ANCIENT ATHENS: THE GENESIS OF THE LEGAL PROFESSION* 51-52, 67, 185 (1927).

over, Socrates complained that his accusers past and present were many and in many cases anonymous: "I cannot call any one of them to Court, to cross-examine him; I have, as it were, simply to fight with shadows in my defence, and to put questions which there is no one to answer."<sup>7</sup>

Nevertheless, one of his chief accusers, Meletus, was present and took the bait.<sup>8</sup> Socrates was allowed to cross-examine him with leading questions, accompanied by large doses of comment or argument.<sup>9</sup> As I.F. Stone put it, Socrates "trap[ped] the rather dim-witted Meletus [spokesman for the poets] into accusing [Socrates] of atheism, a charge he easily refut[ed]."<sup>10</sup> Not that it did Socrates much good in the end, mind you. This is one of the most important things to learn about the limits of cross-examination. You can carry on brilliantly and still lose your case.<sup>11</sup> But I am getting ahead of my story.

Some time during the Babylonian Captivity witness proof and cross-examination must have stood alongside, if not superseded, the test of the bitter waters.<sup>12</sup> According to the story in *Daniel* 13:1-43,<sup>13</sup> the two lecherous elders who falsely accused Susanna of fornication were foiled not by the

7. See CHURCH, *supra* note 4, at 37-38; LIVINGSTONE, *supra* note 4, at 5.

8. CHURCH, *supra* note 4, at 47-54; LIVINGSTONE, *supra* note 4, at 17-21.

9. CHURCH, *supra* note 4, at 47-54; LIVINGSTONE, *supra* note 4, at 17-21.

10. ISADOR F. STONE, *THE TRIAL OF SOCRATES* 199 (1989).

11. See Jerry Giesler, *THE JERRY GIESLER STORY* (1960) reprinted in ARNOLD WOLF, *CROSS-EXAMINATION ON TRIAL* 16-19 (1988). Wolf observes, "it should be noted—and this is a sobering thought—that despite Giesler's obtaining . . . exculpatory admissions from the kidnap victim and his devastating cross-examination of the kidnapper who'd made a deal [to give State's evidence], the jury convicted [the defendant]." *Id.* at 19. Finley Peter Dunne's Mr. Dooley put it even better when he commented on how the best pals of *homo advocatus* can be upset by the bias and irrationality of jurors: "Whin the case is all over, the jury'll pitch th' testimony out th' window, an' consider three questions: Did Lootgert look as though he'd kill his wife? Did his wife look as though she ought to be kilt? Isn't it time we wint to supper?" *Mr. Dooley in War and Peace*, quoted in LOUIS HELLER, *DO YOU SOLEMNLY SWEAR?* 88 (1968).

Say it ain't so, O.J.!

12. This is a form of trial by ordeal described in the Bible. *Numbers* 5:11-31. See Richard Underwood, *Truth Verifiers: From the Hot Iron to the Lie Detector*, 84 KY. L.J. 597, 611-14 (1995-96).

13. *Daniel* 13:1-43, *THE OXFORD ANNOTATED BIBLE* (1962). The story of Daniel and Susanna is an apocryphal account and as such is not contained in the traditional Christian Bible but only in an Apocrypha edition.

ordeal, nor by the side-show tactics of Hyperides.<sup>14</sup> Instead her savior “move[d] for the Rule”<sup>15</sup> and nailed the bad guys on “cross.”

And Daniel said to them, “Separate them far from each other, and I will examine them.” . . . When they were separated from each other, he summoned one of them and said to him . . . “Now then if you really saw her, tell me this: Under what tree did you see them being intimate with each other?” He answered, “Under a mastic tree.” . . . Then he put him aside, and commanded them to bring the other. And he said to him, . . . “Now then, tell me: Under what tree did you catch them being intimate with each other?” He answered, “Under an evergreen oak.” . . . Then all the assembly shouted loudly and blessed God, who saves those who hope in him. And they rose against the two elders, for out of their own mouths Daniel had convicted them of bearing false witness; and they did to them as they had wickedly planned to do to their neighbor, acting in accordance with the law of Moses [Deuteronomy 19:16-21], they put them to death. Thus innocent blood was saved that day.<sup>16</sup>

Eventually, confrontation and cross-examination came to be the signal feature of the common law trial.<sup>17</sup> The hapless Sir Walter Raleigh’s words echoed those of Socrates: “The Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face, and I have done.”<sup>18</sup> He was heard by later generations, at least. With the appearance of the jury trial as we know it today came other true-life cases<sup>19</sup> in which false witnesses were broken on the wheel of cross-examina

14. Hyperides was the lawyer for the courtesan Phyme, who had been accused of profaning the Eleusinian mysteries. At a particularly desperate moment, Hyperides stripped her to her birthday suit and implored the jurors to gaze upon and have pity on a priestess of Aphrodite—always a winning argument. Not guilty! See Richard Underwood, *Logic and the Common Law Trial*, 18 AM. J. TRIAL ADVOC. 151, 160-61 (1994).

15. “Moved for the Rule” is the expression in my neck of the woods used to request a separation of witnesses. See also CHARLES R. HOLLEY, TRIAL OF A CIVIL LAWSUIT 11 (Supp. 1993) (in Florida practice, “invoking the rule”).

16. *Daniel* 13:51-62, THE OXFORD ANNOTATED BIBLE (1962).

17. IRVING YOUNGER, HEARSAY: A PRACTICAL GUIDE THROUGH THE THICKET 2 (1988).

18. 2 T.B. HOWELL, STATE TRIALS 15-16 (1816); see also Richard Underwood, *A Perjury: An Anthology*, 13 ARIZ. J. INT’L & COMP. L. 307, 318-21 (1996) (discussing Raleigh’s case). In *Coy v. Iowa*, 487 U.S. 1012, 1016, 108 S. Ct. 2798, 2800-01, 101 L. Ed. 2d 857, 864 (1988), the Justices debated the relevance of these words from WILLIAM SHAKESPEARE, RICHARD II act I sc. 1: “Then call them to our presence—face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak. . . .” DANIEL KORNSTEIN, KILL ALL THE LAWYERS?: SHAKESPEARE’S LEGAL APPEAL 193-94 (1994).

19. The following are collections of famous cross-examinations, including those which we would refer to as destructive cross-examinations. See WELLMAN, *supra* note 3; ASHER L.

tion. There have been other Daniels, such as Daniel O'Connell, the legendary Irish advocate:

"I left Cork yesterday evening at five o'clock and rode all night, ninety long miles, to see your honor [said the prisoners' messenger to O'Connell]. The friends of the poor boys who are in the dock for the Doneraile conspiracy sent me to you, and unless you are in Cork before the court opens every man of them will be hanged, though as innocent as the child unborn." . . . The judges were asked to postpone the hearing, which was refused, [Baron] Pennefather declaring "the trial should proceed without delay." Scouts were placed along Killarney Road, but no news came. The jury was sworn, and the Solicitor General had begun to address the jury when a loud, increasing volume of cheers arose and swept towards the court house. It was not possible to hear anything but the shouts of the people. "*The counselor is coming!*" How he took his seat at the bar in his traveling robes; how he munched sandwiches and sipped a bowl of milk whilst he corrected the Solicitor General's law between each mouthful; how he bantered and bullied the crown witnesses; and how Nowlan, the most infamous of them, broke down in his lies and howled in his agony: "Wisha the God knows, 'tis little I thought I would meet you here to-day, Counselor O'Connell. May the Lord save me from you!" —these things are all faithfully recorded in the chronicles of the trial.<sup>20</sup>

CORNELIUS, *THE CROSS-EXAMINATION OF WITNESSES* (1929); RICHARD DUCANN, *THE ART OF THE ADVOCATE* (1964); JAKE ERHLICH, *THE LOST ART OF CROSS-EXAMINATION* (1970); WOLF, *supra* note 11; PETER M. BROWN, *THE ART OF QUESTIONING: THIRTY MAXIMS OF CROSS-EXAMINATION* (1988).

The following offer instructive hypothetical cross-examinations. See JULES H. BAER & SIMON BALICER, *CROSS-EXAMINATION AND SUMMATION* (2d ed. 1948); MICHAEL TIGAR, *EXAMINING WITNESSES* (1993).

20. WELLMAN, *supra* note 3, at 226. For another bit of "O'Connellia" see *M'Garahan v. Maguire* [from MONGAN, *CELEBRATED TRIALS IN IRELAND* (1827), reprinted in JOHN H. WIGMORE, *PRINCIPLES OF JUDICIAL PROOF* 596 (2d ed. 1931)]. A priest was charged with seduction. O'Connell proved that it was really a case of blackmail by the victim's family—they had been offered L600 to prosecute. Here are excerpts from the cross-examination of Anne M'Garahan, the "victim":

- O'Connell: Did you ever take a false oath about the business?  
 Witness: Not that I recollect.  
 O'Connell: Great God, is that a thing you could have forgotten?  
 Witness: I believe I did not. I am sure I did not.  
 O'Connell: Oh, I see I have wound you up. Perhaps, then, you will tell me now, did you ever swear it was false?  
 Witness: I never took an oath that the charge against Mr. Maguire was false. I might have said it, but I never did swear it.  
 O'Connell: Did you ever say that your family was offered L500 or L600 for prosecuting Mr. Maguire?  
 Witness: I don't recollect.  
 O'Connell: Did you ever say that you would get L600 for prosecuting him?

The older handbooks on advocacy frequently allude to the almost supernatural power of the experienced trial lawyer—the power to confront and break the false witness. While generally advising counsel to make haste slowly and not reveal counsel's suspicions,<sup>21</sup> all in the hope of trapping the liar, James Ram wrote that some witnesses might be broken rather quickly by a confrontational style:

If he is one of that numerous class who have merely got up a story to which they doggedly adhere, it may be wise to awe him at once, by notice that you do not believe him, and that you do not intend to spare him. We have often seen such a witness surrender at discretion on the first intimation of such an ordeal. This is one of the arts of advocacy which cannot be taught by any thing but experience. It is to be learned only by the language of the eye, the countenance, the tones of the voice, that betray to the practical observer what is passing in the mind within.<sup>22</sup>

Here we see a romantic portrait of the trial lawyer as a scientific (almost Sherlock Holmesian) observer, a psychologist, and a holy terror all rolled into one. Other writers regale us with instances in which, through the use of humor or righteous indignation, the advocate strikes like a bolt from heaven. The witness is humiliated, and in some cases suffers a melt-down. This is what I will call the Ananias Effect.<sup>23</sup> Indeed, that old fibber figures into many a story from simpler, less cosmopolitan days when most everybody

Witness: I never did.  
 O'Connell: Or write it?  
 Witness: Never.

*Id.* The witness was then confronted with just such a letter. Nowadays the prosecution would, no doubt, attempt to counterattack with a psychologist or social worker or two who would explain all of this in terms of one or more victim syndromes.

21. See, e.g., ROLLA R. LONGENECKER, SOME HINTS ON THE TRIAL OF A LAWSUIT 138 (1927). Longenecker comments:

A careful and skillful examiner on cross-examination will try mildness and sympathy with one whom he believes is lying, and lead the witness to believe he is being deceived by the manner and answers of the witness. The examiner leads him on to add more and more to the story, a burst of confidence, and a little more light is thrown on the facts, the examiner is quick to grasp and follow the advantage until finally the witness is caught.

*Id.*

22. JAMES RAM, A TREATISE ON FACTS AS SUBJECTS OF INQUIRY BY A JURY 347 (3d Am. ed. 1873).

23. See *Acts* 5:1-10.

was reading from the same book. Here is Francis Wellman writing of one of his own triumphs.

In a Metropolitan Street Railway case a witness whom I had badgered rather persistently on cross-examination, finally straightened himself up in the witness chair and said pertly, "I have not come here asking you to *play with me*. Do you take me for Anna Held [an actress who sang a popular song with the lyrics "Won't you come and play with me?"]?" "I was not thinking of Anna Held," I replied quietly, "supposing you try Ananias!" The witness was enraged, the jury laughed, and I, who had really made nothing out of the witness up to this time, sat down.<sup>24</sup>

And here is Percy Foreman,<sup>25</sup> reportedly an ordained minister himself, lowering the boom on a State's witness who made the mistake of testifying that he had taken a correspondence course in the Scriptures while in the big house:

- Q: Did I understand you to say that you are now a student of the Holy Writ?  
 A: Yes, Sir.  
 Q: You mean you are a student of the Bible?  
 A: That's right.  
 Q: Have you studied about a character in the Bible by the name of Ananias?  
 A: I certainly have. [Lying]  
 Q: Do you or do you not propose to model your ministry after this individual?  
 A: No, sir, I do not. [Faking it]  
 Q: Who was Ananias?  
 A: Sir, I will preach you a sermon if you would like to hear one.  
 Court: We do not want a sermon. Just answer the question.  
 Q: Tell the jury who Ananias was.  
 A: At this time, sir, I couldn't tell you. [Oops]  
 Q: He is the biggest liar in all antiquity. Does that help you?<sup>26</sup>

It is apparent that we are strolling through a gallery filled with self-portraits by members of the professional guild. Seldom does a cross-examination deliver so much edification and delight. Nor is the typical cross-examination so destructive. Nor can it be.<sup>27</sup>

24. WELLMAN, *supra* note 3, at 47.

25. This was before he met James Earl Ray.

26. HELLER, *supra* note 11, at 22.

27. Nor would the average juror in the 1990's get it—who is this Ananias guy, anyway?



## II. The Reality of Cross-Examination

I will find  
Where truth is hid,  
though it were hid indeed  
Within the centre.

Polonius<sup>28</sup>

So you say. But what is the stuff of cross-examination really?

I have already suggested that when it comes to cross-examination, many of us have “unrealistic expectations which have at their root various legends of the trial bar. For every witness who has been ensnared by a well-conceived examination, hundreds have escaped, as can be attested to by any trial judge or practitioner willing to admit the truth.”<sup>29</sup> So even if we assume that the cross-examiner’s principal task were to attack the witness for the purpose of proving him or her out to be a liar,<sup>30</sup> there must be practical limits on the effectiveness of the average lawyer and his or her technique.

Many lawyers, even experienced trial counsel, have not mastered the basics of cross-examination.<sup>31</sup> The cross-examiner lets the witness repeat, and reinforce, the testimony given on direct.<sup>32</sup> The more aggressive lawyer is often more offensive than effective, crawling all over the witness like a cockroach, looking for scraps—meaningless, petty bits and pieces.<sup>33</sup>

28. WILLIAM SHAKESPEARE, *HAMLET* act 2, sc. 2.

29. WOLF, *supra* note 11, at xi.

30. Actually,

[t]he objects of a cross-examination are three in number. The first is to elicit something in your favor, the second is to weaken the force of what the witness has said against you; and the third is to show that from his present demeanor or from his past life he is unworthy of belief, and thus weaken or destroy the effect of his testimony.

HENRY HARDWICKE, *THE ART OF WINNING CASES OR MODERN ADVOCACY* 152 (1864).

31. See BROWN, *supra* note 19, at xxx (Foreward by Justice Arnold Guy Fraiman (ret.)); see also J. Alexander Tanford, *Keeping Cross-Examination Under Control*, 18 AM. J. TRIAL ADVOC. 245 (1994) (offering an excellent primer on the techniques and strategies of cross-examination). For a recapitulation of the late Professor Irving Younger’s “Ten Commandments,” see Henry Asbill, *The Ten Commandments of Cross-Examination Revisited: Should You Sin to Win When the Case is Criminal?*, 8-WTR CRIM. JUST. 2 (1994).

32. BROWN, *supra* note 19, at xxx.

33. Cf. *id.* at 72 (Avoid Petty Points). On the other hand, one time-honored strategy is to simply wear everybody down. “If you can succeed in tiring out the witness or in driving him to the point of sullenness, you have produced the effect of lying.” WELLMAN, *supra* note 3, at 81. But what if you have driven the judge and the jury to the point of sullenness?

Or how about skipping around? This is an obvious tactic, and one that is usually recommended in the literature as a means of exposing a witness who may be untruthful.<sup>34</sup>

“[T]ake [the witness’s] story as he has already told it, and, beginning where he left off in the direct, . . . lead him backwards through it, skipping from point to point to break the chain of association in his mind, giving him no time to invent or to reflect upon the consequences of his answers, fixing him to dates, places, names and order of events, and then, after a few moments of diversion to foreign matters, . . . return to these details and go over them again.”<sup>35</sup>

This can be an effective technique. But there are some other things to consider. This is not a very good way to tell a story or reinforce a theme. Furthermore, the cross-examiner may exhaust the patience of judge and jury. One does not get to ask an unlimited number of repetitive questions (except, perhaps, in California). Finally, “[f]or the inexperienced practitioner it is . . . not always advisable to attempt [this technique]. Instead of upsetting the witness, [counsel] is likely to confuse his own ideas and become lost in a maze from which he will be unable to extricate himself.”<sup>36</sup>

Another popular notion is that the dishonest witness “should be examined rapidly, so that he can have no time to concoct plausible answers between questions.”<sup>37</sup> Again, not bad advice in the abstract, but the judge and jury may think it fair that the witness have a little more time to answer.

Peter Brown’s interesting book containing “Thirty Maxims of Cross-Examination” sets forth the proposition that “Witnesses Sometimes Brainwash Themselves.”<sup>38</sup> He might have noted—in a footnote at least—that “So Do Lawyers.” In my experience, when it comes to cross-examination, most lawyers are constitutionally incapable of recognizing beforehand that their brilliant plans and traps will not succeed or convince the factfinder, and may even backfire. During the execution, they tend to pay lots of attention to their own questions and posturing, and very little to the witness’s

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34. See YOUNGER, *supra* note 17.

35. BAER & BALICER, *supra* note 19, at 104; see also WELLMAN, *supra* note 3, at 67-68, 135-36.

36. BAER & BALICER, *supra* note 19, at 104.

37. See, e.g., HARDWICKE, *supra* note 30, at 156.

38. BROWN, *supra* note 19, at 68.

answers and the effect, if any, that those answers are having on the jury. They convince themselves that they are scoring points. The jurors and the judge could be asleep or dead. It would not matter. The lawyer would take no note of it.

Even at that, the destructive cross-examination of witnesses is only part of the art. The advocate is not a scientific and disinterested truth-seeker, and the trial is not, in fact, a search for the truth.<sup>39</sup> By the time a trial begins, any searching (for facts, witnesses, documents, etc.) had better be over. The advocate is first and foremost a seller of a story. The advocate's job at trial is to fashion and present (within the ethical limits of advocacy) a version of the truth—the client's version of reality. Whether the witness is perceived to be an ally, an enemy, or neutral, the cross-examiner should not pass up the opportunity to use leading questions to draw from the witness any concession—any bit of evidence—that will support or corroborate the client's theory of the case, or contradict that of the opponent.<sup>40</sup> The conservative, but no less cunning, cross-examiner will “start off easy” on the witness and “thus gain his confidence and possibly, some favorable admissions which might be otherwise withheld if the witness were antagonized.”<sup>41</sup> The quoted advice is from one of my favorite old trial books, which catalogs the various concessions that may be wrung from plaintiffs in personal injury cases.<sup>42</sup>

Of course, not everyone has the patience or the temperament for a gentle, subtle approach. Furthermore, in the real world, witnesses are not clay pigeons. They can move, and some can shoot back. Here, Erle Stanley

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39. See Underwood, *supra* note 12; see also ALLEN HENSON, *CONFESSIONS OF A CRIMINAL LAWYER* 41-42 (1959).

[I have] a deep respect for the temper of the crowd back of the bar. One who is able to gauge it and conform strategy to it, will usually be able to control a case. I learned, too, that a line of argument which awakens impressions fixed in the minds of jurors will find ready acceptance. Mark Anthony . . . captured the mob when at Caesar's funeral he reminded them, "I tell you that which you yourselves do know." . . . Factors which move a jury to acquit are many and varied, and chief among them are devices (and these are many and varied) which take their minds off the evidence.

*Id.* (emphasis added).

40. On the selling of stories model of the trial, see John Leubsdorf, *Stories and Numbers*, 13 *CARDOZO L. REV.* 455 (1991); Richard Lempert, *Telling Tales in Court: Trial Procedure and the Story Model*, 13 *CARDOZO L. REV.* 559 (1991).

41. LOUIS SCHWARTZ, *CROSS-EXAMINATION IN PERSONAL INJURY ACTIONS* 10 (1933).

42. *Id.*

Gardner, the creator of Perry Mason, and an excellent lawyer in his own right, describes his experiences:

The cross-examiner, trying to be as unfair as possible, looks witheringly at the witness and says, "Doctor, you expect to be paid for your testimony in this case, don't you?" . . . The question was framed so as to show that the witness expected to be paid for his *testimony*. . . . [T]he question was deliberately unfair. . . .

But every once in a while a smart one would look me in the eyes and say, "No!" . . . and, before I could quite ask the next question, the witness would say, "I expect to be paid for the *time* I have spent in research and for the *time* I am *forced* to put in the courtroom. I *never* take pay for my testimony." It was then up to me to either ask him about what he expected to charge for his time, or quit. If I asked him about the value of his time, the smart witness would smile at me, turn to the jurors and explain that his time had to include his overhead, the cost of maintaining his office, his books, his telephone, his secretary, the purchase of new machines or instruments, and the purchase of new books. . . . I was, of course, at liberty to stop him and I had to stop him because with every word he was selling himself to the jury. But when I stopped him the jurors felt as though I had jerked the magazine out of their hands. . . .<sup>43</sup>

"The sympathies of the jury are invariably on the side of the witness, and they are quick to resent any discourtesy toward him. They are willing to admit his *mistakes*, if you can make them apparent, but are slow to believe him *guilty of perjury*."<sup>44</sup>

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43. *Confessions of A Cross-Examiner*, in SARA ROBBINS, LAW: A TREASURY OF ART AND LITERATURE 314-15 (1990) (this excerpt is from a speech delivered in 1957 to the American Academy of Forensic Sciences). For guidance insofar as attacks on medical witnesses are concerned, see *Scott v. Spanger Bros.*, 298 F.2d 928, 931 (2d Cir. 1962) (questioning whether evidence that an expert has a reputation as a plaintiff's witness is sufficient to disqualify him as an expert witness); *Timpte v. District Court*, 421 P.2d 728, 729 (Colo. 1966) (analyzing whether defendant may be denied the right to have plaintiff examined by a doctor of his choosing); *Campbell v. Wilson*, 239 S.E.2d 546 (Ga. Ct. App. 1977) (questioning whether an expert witness's expulsion from county medical society is proper inquiry for cross examination); *Mezzanotte Constr. Co. v. Gibbons*, 148 A.2d 399 (Md. 1959) (examining whether a trial judge erred in refusing to allow inquiry on cross examination of plaintiff's expert concerning compensation paid to expert for testifying and whether this error was sufficient to constitute reversible error); *Janus v. Hackensack Hosp.*, 330 A.2d 628, 630-31 (N.J. Super. 1974) (discussing whether a trial judge may prevent inquiry on cross examination as to the number of times an expert has testified in malpractice cases); *Lawlor v. Kolarsick*, 223 A.2d 281 (N.J. Super. Ct. App. Div. 1966) (holding that proper inquiry on cross may be made into expert witness's varied and eccentric literary undertakings to show expert had little time for medical practice); *Virginia Linen Serv. v. Allen*, 96 S.E.2d 86, 91 (Va. 1957) (discussing whether a judgment may be set aside based on after-discovered evidence of a relationship between plaintiff's attorney and plaintiff's expert witness).

44. WELLMAN, *supra* note 3, at 30.

Finally, the painful reality is that not every false witness will be identified as such, let alone defeated. Such are the limits of cross-examination.

More cases have been lost than won by belaboring witnesses on cross-examination. Lawyers are constantly publishing works on the art of cross-examination. When I read them I muse in reflection: "Brother, you might write a classic on this art, but if you are to win your tough cases you had best toss your book out the window and learn the art of direct examination."<sup>45</sup>

### III. The Ethics of Cross-Examination

Also troubling is the possibility that a truthful witness might be targeted and ruined by a clever cross-examiner,<sup>46</sup> or that a cross-examination will have little or nothing to do with the witness, and serve only as an orifice through which inadmissible and prejudicial matter is injected.

Some years ago I wrote an article in which I attempted to collect some of the standard dirty tricks of advocacy.<sup>47</sup> Through the wondrous process of academic cold fusion this little piece grew into two books.<sup>48</sup> Of course, my offerings were well intended. Like the unknown author of *Rhetorica Ad Heremium*,<sup>49</sup> I meant to warn practicing lawyers away from sin, and at the same time teach my students how to spot and avoid illegal blows, counterpunch, and move on. However, there is reason to believe that these mental cartridges misfired. In my experience,<sup>50</sup> the few lawyers that have actually consulted such works seem to have done so with evil in their hearts.<sup>51</sup>

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45. HENSEN, *supra* note 39, at 180.

46. See Robert P. Lawry, *Cross-Examining the Truthful Witness: The Ideal Within the Central Moral Tradition of Lawyering*, 100 DICK. L. REV. 563 (1996).

47. Richard Underwood, *Adversary Ethics: More Dirty Tricks*, 6 AM. J. TRIAL ADVOC. 265 (1982).

48. RICHARD UNDERWOOD & WILLIAM FORTUNE, *TRIAL ETHICS* (1988); WILLIAM H. FORTUNE ET AL., *MODERN LITIGATION AND PROFESSIONAL RESPONSIBILITY HANDBOOK: THE LIMITS OF ZEALOUS ADVOCACY* (1996).

49. Underwood, *supra* note 12, at 597, 602 (discussing this and other venerable works on the black arts of advocacy).

50. I have been a Bar Association Ethics Chairman for almost 15 years.

51. I suspect that the record one-day sale of *TRIAL ETHICS* came when our library replaced its five or six copies, *which had been stolen*. This provided me with a few bucks and a pretty good character and fitness anecdote.

Some wanted to find a few new dirty tricks that they had not yet tried. Others were looking for a way to sidetrack matters into ethics inquiries regarding the propriety of their opponents' trial tactics so that they could avoid falling back on the merits of their claim or defense.<sup>52</sup> I admit that at least some of the professional literature has begun to acknowledge the excesses of the system.<sup>53</sup> But when it comes to *apology*, the sentiment has not been so much in the direction of regret as it has been in the direction of defense of prevailing practices.<sup>54</sup>

Indulge me while I run through a mini-restatement of some all-too-commonly-employed tricks of the trade, which hardly spark the engine of any "truth machine."

1. Cross-examination by innuendo is the most common offense. Within the realm of innuendo, the lawyer has no good faith basis for asking a question that is suggestive of improper conduct by the witness. The lawyer

52. Still, a few similarly well intended articles followed my original offering. See, e.g., Philip H. Corboy, *Cross-Examination: Walking the Line Between Proper Prejudice and Unethical Conduct*, 10 AM. J. TRIAL ADVOC. 1 (1986). And I was hardly the first latter day law professor writing in the tradition of RHETORICA AD HERENNIVM. See James McElhaney, *Dealing With Dirty Tricks*, 7 LITIG. 45 (1981).

53. Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403 (1992). Van Kessel states:

[T]ruth-finding over the past few decades has been subordinated to a number of other values, often in situations where the reasons for sacrificing truth appear more speculative than compelling. . . . Few would contend that truth is always an objective which, like a scientific principle or an ancient ruin, is waiting to be discovered and verified. But most judges and lawyers would agree that the *central issues* in the great bulk of criminal cases involve the determination of historical facts.

*Id.* at 451, 457 (emphasis added); see also Lawry, *supra* note 46, at 563.

54. See, e.g., Eva Nilsen, *The Criminal Defense Lawyer's Reliance on Bias and Prejudice*, 8 GEO. J. LEGAL ETHICS 1, 5 (1994) ("This article argues against [proposed rules aimed at eliminating lawyer's use of bias] because they impinge on legitimate lawyering, and they may distract the bar from the more serious ethical problem of underzealousness, particularly in the representation of poor people."); Corboy, *supra* note 52. Corboy observes:

Truth, as an absolute, is an incidental function of the adversary process. . . . [A] lawyer may effectively employ trial skills and tactics that make a witness appear unreliable, although that countenance stems more from the artifice of counsel's skillful questions than any discomfiting revelations by the witness. . . . Out of the process of destruction on cross-examination, the truth, as spoken, is whittled. . . . From this dialectic, a terrible beauty is born; it is called justice.

Corboy, *supra* note 52, at 5, 13. Did the "O.J." trial ruin this for us?

simply invents an outrageous scenario and presents it to the jury by way of question. The fact that there is no actual evidentiary basis for such a question proves to be of little importance.<sup>55</sup>

2. Another example is impeachment by evidence that does not satisfy the rules. For example, reference to arrests,<sup>56</sup> marital infidelities,<sup>57</sup> or other embarrassing misdeeds or delicts, real or imagined do not satisfy the rules.

3. The prosecutor may also inject other acts evidence for which there is no factual basis. During a prosecution charging defendant with being a bomb-maker:

Q: You said that occasionally Charles Lowe may refer to you as Pigface?

A: Yes, sir.

Q: Are you the same Pigface that he had go into the Hobby Shop and buy some remote control devices for him?<sup>58</sup>

There was no evidence to support the suggestion that this had ever happened.

4. A common variant asks the witness being cross-examined to assume that the defendant has committed some reprehensible or loathsome deed, and then asks if that would change the witness's mind about the defendant's reputation, or change the witness's opinion of defendant's character.<sup>59</sup>

5. Manipulative questioning that lays the foundation for the admission of otherwise inadmissible evidence for a limited purpose, which limitation may be conveniently forgotten when the time comes for summation.<sup>60</sup>

6. Also notable is the injection of inadmissible data or reports under the guise of impeachment of the opponent's expert witness.<sup>61</sup>

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55. See *Kiefel v. Las Vegas Hacienda, Inc.*, 39 F.R.D. 592 (N.D. Ill. 1966), *aff'd*, 404 F.2d 1163 (7th Cir. 1968) (resulting in a mistrial and monetary sanctions).

56. See *Hawk v. Superior Court*, 42 Cal. App. 3d 108, 116 Cal. Rptr. 713 (1974).

57. See *Harmon v. Commonwealth*, 898 S.W.2d 486 (Ky. 1995).

58. *United States v. Liesure*, 844 F.2d 1347, 1362 (8th Cir. 1988).

59. See, e.g., *United States v. Mason*, 993 F.2d 406, 407 (4th Cir. 1993); *United States v. Oshatz*, 912 F.2d 534, 536 (2d Cir. 1990); *United States v. Siers*, 873 F.2d 747, 748 (4th Cir. 1989).

60. See, e.g., *Daggett v. Atchison, Topka & Santa Fe Ry. Co.*, 48 Cal. 2d 655, 669, 313 P.2d 557, 560 (1957); *Croley v. Huddleston*, 301 Ky. 580, 584, 192 S.W.2d 717, 720 (1946) (indicating the propriety of a summation that disregards an earlier limiting instruction).

61. Cf. *Polythane Systems, Inc. v. Marina Ventures Int'l, Ltd.*, 993 F.2d 1201, 1207 (5th Cir. 1993) (finding that testifying expert's reliance on report of nontestifying expert did not make nontestifying expert's report admissible).

7. Cross-examination that involves lying to the witness, to set the witness up for a fall is yet another trick employed.<sup>62</sup>

8. Outright abuse of the witness, or harassment and humiliation for its own sake is also problematic.<sup>63</sup>

9. Perhaps the most extreme abuse of cross-examination is the calling of a witness solely for the purpose of impeaching that witness. This is referred to as "impeachment as a subterfuge."<sup>64</sup> This is used by prosecutors to inject guilt by association.<sup>65</sup> It has also been employed, rather crudely, as a vehicle for bias incitement in civil cases. In *Arnoldt v. Ashland Oil, Inc.*,<sup>66</sup> an obliging trial judge permitted the plaintiffs to call the CEO of the defendant corporation as an adverse witness, as if on cross, introduce a letter "referencing Ashland's long history as a responsible corporate citizen"<sup>67</sup> and then impeach him with corporate acts unrelated to the issues before the court but inconsistent with good corporate citizenship. Fortunately, the overreaching lawyers were rewarded with a reversal.<sup>68</sup>

#### IV. Summing Up

[Mr. Mark Twain] . . . he told the truth, mainly. There was things which he stretched, but mainly he told the truth. That is nothing. I never seen anybody but lied one time or another, without it was Aunt Polly, or the widow, or maybe Mary.<sup>69</sup>

I have ended, only to begin again; but that actually makes some sense. When preparing a case, the wise lawyer begins at the end, with the jury charges that the judge is likely to give. Prepare the closing argument you

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62. See, e.g., *Kiner v. State*, 643 N.E.2d 950, 956 (Ind. Ct. App. 1994); *In re Metzger*, 31 Haw. 929, 932 (1931).

63. See *United States v. Dowdy*, 960 F.2d 78 (8th Cir. 1992).

64. Don Johnsen, *Impeachment With an Unsworn Prior Inconsistent Statement as Subterfuge*, 28 WM. & MARY L. REV. 295, 298 (1987).

65. See *United States v. Fleetwood*, 528 F.2d 528, 530 (5th Cir. 1976) (involving a prosecutor who called a former codefendant and attempted to impeach him by alluding to his earlier guilty plea).

66. 186 W. Va. 394, 412 S.E.2d 795 (1991).

67. *Arnoldt*, 412 S.E.2d at 809.

68. *Id.* at 814.

69. MARK TWAIN, *THE ADVENTURES OF HUCKLEBERRY FINN* at 1 (Holt, Rinehard & Winston, Inc. 1948) (1881).



would like to make, and build toward it. What cross-examination will advance your theory of the case?

Consider the jury charges that the judge will give concerning the credibility of witnesses. But again, do not bet everything on cross. Here is a special charge on the character and credibility of the complaining witness, taken from the “summing up” delivered by His Honor the Judge (Sir Joseph Cantley) in the wacky trial for conspiracy to murder of Mr. Jeremy Thorpe in the Old Bailey in 1979:

“[A]t one time [he] was suspected of stealing silver from a house where he was living in Dublin, although he denied this. He is a crook. . . . He is a fraud, he is a sponger. He is a whiner. He is a parasite. But, of course, he could still be telling the truth. It is a question of belief. . . . *I am not expressing any opinion.*”<sup>70</sup>

Mr. Thorpe, a member of Her Majesty’s Privy Council, was acquitted. Could there have been any other result?

In America, federal judges retain the power of the British judge to comment on the evidence—to sum up for the jury, and to give elaborate instructions. However, most federal judges are, well, judicious when it comes to exercising these particular muscles. In many states the judge may not comment on the evidence, and even jury instructions are limited to the bare bones.<sup>71</sup> It is unlikely that you will encounter the likes of His Honor Sir Joseph Donaldson Cantley in your neck of the woods. Still, American judges do give instructions regarding the credibility of witnesses. Basically, they outline the more obvious avenues of cross-examination. One pattern jury charge in the Sixth (federal) Circuit goes like this:

Another part of your job as jurors is to decide how credible or believable each witness was. This is your job, not mine. It is up to you to decide if a witness’s testimony was believable, and how much weight you think it deserves. You are free to believe everything that a witness said, or only part of it, or none at all. But you should act reasonably and carefully in making these decisions. Let me suggest some things for you to consider in evaluating each witness’s testimony.

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70. AUBERON WAUGH, *THE LAST WORD: AN EYEWITNESS ACCOUNT OF THE TRIAL OF JEREMY THORPE* 224-25 (1980) (emphasis added).

71. In my home state of Kentucky, instructions which comment on the testimony are improper, as are instructions which give the jurors rules to employ in evaluating the credibility of witnesses! See 1 WILLIAM COOPER, *KENTUCKY INSTRUCTIONS TO JURIES* 21-22 (1993).

- (A) Ask yourself if the witness was able to clearly see or hear the events. Sometimes even an honest witness may not have been able to see or hear what was happening, and may make a mistake.
- (B) Ask yourself how good the witness's memory seemed to be. Did the witness seem able to accurately remember what happened?
- (C) Ask yourself if there was anything else that may have interfered with the witness's ability to perceive or remember the events.
- (D) Ask yourself how the witness acted while testifying. Did the witness appear honest? Or did the witness appear to be lying?
- (E) Ask yourself if the witness had any relationship to the government or the defendant, or anything to gain or lose from the case, that might influence the witness's testimony. Ask yourself if the witness had any bias, or prejudice, or reason for testifying that might cause the witness to lie or to slant the testimony in favor of one side or the other.
- (F) Ask yourself if the witness testified inconsistently while on the witness stand, or if the witness said or did something [or failed to say or do something] at any other time that is inconsistent with what the witness said while testifying. If you believe that the witness was inconsistent, ask yourself if this makes the witness's testimony less believable. Sometimes it may; other times it may not. Consider whether the inconsistency was about something important, or about some unimportant detail. Ask yourself if it seemed like an innocent mistake, or if it seemed deliberate.
- (G) And ask yourself how believable the witness's testimony was in light of all the other evidence. Was the witness's testimony supported or contradicted by other evidence that you found believable? If you believe that a witness's testimony was contradicted by other evidence, remember that people sometimes forget things, and that even two honest people who witness the same event may not describe it exactly the same way.<sup>72</sup>

One of the more interesting points made in these instructions is the notion that inconsistency does not necessarily rule out believability. On the other hand, it is also common for a judge to tell the jury that

if a person is shown to have knowingly testified falsely concerning any important or material fact, [then the jurors] obviously have a right to distrust the testimony of such an individual concerning other matters. [The jurors are permitted, but not required, to] reject all of the testimony

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72. EDWARD DEVITT ET AL., CREDIBILITY OF WITNESSES ch. 15 (1990) (offering this and additional charges for every federal occasion); see Underwood, *supra* note 12, at 597 (offering more on demeanor evidence).

of that witness or give it such weight or credibility as [the jurors] may think it deserves.<sup>73</sup>

This instruction reflects the notion that a permissible and negative inference about the witness's credibility may be drawn when the witness lies on any point. The jury may decide that if the witness is false in one thing, then the witness is false in all things—*falsus in uno, falsus in omnibus*.

A related question is whether an admitted or convicted perjurer can be believed? In fact and in law, a perjurer's testimony is admissible. We no longer bar convicted perjurer's from taking the witness stand.<sup>74</sup> But a standard jury charge informs the jury that "the testimony of a perjurer should always be considered with caution and weighed with great care."<sup>75</sup>

Lawyers and lawyer-watchers seem to think that the logic of these charges is compelling, and that jurors are greatly influenced by them.<sup>76</sup> Catch somebody fibbing on one little thing, and the whole case is in your pocket. Maybe so, and maybe not. My advice is: Don't bet the whole farm on it.

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73. DEVITT ET AL., *supra* note 72, § 15.06. This instruction is *improper* in a few states like Kentucky! See COOPER, *supra* note 71, at 22.

74. For the practice in the good old days of Merry Old England see The [Perjury] Statute of 1563, which provided for imprisonment, fine, the pillory, the "nailing" of the ears, and exile from the witness stand; in the United States the Act of April 30, 1790, section 18 provided for imprisonment, fine, an hour in the pillory but no ear "nailing," and exile from the witness stand in any court of the United States. Richard Underwood, *False Witness: A Lawyer's History of the Law of Perjury*, 10 ARIZ. J. INT'L & COMP. L. 215, 241-42, 246-47 (1993).

75. DEVITT ET AL., *supra* note 72, § 15.10.

76. See, e.g., STEPHEN J. ADLER, *THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM* 188, 192 (1994). Cf. *Knapp v. State*, 79 N.E. 1076, 1077 (Ind. 1907) ("One of the first principles of human nature is the impulse to speak the truth. 'This principle . . . has a powerful operation, even in the greatest liars; for where they lie once, they speak the truth 100 times.'").