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Cross-Examination, by John Alan Appleman

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BOOK REVIEWS

CROSS-EXAMINATION. By John Alan Appleman. Virginia: Coiner Publications, Ltd. 1963. Pp. vii, 226. \$8.00.

The foreword to this text was written by Mr. E. Donald Shapiro, Director of an Institute for Continuing Legal Education, who says:

Probably no other area of law offers the challenge and the pitfalls cross-examination affords. Cross-examination can make or destroy a case. It is the keystone of the successful trial. Because of the dramatic possibilities inherent in cross-examination, it has become the favorite courtroom device to be exploited by the cinema, stage and television. When the law student assumes the role of Walter Mitty and dreams of himself in the courtroom, he invariably pictures himself as a skilled cross-examiner. And, when older, more experienced lawyers meet, the one area to which their reminiscences always seem to return is their successful jousts on the field of cross-examination.

Yet, despite all this public and professional interest in the field of cross-examination, there has been less serious writing done in this area than in any other field of the law. . . .¹

If that conclusion is true, and I am willing to take Mr. Shapiro's word, it can be reasonably explained by the fact that it was axiomatic among lawyers of past generations that the art of cross-examination could not be learned from legal texts nor law school lectures, but is derived from wide experience, a retentive memory, a better than average comprehension of the laws of cause and effect, and a general knowledge of human nature. This, of course, is an overly simplified capsule version of a background which I will amplify later. But it is a well recognized fact among lawyers that many attorneys who are truly learned in the law—who can write demurrer-proof complaints, prepare sound briefs, write excellent instructions for the jury, and make able arguments—never seem to acquire the knack of devastating cross-examination.

Mr. Appleman's major premise, with which I wholly agree, is that the foundation of effective cross-examination is tireless preparation. As to the type of preparation necessary I differ with him slightly, but I

1. P. iii.

readily grant that he makes a good case for himself. Nevertheless, the fact that many lawyers who are experts in other fields frequently call in outside counsel to assist in important trials would seem to indicate that these lawyers who are able to prepare themselves in other areas recognize an inability in themselves to prepare adequately for trial work.

The author of this book under discussion is introduced in the foreword as an "advocate's advocate,"² and he himself states that he is often called upon to try personal injury cases for other attorneys. With such a background he has earned the right to be heard on the subject of his book.

Mr. Appleman sets forth seven primary purposes of cross-examination: (1) to destroy testimony, (2) to minimize testimony, (3) to minimize the witness as a witness, (4) to minimize the witness as a person, (5) to destroy or damage other testimony of the adversary, (6) to corroborate other testimony on our side, and (7) to build up a witness for our side.³ Such categorizations are always difficult to make, and are generally not exhaustive, but I would agree with Mr. Appleman that these seven are the primary purposes to be achieved by cross-examination. I can think of at least one additional use for the technique of cross-examination which the author does not mention, probably because it does not take place in the court room as part of the formal trial. A lawyer generally accepts the word of his client as to matters in controversy if his story is reasonable and cohesive, but, in preparation of his case it is sometimes well to test the client's story, as well as the accounts of his chief witnesses, by subjecting them to the same type of cross-examination they may expect from opposing counsel. This serves the twofold purpose of preparing the witness for the pitfalls of leading questions, and demonstrating to him the importance of remaining calm under a barrage of hostile inquiry. It is much easier for the witness to learn such lessons in a private law office than in open court, and it may save him considerable embarrassment when he faces the actual cross-examination.

In any guide to cross-examination it is well to stress in the beginning the fact that it is often unnecessary or inadvisable to cross-examine at all, and the book under discussion covers that ground satisfactorily. Mr. Appleman points out that an advocate is not forced to cross-examine and, indeed, he should not do so unless the witness has damaged his case, for a witness who knows what he is talking about and who testifies to the truth is not vulnerable to cross-examination. Furthermore, if the lawyer does undertake to cross-examine he is not required to examine about

2. P. iv.

3. P. 7.

everything contained in the story of the witness, nor should he reiterate the story of the other side, for such an examination only gives double emphasis to such testimony. Another rule, which the author states is given credence by nearly all effective advocates, is that an attorney should not ask a question unless he is quite sure what the answer will be.⁴ These guidelines, all well chosen, which point out the negative approach to cross-examination will meet the general approval of the trial advocate.

The positive approach is also well covered, and well indexed.⁵ In fact, the simplicity of the indexing is one of the best features of the book, which is small, and well printed in large and readable type. It is a "handy" volume. Do not, however, expect the index headings to be voluminously elaborated or illustrated. They are not, and in the very nature of any work on cross-examination they could not be. The field is far too vast for more than a token illustration. But they are provoca-

4. P. 6-14.

5. PRINCIPLES OF CROSS-EXAMINATION

Types of Witnesses.

The Confused Witness
 The Agreeable Witness
 The Timid or Hesitant Witness
 The Reticent Witness
 The Faker
 The Exaggerating Witness
 The Dogmatic Witness
 The Bullying Witness
 The Smart Aleck
 The Voluble Witness
 The Perjured Witness
 The Female Witness

EXPERT TESTIMONY

Handwriting
 Banker as Handwriting Expert
 Examiner of Questioned Documents
 Sanity or Mental Competency
 Eminent Domain
 Gas Storage Valuation
 Geologic Experts
 Water Resources

MEDICAL EXPERTS

Extent of Expert's Knowledge of Case
 Cursory Examination
 Soft Tissue Injuries
 'Medicine Is Not An Exact Science'
 Cross-Examination By Medical Texts
 Conjectural Testimony
 'Flattery Technique'
 Lack of Treatment
 Reducing the Testimony of a Physician
 Disc Injuries
 Getting Affirmative Replies
 Contrary Medical Opinions
 Summary P. vi-vii.

tive and stimulating, and if the reader has had sufficient experience in evaluating circumstances and physical facts, and has thoroughly prepared his case, they will aid him. And this brings me back to my original observation, namely, that cross-examination is not learned from books nor lectures, nor can it be adequately prepared in that relatively brief period allotted most lawyers for pre-trial preparation. The kind of preparation necessary for expert cross-examination begins with elementary education, and is acquired only by a chosen few who have a seeing eye and a retentive memory. It is possible to use photographs, maps drawn to scale, weather data from government records, etc., to fix in the cross-examiner's mind the physical conditions at the time and place, and that type of preparation must be thorough, as Mr. Appleman suggests. But the court room confrontation of the actual testimony from the witness stand with the physical facts and the circumstantial evidence can only be prepared from a lifetime of experience and memory.

On the matter of cross-examination of expert witnesses Mr. Appleman hits the target squarely. That type of cross-examination *can* be prepared by counsel during the pretrial period allotted. Any lawyer who has surmounted the rigorous requirements of law school can place himself in the hands and under the tutelage of able experts, read the latest texts, learn the technical language of engineers, medical men, handwriting experts, ballistic experts, geologists, chemists and the like, and within the narrow field opened up by one particular case, prepare himself to conduct an intelligent and effective cross-examination of an expert in that area. Here, as Mr. Appleman points out, the attorney must know the subject thoroughly. To quote him:

I have an extensive medical library, particularly as it applies to traumatic injuries. However, the books which I have in my library and which I use and know quite thoroughly are not the books written for lawyers. They are the medical books which are studied by physicians and which you will find in the offices of specialists in that phase of medicine. One must know as much as, or more than, the physician to be cross-examined upon a particular subject if such questioning is to be effective. And the same is true when it comes to the examination of experts of any type—whether they be accountants, engineers, geologists, railroad employees, or other persons having knowledge of a specialized character.⁶

So, as Mr. Appleman sums it up, "the best cross-examinations are the

6. P. 5.

result of hard and tedious work.”⁷ Hard and tedious, yes, but not impossible for an attorney who is accustomed to difficult preparation and intensive study.

But most cross-examination does not deal with experts. It concerns ordinary men and women, giving, each in his own way, an account or an opinion of an event, or a series of events, or a situation, from the witness stand. No pre-trial preparation, except in the most general sense, will avail a lawyer there. Let me quote in support of my theory an illustration taken from Mr. Appleman's book.

Years ago, a law partner of mine was trying a divorce case where infidelity of the lady was an issue. He asked the witness whether or not the woman had a reputation of being chaste. The witness stated that she did. Rocked back on his heels, my partner finally asked: “How do you spell ‘chaste?’” The witness promptly replied: “c-h-a-s-e-d.”⁸

That question was not prepared, nor that answer expected. It was a shot in the dark which struck the mark.

Mr. Appleman lays considerable stress upon the dramatic approach as a technique in cross-examination. He uses the word “dramatic” a dozen times or more in his book, and suggests whenever possible a dramatic rather than a simple presentation of evidence. He refers to the fiction of Erle Stanley Gardner as exemplifying “some of the better examples of modern cross-examination. . . .”⁹

I would not quarrel with the author's admiration for Mr. Gardner. I enjoy Perry Mason myself, although I doubt if many of his cross-examinations would stand up under the rules of evidence. After all, why should they? Mr. Gardner's business is to entertain, while the advocate's aim is to convince. Their ultimate objectives are entirely different. The author confronts his audience with the fictitious story which he tries to bring to life by the mechanics of dramatic impact. But when the litigants, their lawyers, the judge, the bailiff and the reporter meet in the courtroom, in an actual trial, they are facing reality—they are playing for keeps for somebody's rights, his property, his liberty, or even his life, and because it is a showdown instead of merely a show, drama is always present.

As a lawyer I have frequently been impressed by the aptitude displayed by lawyers in small county seats for cross-examination. A boy-

7. P. 6

8. P. 15.

9. P. 17.

hood spent on a farm where, in addition to planting, cultivating, reaping and harvesting the family is continually confronted with all kinds of repairs to buildings and farm machinery; where people are weather-wise and direction conscious, and where judgments of time, distances, weights and measures are acquired, provides a good foundation upon which to build experience which will later be useful in detecting discrepancies in statements made on the witness stand.

High school years spent in absorbing the rudiments of physics and chemistry will pay many a dividend in the courtroom. Courses in mechanical drawing which will enable one to read a blue print, draw a map to scale or to learn some of the language of the engineer are very important. A student who at one time aspired to study medicine or become an engineer, and took a pre-medic or a pre-engineering course before finally turning to the law will make a valuable addition to any law office.

Experiences on the athletic field, where one may see the distance of a mile divided by white lines into half and quarter-mile segments, and note the measured distance of a hundred yards on the gridiron divided into five and ten yard sections and fix in his mind the distance from the fifty yard line to the goal; or where by watching a stop watch you can observe how great a space of time is measured by ten seconds, or a minute, or five minutes, is a useful bit of knowledge you can tuck away in your memory against the time you may be confronting a witness who has only the vaguest idea of the judgment of time and distance. Further, the experience gained in driving an automobile is extremely valuable in enabling an attorney to spot inconsistencies in testimony concerning automobile accidents, and to appraise the degree of care used by a driver on slippery or dry roads, curving or straight roads, hilly or level roads.

None of these experiences are rare or unusual. Most of us have had them. But only a comparative few have the knack of fixing them in their minds and filing them away for future reference. Lawyers, sad to relate, are just as prone to forget their experiences with physical facts as laymen. It is only a *remembered* fact which becomes a useful and informative experience, and which will instantly make plain to the skilled cross-examiner the "point of vulnerability"¹⁰ mentioned by Mr. Appleman.

To return in conclusion, Mr. Appleman's book is both interesting and readable. It will not, in the reader's opinion, teach you to cross-examine, nor can any other text. But it contains many practical hints

and stimulating examples, and it has the virtue of brevity and good indexing.

WILLIAM H. REMY†

THE GREAT PRICE CONSPIRACY. By John Herling. Washington: Robert B. Luce, Inc. 1962. Pp. xv, 366. \$5.50.

[N]o matter what General Electric's past [has] been in regard to the observance of the antitrust laws, "our record for the past decade and more indicates that the managers of the General Electric Company are making earnest and successful efforts to comply not only with the letter, but also with the spirit of the antitrust laws.

As long ago as 1946 . . . the company embarked upon an educational program, a program which has been continued to date with undiminished vigor, designed to sharpen the sensitivity and awareness of all our people to the role and importance of the antitrust laws." [I]n 1958 . . . [the] Assistant Attorney General in charge of the Antitrust Division . . . "cited the General Electric Company as the 'number one example' of companies which have made earnest efforts to live up to the antitrust laws."¹

These words were spoken by Ralph J. Cordiner, Chairman of the Board of the General Electric Company during a May, 1959, appearance before the Senate Subcommittee on Antitrust and Monopoly. They represent the image projected by General Electric at the time of the first public rumblings of "The Great Price Conspiracy," the revelation and prosecution of which was to shake the electrical manufacturing industry to its very foundations.

In compiling this history of the electrical industry's price fixing scandal, the author, newspaperman John Herling has called upon many sources for his information, including the individual defendants, executives of defendant corporations, the staff of the Senate Subcommittee on Antitrust and Monopoly, officials of the Department of Justice, as well as his fellow newspapermen. He utilizes, as could be expected, a reportorial style, placing the main emphasis on the role of General Electric and its officials in the conspiracies.² The absence of any detailed le-

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1. P. 54-5.

2. General Electric was involved in nineteen of the twenty conspiracies for which indictments were returned, as was also true of Westinghouse, the other giant corporation in the electrical industry.