Praise for *Dynamic Cross-Examination*

"Based on his decades of experience and unparalleled wisdom, Jim McComas has created an innovative and powerful method for cross-examination. It will pull even the most experienced expert witnesses from the relatively safe harbor of the typical yes-or-no cross-examination into perilously unchartered waters, where any biases, flawed assumptions, and faulty reasoning are most likely to be exposed."

—Gregg O. McCrary, former supervisory special agent
for the FBI's Behavior Science Unit and now an
independent analyst in civil and criminal cases

"Jim McComas, one of the finest lawyers in the country, shares his valuable insights and methods with those of us who represent the underdog, and helps us all to be better advocates."

—Andrea D. Lyon, associate dean for Clinical Programs
and director of the Center for Justice in Capital Cases at
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"What Jim has coined in *Dynamic Cross-Examination* is his spot-on identification of a method for successful interaction with your opponent's witness. A must-read for trial lawyers."

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"In my ten years of trying mostly murder cases with the author, I have seen this method create powerful and case-winning dynamics in the courtroom. It will change the way you practice. It is the next generation of winning trial technique."

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Champion of Liberty Award winner

"James McComas, skilled trial lawyer and master of cross-examination that he is, has 'nailed it' in *Dynamic Cross-Examination*."

—Phillip Weidner, BS, MIT's Sloan School
of Business and JD, Harvard Law School

"Jim McComas takes cross-examination to another level in *Dynamic Cross-Examination*. Beautifully written by one of the best trial lawyers in the country, this book is a must-read for all serious trial lawyers and a great text and sourcebook for anyone who teaches trial advocacy."

—Angela J. Davis, professor of law at American University,
former director of The Public Defender Service
in Washington, D.C.

"Jim McComas is that rare lawyer who blends a towering intellect with unsurpassed practical experience. The result is an important and original book that will open your eyes and explain how successful cross-examination can be achieved. Mr. McComas's insight, logic, and infectious passion will delight, inform, and challenge those who want to succeed in the well of the court. This book is a gem!"

—Bob Muse, senior partner at Stein, Mitchell & Muse,
adjunct professor of law at Georgetown
and Harvard Law Schools

"McComas debunks longstanding myths and draws on his extensive trial experience to create a provocative new framework for thinking about how to maintain leverage in cross-examination. What he does is offer the trial lawyer a new opportunity to win in the courtroom. It's a must-read for trial lawyers and educators."

—Kim Taylor-Thompson, professor of law at the
New York University School of Law,
former director of The Public Defender Service
for the District of Columbia

Dynamic Cross-Examination

Dynamic Cross-Examination

A Whole New Way to Create Opportunities to Win

James H. McComas

Trial Guides, LLC

Trial Guides, LLC, Portland, Oregon 97205

Printed in the United States of America

ISBN: 978-1-9410077-0-9

Library of Congress Control Number 2011941976

Interior design by Laura Lind Design

Jacket design by Theodore Marshall

This book is printed on acid-free paper.

To all those trial lawyers "who in
their lives fought for life, who wore at their hearts
the fire's center." (Stephen Spender, 1933)

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Acknowledgments

Thanks from the get-go to my mentor and close friend W. Gary Kohlman, who taught me how to pay attention and search unceasingly for opportunities in trial. And to my brothers-by-choice—my law school, then D.C. Public Defender Service (PDS) colleagues—Jimmy Klein and Prof. Charles Ogletree, for their decades of friendship, loyalty, and support. Thanks to the amazing women who co-counseled trials with me in D.C.: Avis Buchanan, Angela "Amani" Davis, Syrie Davis, Penny Marshall, Rita Pendry, and Kim Taylor, as well as the awesome advocate, Michele Roberts, who succeeded me as Trial Chief. Thanks also to Jonathan Rapping, the outstanding trainer now tirelessly helping Southern lawyers bring quality representation to their indigent clients. And to all the other lawyers who have done the hardest work at PDS, for their great friendship, loyalty, and effort, both when I was there and since then, as I've had the privilege of seeing them in training every year since 1988.

Then there's twenty years in Alaska, where I met three great lawyers who became dear friends: Rick Friedman, to whose firm I was *Of Counsel* for ten years, who encouraged me for decades to write this book; Cindy Strout, who tried fascinating murder cases with me throughout the vast lawless stretches of the last frontier; and Phil Weidner, who never asks for, or grants, any quarter. Also, thanks to my special plaintiff's case consultants, attorneys Kirsten Friedman and Lesley Zork.

Thanks to my mother and father, Hazelyn and Harrold McComas, for the intellectual environment and education opportunities that made my career possible. And thanks to my dear friend Brian Long, who helps me maintain some sort of balance in my life by sharing with me his intimate knowledge of the wildness of northern Wisconsin.

Finally, and now, at last, once again first in the line of my focus and attention, I want to thank my remarkable wife of thirty-seven years, Anne, and my sons, Dan and Henry, for allowing me to pursue the consuming trial work I did for thirty years, and for filling my life with love, humor, and excitement along the way. I treasure every moment.

Author's Note

The examples in this book are derived from actual cases, in all of which I participated, except for the cross-examination of Dr. Ugit Nottabuk in chapter 16. However, the example cases often consist of composites of several cases. Moreover, the names of all litigants, witnesses, and counsel, and other identifying details have been changed. For these reasons, any similarity between the fictionalized names, and other particulars in this book, and real individuals, companies, and cases is strictly coincidental.

Publisher's Note

This book is intended for practicing attorneys. This book does not offer legal advice and does not take the place of consultation with an attorney or other professional with appropriate expertise and experience.

Attorneys are strongly cautioned to evaluate the information, ideas, and opinions set forth in this book in light of their own research, experience, and judgment, to consult applicable rules, regulations, procedures, cases, and statutes (including those issued after the publication date of this book), and to make independent decisions about whether and how to apply such information, ideas, and opinions to a particular case.

Quotations from cases, pleadings, discovery, and other sources are for illustrative purposes only and may not be suitable for use in litigation in any particular case.

As set forth in the Author's Note, the cases described in this book are composites, and the names and other identifying details of participants, litigants, witnesses, and counsel (other than the author of this book) have been fictionalized except where otherwise expressly stated by the author.

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Foreword by Rick Friedman

Here is something one rarely sees, a book that teaches how to think creatively. Can the type of creative communication that leads to good—even great—cross-examination be taught? *Dynamic Cross-Examination* is proof that it can. Can a book written by a criminal defense lawyer help civil plaintiff's lawyers win trials? I am living proof that it can.

I first heard of Jim McComas while practicing in Anchorage, Alaska. Venue for the most notorious murder trial in Alaska history had been moved from Anchorage to Fairbanks due to pretrial publicity. The multimillionaire defendant had hired a big-name criminal defense lawyer from back east, and the big-name lawyer had a sidekick, Jim McComas. It was impossible to win the case, but we were all interested in how the big-name lawyer would do.

As word of the trial started trickling in from up north, it appeared the big-name lawyer wasn't doing much, but stories were told about the sidekick. His amazing motions *in limine* were resulting in rulings we had never dreamed of before. Each week seemed to bring a new account of the sidekick destroying another previously invulnerable state witness. He had jurors crying during his closing argument.

After a three-month trial, a mistrial was declared when improper material found its way into the jury room. Six months later, sidekick Jim McComas came back to Alaska, this time alone, and tried the case again. His client was acquitted of all charges, and this verdict became the first in a string of "impossible" acquittals Jim achieved in Alaska.

While Jim was regrouping after the mistrial, I had my own first degree murder case to worry about. The defendant had been in jail for a year when I was appointed to represent him. The evidence of guilt appeared ugly and overwhelming. I accepted the case six weeks before trial. I was young and broke; I needed the work.

At the time I had been practicing law for eight years. I had many civil and criminal trials under my belt, including two

murder cases. In my previous cases I had been unable to stick with the traditional yes-no cross-examination method, which requires all leading questions. I could not put my finger on the reason, but it often just didn't feel right. I would deviate from the method, fumbling along, with no clear idea of what I was doing—trusting my intuition, which at times served me well and at other times failed me.

As I prepared for trial, I received the biggest break of my legal career—my client supposedly "confessed" to the same cellmate that Jim's client had. I got transcripts from Jim's trial and read his cross of the cellmate. Then I read the rest of the trial transcript, cover to cover.

What I saw was a revelation. Cross after cross, Jim used the Dynamic Cross techniques described in this book to dismantle the state's case, and to create a plausible, persuasive reality of his notorious client's innocence. I didn't fully understand what he was doing, but reading the transcripts freed me up to engage witnesses on a moral and psychological level. I had no hope of being as brilliant, articulate, or self-confident as Jim, but for the first time I saw a glimmer of hope in my truly hopeless case.

To the amazement of everyone who didn't see the four-week trial, my client was acquitted after an hour and a half of deliberations. My approach to trying cases has never been the same. For the past twenty years, I have tried nothing but civil cases; thanks to Jim, every cross-examination I have done since 1987 has been a Dynamic Cross-Examination.

I think about the famed forensic psychiatric witness set to ravage my client in an insurance disability case. My client, said the witness, was a dishonest fake, and this doctor had all the credentials and experience to make the jury believe his opinions. He had been deposed years before I entered the case, and was the first witness called by the defense at trial. I asked a question to which I did not know the answer—a Dynamic Cross-Examination question:

"Good morning, Dr. Expert, can you tell us why you became a doctor?"

I thought he would deliver a self-serving answer about a desire to help people. I would then contrast his answer with what he had

just done to my client in front of the jury. A good Dynamic Cross plan. But as so often happens with Dynamic Cross-Examination, he gave a better answer than I expected—the witness gave me the opportunity to greatly promote my case. Over the next few minutes, with a few gentle prompting questions from me, he explained that his parents were both doctors and wanted him to be a doctor. He never felt like he had another choice. In medical school, he went on a fellowship to England and was exposed to a prominent forensic doctor, which caused him to go into that field. He liked the intellectual give-and-take of the courtroom. Having gotten the gold with dynamic questions, I then nailed down the ramifications with leading questions and established our theme.

"It sounds like you almost would have preferred to be a lawyer."

"Yes, that is probably true."

"But as a forensic psychiatrist, you can do pretty much the same thing—advocate for your positions in the courtroom."

"Yes."

In the first five minutes, he voluntarily shed the mantle of one of our most respected professions (doctor) to adopt that of one of our least respected professions (lawyer). Throughout the rest of the examination, I politely reminded him (and the jury) that he was acting as an advocate, not as an impartial doctor. He left the witness stand, clearly in the role of wannabe lawyer, arguing whatever position he thought would best help the defense.

After the favorable plaintiff's verdict, the judge told me he was amazed that with witness after witness (there were five IME doctors), I kept asking questions to which I clearly did not know the answer. He said he kept catching himself holding his breath to see what the answers would be—and he thought the jurors were doing the same thing.

Examples of how Dynamic Cross-Examination has helped me win civil cases could fill several books, but examples should not be necessary. Any experienced trial lawyer knows that the principles of cross-examination are the same in both criminal and civil trials. If anything, Dynamic Cross-Examination provides more opportunities in civil practice than in criminal. Civil

lawyers can practice Jim's techniques in depositions. Experienced witnesses and civil defense counsel are often taken off-guard by Dynamic Cross-Examination questions. The deposition answers then provide a broader array of information to draw upon to construct Dynamic Cross-Examinations for trial.

I feel safe in saying you hold in your hands a book that will revolutionize how generations of trial lawyers think about cross-examination. Like most revolutionary books, this one will meet resistance. Some of the resistance will come from people who simply dislike new ideas or are resistant to changing their own approach to trying cases.

From my own observation, the great trial lawyers never stop being students of trial advocacy. They are in constant search of new ideas and techniques—and not afraid of the hard work involved in learning a new approach. I can't promise this book will make you a great trial lawyer, but I do promise it will make you a better one. I have seen lawyers, with all levels of experience and talent, improve tremendously after exposure to Dynamic Cross-Examination. All you need is the willingness to work hard and take some risks—the very qualities every trial lawyer needs in abundance. And, as Jim points out, the risks are much smaller than they are generally perceived to be.

Joseph Campbell says the role of a hero is to go where no one has gone before and return with gifts for the community. Jim has definitely gone places most of us will never go; I know you will enjoy, and our clients will benefit from, what he has brought back to our community of trial lawyers.

—Rick Friedman

Rick Friedman is a member of the Inner Circle of Advocates and is the author of *Rules of the Road, Polarizing the Case,* and *Rick Friedman on Becoming a Trial Lawyer.*

Foreword by W. Gary Kohlman

Jim McComas became a legend in the Washington, D.C., bar not long after he first cut his teeth as a criminal defense attorney at the D.C. Public Defender Service. I had the pleasure and challenge of being the PDS Training Director the year Jim and his close friends and law school classmates Charles Ogletree and Jimmy Klein started at the agency. From the outset it was obvious that Jim was going to be a star; the only question was how bright he would shine. In rapid sequence, Jim became a leading trial lawyer, the PDS Training Director, and the Trial Chief. In those later roles, his passionate style of practice influenced and inspired the careers of countless young attorneys.

From the very beginning, Jim was quick to absorb the conventional wisdom of trial practice, but, like the curious boy with the old-time radio, his inquisitive mind drove him to take accepted trial practice apart to understand why it worked and why it sometimes failed. After an extraordinary run in the District of Columbia, Jim took the trial skills he honed to Alaska, where he became a legend in that state as well, refining and revising the trial strategies that made him a true champion of liberty.

Now, in a priceless gift to every attorney who dreams of becoming a trial lawyer, and for those of us who fancy ourselves the same, Jim has written a highly provocative book on cross-examination. This book—an absolute must read for aspiring and seasoned trial lawyers alike—pulls the curtain wide open to reveal why some cross-examinations succeed, while others fail. More fundamentally, Jim shows us why some criminal defense and plaintiff's attorneys are successful in difficult cases, but others are not.

To fully appreciate the wisdom of the book, one must consider two phenomena, which we usually assume are unrelated and which every seasoned trial lawyer experiences. The first is that moment when it becomes crystal clear which party will win and

which will lose. Quite often that blinding flash of insight occurs during an important witness's testimony. The lawyer can almost feel the courtroom move as she senses that the jury has reached an unspoken consensus as to what its verdict will be.

Second, most trial lawyers also know what it's like when, in the midst of a cross-examination, the witness gives an unexpected answer (or even exhibits an unexpected demeanor) that suddenly shifts the examination in a direction that the lawyer did not anticipate. The lawyer finds herself a million miles away from her carefully mapped-out, controlled examination, in a world where the witness begins to reveal who he really is and what his motivations really are. My experience has been that some of those cross-examinations turned out remarkably well and some did not—but the reasons for the difference escaped me.

In this remarkable book, Jim brilliantly demonstrates the very close relationship between those two events. In a carefully thought-out manner, relying heavily on highly instructive case studies, he shows how what he describes as a *Dynamic Cross-Examination* can quite often create the moment in which a trial is decided.

This is a book accessible to every level of practitioner, because the foundation of Jim's method starts with thorough and imaginative preparation long before the trial. Jim's theory starts with an assumption that the practitioner knows every nook and cranny of the case. From there, Jim stresses the significance of developing a case theory that takes advantage of every favorable fact and blunts the unfavorable ones. Finally, the Dynamic Cross-Examination model assumes the attorney fully understands that every single action she takes in a courtroom, including the color of her shoes, is an act of advocacy that she must calculate as part of the trial plan.

With these building blocks in place, Jim walks the reader through the traditional methods of cross-examination that stress total attorney control (Jim refers to this as the yes-no approach). Jim convincingly shows that overreliance on the traditional methods of cross-examination may make the lawyer look good, but the end product is rarely going to accomplish more than holding the ground the attorney held after she started the cross. Jim notes

that we should develop the ability to do a yes-no cross because we can effectively integrate it into a Dynamic Cross-Examination, but it should never be the centerpiece.

What Jim advocates is nothing less than a full-scale dialogue with the witness—or, as Jim puts it, "a fight or a dance." This is a dialogue that breaks all the rules. It uses open-ended questions, which require the witness to produce the opportunities that enable the examiner to promote her case. As Jim shows through his case studies, the open-ended questions coax answers from the witness that expose to the jury who the witness really is and what is truly motivating his testimony. Gone, of course, is the safety net that comes from "never asking a question you don't know the answer to," but Jim shows that the supposed risks of doing so have been greatly overstated. He also emphasizes that the ultimate weapon the attorney has is the logic of her case theory. If the witness gives an answer that fits the case theory, Jim shows how to display that to the jury quickly. If, on the other hand, the answer is inconsistent with the case theory, the attorney uses the logic of the case theory to demonstrate the testimony's falsity.

The first read-through of Jim's book can be a terrifying as well as eye-opening experience, because suggesting that the attorney is not in complete control of the cross-examination is so foreign to most of us. But that is the beauty of the case studies. They illustrate that the attorney ultimately does stay in control by the choice of topics she chooses to question about, and by her ability to use the answers to advance the case theory.

Reading Jim's book and following his case studies, it becomes readily apparent to criminal defense attorneys and plaintiff's lawyers alike that we can accomplish much more in cross-examination than perhaps undermining a witness's credibility. During the prosecutor's case itself, a Dynamic Cross-Examination can demonstrate that a witness's testimony cannot withstand the force of logic that is inherent in a well thought-out case analysis. For the civil practitioner, there is the additional benefit that many of Jim's ideas can be explored at depositions, which will enhance the value of a case and potentially lead to attractive settlement possibilities.

Imagine a book that explains how Bob Dylan strung his lyrics together, or one that reveals how Hank Aaron could distinguish in a millisecond a fastball from a curve. Those books remain to be written, but Jim has given us the equivalent in the area of trial practice. Years ago, Jim gave me a 1903 original edition of *The Art of Cross-Examination* by Francis Wellman, a book I consult before every case I try and before every trial practice class I teach. Now Jim has written a book that makes the magic of Wellman's "art" accessible to every lawyer willing to do the preparation work, pay attention, and conquer their own self-censorship. *Dynamic Cross-Examination* will be an immediate classic. When I receive my printed copy, I'm placing it right next to Wellman's.

—W. Gary Kohlman

W. Gary Kohlman is a partner in Bredhoff & Kaiser in Washington, D.C., specializing in litigation on behalf of labor clients. He graduated from the University of Michigan Law School. From 1973 to 1982, Mr. Kohlman served as a trial attorney, Training Director, and Chief of the Trial Division at The Public Defender Service in Washington, D.C. Mr. Kohlman has tried hundreds of civil and criminal cases throughout the country, and taught trial advocacy in many venues.

Introduction

Generations of lawyers have been trained to believe that confronting the key witnesses against their clients is fraught with danger. Mantras like "Never ask a question to which you do not already know the answer," and "Always use narrow, leading questions," have taken on the aura of holy writ. The goal of this purportedly risk-averse approach is for the attorney to be able to return to her seat, having scored a few points and not having lost the case by asking dangerous questions.

The paradigmatic story supporting this view concerns a fight out on the street sometime in the 1800s. As a result of the fracas, one participant was charged with mayhem for biting off the other's ear. At trial, the defense lawyer did a masterful job with leading questions, establishing how dark it was, how large and dense the crowd in attendance was, and how fleeting and poor the witness's glimpses of the action were. This fine job of questioning culminated in the last leading question: "And for all those reasons, the truth is that you never saw my client bite off the man's ear, did you?"

"You're right," responded the witness. "I did not see him bite off the ear."

Now, according to the proponents of risk-averse cross-examination, this is where the defense attorney must stop. She's nearly won the case, and she should just sit down. Instead, she asked

the Dreaded Conviction-Guaranteeing Question—"Then why did you testify for the prosecutor that my client bit off the ear?"

"Well," replied the witness, no doubt with a slight smirk, "I saw him spit it out."

Current dogma provides that the defense lawyer has now lost the case, solely because she asked one question too many, and a nonleading one at that.

Nonsense. She did no such thing. Giving it a little thought, does anyone really believe that this "devastating" answer would not already have been elicited by the prosecutor on direct examination? And, if not, it surely is coming on redirect the moment the opponent stands up. The fear of eliciting a bad-verdict-guaranteeing answer is largely illusory. Yet the shadow of self-censorship in advocacy, which such fear casts, is wide and deep.

The smaller risk in this example is that the trial was being conducted in front of a judge who did not allow recross-examination, as many do not. So, if the answer did not come up on direct or cross, but only on redirect, the defense never has a chance to challenge it.

The big risk is that the traditional cross-examination, although totally "safe," will not be sufficient to generate an acquittal.

The first purpose of this book is to point out that the emperor of self-censorship in cross-examination has no clothes. The fear of losing the case, which law school, continuing legal education, and tradition have drummed into us, is a false fear. The surprising answers that do occur are actually manageable, and they often provide opportunities to win cases.

The second purpose of this book is to provide a functional means of conducting Dynamic Cross-Examination. Effective lawyers invariably break away from the constraints of the risk-averse method because they learn through experience that they can win many more cases by doing so. The problem is that these forays are typically anecdotal and highly individual. This book provides insights and guidelines for a much more open method of cross-examination, which we can study, try, and improve throughout our practice.

Dynamic Cross-Examination is a powerful and flexible process of human communication with adverse witnesses—a simultaneous

communication among attorney, witness, and jury, for the purpose of persuading the jurors. In the Dynamic Cross-Examination method, the witness is an active participant, not a cardboard figure saying only yes or no.

In Dynamic Cross-Examination, we mix nonleading and leading questions, and use other available tools and circumstances in the courtroom, to create a dynamic environment during the examination. Such questioning generates power in motion, often instigated by the witness's own answers or conduct, always moving fluidly as we elicit and provoke responses and then react to what the witness says.

Dynamic Cross-Examination is not merely a technique. Instead, it is a substance-based method for obtaining information from witnesses in order to promote our position on the most important points in the case. Rigorous case analysis of what will determine the outcome, what is plausible, and what is persuasive fuels every effective Dynamic Cross-Examination.[1]

Instead of prohibiting the question *why,* Dynamic Cross-Examination answers all the important *why* questions in a way conducive to the acquittal of, or recovery by, our clients. The answers to these *whys* make plausible the reality we want the jury to believe, and help lever the outcome in our favor. This dynamic method uses the witness's own statements, demeanor, and behavior in court to provide those answers.

To elicit helpful answers to key questions, Dynamic Cross-Examination employs a psychologically based strategy. By investigation, preparation, and careful observation at trial, the examiner determines who the witness wants to be for purposes of his court appearance. Then she designs her approach and her questions to the witness in order to take full advantage of the witness's predisposition, needs, and agenda.

The results are often remarkable. Dynamic Cross-Examination can produce enormously useful answers, devastate credibility, and create courtroom dynamics that would never occur by use of the yes-no approach. This is how hard cases are won.

---

1. James H. McComas, *Case Analysis: Winning Hard Cases Against the Odds* (2011).

One caveat: before using the Dynamic Cross-Examination method in trials where the client's life or liberty is at stake, we must first master the overcontrolled, risk-averse technique of cross-examination, which uses only leading questions. We must do so for three reasons:

1. We have to walk before we fly, and our clients must not pay the price of our learning curve.
2. We must master the detailed preparation that the traditional approach requires before we can even attempt something more challenging and more productive.
3. Asking leading questions is one of the essential tools we will use in conducting Dynamic Cross-Examinations.

I developed the method of Dynamic Cross-Examination throughout my thirty years of practice as a criminal defense lawyer. Criminal defense depends heavily on cross-examination for success, so it was a natural focus for me. My plaintiff's lawyer friends assure me, as Rick Friedman and Gary Kohlman do in their forewords to this book, that the method can be equally or more successful in civil cases, given the greater access to, and information about, witnesses that civil discovery provides.

Following is a summary of how this book is organized.

Part I (chapters 1–6), "Comparing Methods Calls for a New, Dynamic Approach," presents and compares the traditional and dynamic methods of cross-examination; it also demonstrates how to prepare for and conduct the latter.

Chapter 1: "What Is the Purpose of Cross-Examination?" looks at the systemic justifications for, and constitutional underpinnings of, the right to confront and cross-examine opposing witnesses. This review suggests that the examination method should be more dynamic than the risk-averse ordeal that too often occurs today.

Chapter 2: "Cross-Examination: Art or Science?" reviews and rejects the claims that cross-examination is either one of these. Instead, cross-examination is a means of three-way human communication and persuasion, involving the attorney, the witness, and the jury.

Chapter 3: "The Modern Yes-No Method of Cross-Examination" describes and critiques the risk-averse method we follow today. This technique is called the yes-no method, since those are the answers it seeks to obtain. Ultimately, this chapter places this highly controlled method of questioning where it belongs—as one, but not the only, tool in the cross-examiner's arsenal.

Chapter 4: "The Method Matters a Lot" takes a case example and compares a traditional yes-no examination with a truly dynamic approach. This example gives us a glimpse of the vastly more effective potential of using a dynamic method.

Chapter 5: "The Dynamic Method of Cross-Examination" presents a new and dynamic way to confront witnesses. It uses the witness's participation in the dialogue to promote our case and create opportunities to win that otherwise would never occur. This chapter also discusses the general principles that apply to this method, where and when to use the yes-no method in the dynamic process, and how to make the room we need in the courtroom to do a Dynamic Cross-Examination.

Chapter 6: "How Do You Do Dynamic Cross-Examination?" explains how to use this method. First, it discusses the case and witness analyses that are necessary to prepare for the task. Effective Case Analysis—which continues throughout the investigation, preparation, motions, and trial stages of every case—is critical to conducting successful Dynamic Cross-Examinations. Such analysis provides the focus, prioritization, and substance of Dynamic Cross-Examination. I present this method fully in my book *Case Analysis: Winning Hard Cases Against the Odds.*[2]

Second, chapter 6 augments the general principles from chapter 5 with additional detail about the tools available in a Dynamic Cross-Examination. Third, it explains how to deal with the surprise answers that sometimes result from Dynamic Cross-Examination. Finally, this chapter discusses some issues involving recross-examination.

Part II (chapters 7–11), "Case Example: *State v. Peter Piper,*" presents the bulk of the Dynamic Cross-Examinations of two key

2. McComas, *Case Analysis, supra* Introduction, note 1.

witnesses in an actual case. This part also provides preparation steps and sample documents to use in cross-examining each witness.

Part III (chapters 12–16), "Dynamic Cross-Examination for Plaintiff's Lawyers in Jury-Trial Cases," addresses some specific similarities and differences between cross-examination by criminal defense attorneys and by plaintiff's lawyers in civil cases. Additionally, part III contains two examples of Dynamic Cross-Examinations of critical witnesses by plaintiff's counsel in two very different civil cases.

Part IV, "Final Issues Concerning Cross-Examination," encompasses chapters 17 through 20.

Chapter 17: "Analytical Charts and Visual Aids" describes how to create the charts and visual aids that we saw used earlier in several case examples.

Chapter 18: "Handling Special Cross-Examination Problems" explains how to deal with three recurring issues that affect our cross-examinations: our opponent's objections; the common opponent's claim that our cross-examination has opened the door to otherwise inadmissible evidence; and wrongheaded opponent or judicial claims that we lack a sufficient evidentiary basis to ask certain *leading* questions on cross.

Chapter 19: "Maxims for Attorneys for the Underdog" consists of thirty-two truths about representing people and trying cases.

Chapter 20: "Conclusion" contains an invitation to all readers to help expand the scope of the "possible" by trying and developing the Dynamic Cross-Examination method.

Appendices A through E contain portions of five Dynamic Cross-Examinations in real cases. Each case presents different issues and means, showing the breadth of the Dynamic Cross-Examination approach.

Appendix F contains a convenient summary chart of possible objections and proposed responses, as discussed in chapter 18.

Appendix G contains the trial memo on the legal limits on the doctrine of curative admissibility, which is discussed in chapter 18.

Except in specific cases, in this book I use the female pronoun for attorneys and the male pronoun for witnesses. There is no significance to this allocation of roles. Hopefully it promotes clarity.

PART ONE

Comparing Methods Calls for a New, Dynamic Approach

1

What Is the Purpose of Cross-Examination?

Professor J. Wigmore described cross-examination as the "greatest legal engine ever invented for the discovery of truth."[1] In a similar vein, the U.S. Supreme Court has described cross-examination as "primarily a functional right that promotes reliability in criminal trials."[2] This connection between cross-examination and the "truth"—a connection that assumes there is only one truth in every case and that it can be known—views the adversarial system as a crucible out of which factual truth emerges.

These quaint opinions notwithstanding, the adversarial system is not calibrated to maximize the discovery of factual "truth" in criminal cases. Instead, it minimizes the risk of convicting the innocent.

> It is indisputable that a primary goal, perhaps the paramount goal, of the criminal justice system is to protect the innocent accused against an erroneous conviction . . . In the criminal system, however, the goal of reliable factfinding and the goal of protecting the innocent accused may conflict. When these

1. J. Wigmore, *Evidence* § 1367 (3rd ed., 1940).
2. *Lee v. Illinois,* 476 U.S. 530, 540 (1986).

> two goals conflict, it is the goal of reliable factfinding that must give way to the paramount goal of protecting the innocent accused.[3]

Often, the "factual" component is not the most important feature of a great cross-examination. Usually, it is the impact of the cross-examination on the witness's credibility or the creation of a dynamic in the courtroom that is the key to success in cross-examination.

More practically, in criminal trials, cross-examination is where acquittals come from. Great cross-examinations of prosecution witnesses are usually the necessary predicate for, and often the sufficient cause of, acquittals in criminal cases. Fueled by a creative voir dire and a big opening statement that makes a convincing case for the accused's actual innocence, effective cross-examination of the important prosecution witnesses delivers on the promise.

"Truth" aside, other constitutional discussions of the right to cross-examine are extremely important to understanding the dynamic method. In criminal cases, "A primary interest secured by [the Sixth Amendment] is the [accused's] right of cross-examination."[4]

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.[5]

Even more specifically, the U.S. Supreme Court has explained:

> [T]he right to confront and cross-examine adverse witnesses contributes to the establishment of a system of criminal justice in which the perception as

3. *Shaw v. State,* Dept. Admin., 861 P.2d 566, 570–71 (Alaska 1993).
4. *Ohio v. Roberts,* 448 U.S. 56, 63 (1980).
5. *Pointer v. Texas,* 380 U.S. 400, 405 (1965)

well as the reality of fairness prevails.[6]

The jury's, the accused's, and the community's perceptions of fairness are primary purposes of the right to cross-examine. This is a critical observation, because it means part of the value of cross-examination depends upon regular people's perceptions and thoughts, not the lawyer's and the judge's.

To ensure the fairness value, the Confrontation Clause has been interpreted to require that we exercise the right of cross-examination by questioning the witness in the jury's presence.

> The Confrontation Clause envisions a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only for testing the recollection and sifting the conscience of the witness, but of compelling him to stand face-to-face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.[7]

In the Dynamic Cross-Examination method, as in the Sixth Amendment's constitutional vision, the witness is an integral part of the process, as is the jury's ability to scrutinize the confrontation.[8] Cross-examination is a dynamic process of human communication and persuasion—a simultaneous communication among attorney, witness, and jury, for the purpose of persuading the jurors.

6. *Lee v. Illinois,* 476 U.S. 530, 540 (1986).
7. *Mattox v. U.S.,* 156 U.S. 237, 242–43 (1895), quoted in *Roberts,* 448 U.S., 63–64. *Accord Crawford v. Washington,* 541 U.S. 36 (2004).
8. See chapter 5.

2

Cross-Examination: Art or Science?

It is no accident that the twentieth century's two most influential books on cross-examination answer this question differently. Francis L. Wellman's short and classic book is titled *The Art of Cross-Examination*.[1] By contrast, attorneys Larry Pozner and Roger Dodd have provided us with 734 pages describing *Cross-Examination: Science and Techniques.*[2]

Wellman's book contains many insights into cross-examination that are still valid today. Chief among them is that the witness is, and should be, an active participant in his own destruction. *The Art of Cross-Examination* is not, and does not purport to be, a unified theory applicable to all witnesses in all cases. It illuminates various aspects of the subject by means of tips and anecdotes. It also presents a number of "model" cross-examinations by outstanding attorneys, some of which remain impressive to this day.

Pozner and Dodd reject the concept that cross-examination is an art, primarily on egalitarian grounds.

1. Francis L. Wellman, *The Art of Cross-Examination* (1903).
2. Larry S. Pozner and Roger J. Dodd, *Cross Examination: Science and Techniques* (1993).

> Referring to cross-examination as an art conveys the same negative message to the aspiring cross-examiner as that of the seventh grade art teacher: "All of you should work diligently and as hard as you can on your artwork; however, the fact of the matter is that only one out of a hundred of you really has the talent to produce a work of art." . . . This book wholly and flatly rejects such narrow and self-congratulatory thinking . . . Cross-examination is a science . . . The elements of successful cross-examination can be described, they can be practiced, and they can be learned.[3]

There is merit to this objection. Many lawyers can become effective cross-examiners by learning, paying attention, applying a lot of effort, and practicing.

The defining feature of the Pozner-Dodd scientific method is that the attorney must maintain total and visible control of the witness. Pozner and Dodd only permit leading questions and do not ask questions unless the answer is predictable or leveraged with a witness's prior statement. The late Irving Younger popularized this approach nationally in his thought-provoking and entertaining videotaped lecture on the "Ten Commandments of Cross-Examination." I refer to the modern total-control technique as the *yes-no method,* since this method produces nothing more from the witness than answers of yes, no, I don't know, or I don't remember.

Pozner and Dodd have provided the ultimate book on how to use the yes-no method. Lawyers who read it can expect to acquire the knowledge and confidence necessary to conduct a controlled, safe cross-examination of nearly any witness. This is particularly true in civil cases, where the civil discovery rules provide so much more information about, and pretrial access to, witnesses than ever occurs in defending criminal cases.

The Pozner and Dodd book contains invaluable instructions on how to prepare for and organize a controlled yes-no cross-examination. The preparation and organization skills we

3. *Id.,* 3–4.

can acquire and develop from that book are critical, not only to the yes-no method, but even more so when doing a Dynamic Cross-Examination.

Ironically, however, Pozner and Dodd simply replace one of Francis Wellman's overstatements with two of their own. First, Pozner and Dodd's claim that cross-examination is a science is false. Their approach is not based on anything remotely resembling the scientific method—they didn't use any controls, and it is humanly impossible to identify and isolate the variables implicated in the trial process to sufficiently validate or invalidate any particular approach or tactic. It comes down to a matter of insight and judgment. Like Wellman's view, Pozner and Dodd's theory depends upon assessing and analyzing their own trial experience and what they have learned from watching others. Dynamic Cross-Examination rests on the same basis. What else can we rely on? But it is important to understand that cross-examination is not a scientific method.

Pozner and Dodd's second overstatement is their implication that mastering their approach will make us successful in court. The gap between doing a good, even technically "perfect" yes-no cross-examination of a witness and winning the case on cross is enormous. Minimizing risk, overcontrolling the witness, and following a carefully prepared game plan may make the attorney look proficient, but that really doesn't matter, does it? The real question is: what do I need to do to win this case?

> We are not trying to make a reputation for ourselves with the audience as "smart" cross-examiners. We are thinking rather of our client and our employment by him to win the jury upon his side of the case.[4]

As Wellman poignantly observed, "the truly great trial lawyer is he who, while knowing perfectly well the established rules of his art, appreciates when they should be broken."[5]

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4. Wellman, *supra* ch. 2, note 1, at 40.
5. *Id.,* 127.

At the same time, conceptualizing cross-examination as an art is also misleading. The twenty-first-century meaning of the term suggests that only a very few women and men who are born with a special gift can be successful cross-examination *"artists."*

> *Cross-examination is a dynamic process of human communication and persuasion—a simultaneous communication among attorney, witness, and jury, for the purpose of persuading the jurors. To be effective cross-examiners, we need be neither artists nor scientists; we must be students of human experience, and perceptive, sensitive, and unrelenting communicators.*

Whether or not we learn and master these skills, becoming great cross-examiners remains to be seen. Not everyone can do so. And not every attorney can, or should, be a trial lawyer. On the other hand, countless women and men have the communication and perception skills, the work ethic and will, and the courage necessary to master the Dynamic method. Indeed, many have already done so, and they are winning difficult cases as a result.

The yes-no approach is a technical method, which the Pozner and Dodd treatise refined enormously. By contrast, Dynamic Cross-Examination is a whole new way of seeing the witness-attorney-jury exchange. To be sure, this book will discuss techniques and methods, but it is the dynamic of communication in which the witness actively participates and the jury inactively participates that makes Dynamic Cross-Examination so special and imbues it with the potential for previously unimagined success.

The yes-no approach is content neutral—we can use it regardless of the substance of the witness's testimony. Conversely, Dynamic Cross-Examination is content generated. It requires an outstanding case analysis from the beginning of the case and continuing to the end. This is what empowers us to successfully engage the witness, and to win on the points that determine the verdict.