

THE ART OF
CROSS-EXAMINATION

THE ART OF CROSS-EXAMINATION

*With the Cross-Examinations of Important
Witnesses in Some Celebrated Cases*

SECOND EDITION

FRANCIS WELLMAN

WITH FOREWORD & COMMENTARY

BY ROGER DODD



TRIAL GUIDES, LLC

The Art of Cross-Examination with the Cross-Examinations of Important Witnesses in Some Celebrated Cases

Trial Guides, LLC, Portland, Oregon 97210

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*Cross-examination—the rarest,
the most useful, and the most
difficult to be acquired of all the
accomplishments of the advocate....
It has always been deemed the surest
test of truth and a better security
than the oath.*

—Cox

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PUBLISHER'S NOTE

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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.

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FOREWORD

TRIAL LAWYERS ARE INCREDIBLY BUSY and stressed. We crave as much information as we can find about improving our skills in the courtroom. So the questions are:

- Is this book worth taking the time to read?
- Will it add skills I need in the courtroom, especially during cross-examination?

Yes and yes. Unequivocally yes and yes.

How is it possible that a book over one hundred years old can do that? Thirty-nine years ago, I asked the same question. I still own the copy I bought then. I keep it close. It still has my handwritten notes and underlining from my first reading. Since then, I have read it from cover to cover at least three times. I have read parts of it innumerable times. The pages are curled on the edges, and many are dog-eared and creased. I still use it, work with it, and rely on it.

It is difficult to recall what the practice of trial law was like back in the mid 1970s, even for those of us who lived it. That reality is impossible to fully convey to those who were not trying cases then. There was no internet. Computers were novelties and lawyers seldom owned them. There were no faxes or cell phones, and “electronic” was not a word you heard often—forget about Facebook, Twitter, emails, texting, or Listservs.

Why is this history important? Because obtaining information on any legal subject back then, particularly on trial work and cross-examination, was difficult, unreliable, and time-consuming.

Law schools did not teach trial advocacy as it is known today. There were few trial lawyers, and they were not particularly well thought of by academics or silk-stocking transactional attorneys. CLEs were not mandatory or well attended. Even talking to other trial lawyers around the country and other parts of the state had limitations because long-distance phone calls were so expensive. It was rare to have a network of trial lawyers that reached outside the counties in which we practiced daily.

Trial skills were seldom taught at CLEs, and when they were, they were taught by hard-drinking, chain-smoking trial lawyers in profanity-laced presentations. Since only trial lawyers or those who wanted to be trial lawyers attended, no one complained or even noticed. Political correctness was not practiced—it had not been invented.

Four decades ago, after formal presentations, those of us who wanted to be trial lawyers would beg for practical lessons, anecdotes, and readings from the real trial lawyers, who gave few, if any, references. After months of frustration, I was able to corner one lawyer, who later became my mentor. He told me about Francis Wellman's *The Art of Cross Examination*. It took me several weeks to track down a copy and have it delivered. There was no Amazon Prime or one-click purchasing.

When it arrived, I read the date of publication and thought I had made a very outdated mistake. I was wrong. Within hours, I was underlining, scribbling marginalia, and dog-earing pages as I discovered one cross-examination secret after another.

The Art of Cross-Examination is packed with cross-examination principles and examples and applications of those principles, which are as valid today as they were when Wellman first wrote them. Wellman was the first to analyze and put this fount of knowledge into writing. In these pages, we learn our history as trial lawyers through an anecdotal bibliography of biographies and autobiographies. That history strengthens our skills. In fact, I have not merely used his lessons throughout my career—the skills I learned from Wellman are so

ingrained in me they serve as a fundamental basis for all my work in cross-examination. No document I have read in the last forty years has surpassed the influence of *The Art of Cross-Examination*, be it a book, article, or unpublished paper. Nor have I written anything better.

Irving Younger became famous for his delightful “Ten Commandments of Cross-Examination” lecture shortly after I read Wellman’s work for the first time. We all attended and tried to learn more. To anyone who had read Wellman, it was easy to see that the book had greatly influenced Younger, right down to the Biblical references (Wellman’s “Golden Rules”). So too is every other lecture, book, and article on cross-examination since 1903 indebted to this work.

I invite you to return to the roots of analysis on cross-examination. It reads quickly and imparts wisdom on every page. Some of my peers will say I have spent my entire adult life infatuated with cross-examination. When I first heard them say this, I had honestly never considered that truth. Now I will admit it. I have studied cross-examination, watched others apply it, and read everything I could find ever written about it. There is no end to its nuances, to how and why it works when it is done well. Nor, when it is an utter failure, is there an end to the reasons why. The more I experience and learn in court, the more I find new valuable and insightful wisdom in Wellman.

Wellman quotes an accomplished English barrister who tried cases circa 1850. To paraphrase: “‘The speech’ (closing argument) does not sway juries, but cross-examination does.” It was true in 1850. It remains true. The analysis contained in this relatively short book will make you better in court. The manner in which it is presented will make you better in court. Wellman has a way with writing, as he did with his cross-examinations.

While you are reading, please keep in mind that the worldviews and acceptable language in Wellman’s more than one-hundred-year-old writing do not match those of today—what was acceptable in 1903 is, in many cases, offensive to us now. Trial Guides and I do not endorse

those outdated concepts. In this edition, we have not edited Wellman's original text. This personal example may sound corny, but I use it to illustrate the point that just because a text is older does not mean its power, inspiration, or meaning have eroded: I learned "be prepared" before I was ten. Good advice then for a ten-year-old—it remains good advice now for a trial lawyer. The Boy Scouts have changed—some of their earlier ideas are now outdated. I have also changed, and so has my application of what it means to "be prepared," yet the concept retains a core validity. Likewise, the vast majority of Wellman's concepts and ideas have not eroded. Embrace the wisdom—ignore outdated social concepts.

Trial Guides has honored me by asking me not only to write this foreword but also to add editorial comments and annotations throughout the book. I trust this foreword has influenced you to read *The Art of Cross-Examination*. It is my hope that my comments will add to your knowledge and enjoyment of it.

—Roger J. Dodd
Park City, Utah
Winter of 2016

PREFACE TO THE SECOND EDITION

I presume it is the experience of every author, after his first book is published upon an important subject, to be almost overwhelmed with a wealth of ideas and illustrations which could readily have been included in his book, and which to his own mind, at least, seem to make a second edition inevitable. Such certainly was the case with me; and when the first edition had reached its sixth impression in five months, I rejoiced to learn that it seemed to my publishers that the book had met with a sufficiently favorable reception to justify a second and considerably enlarged edition.

The book has practically been rewritten, so important are the additions, although the first few chapters have been left very much as they were.

The chapter on the “Cross-examination of Experts” has been rearranged, many new examples added, and the discussion much extended.

There is a new chapter on “Cross-examination to the Fallacies of Testimony,” which is intended to be a brief discussion of the philosophy of oral evidence.

There is also a new chapter on “Cross-examination to Probabilities—Personality of the Examiner, etc.,” with many instructive illustrations.

Perhaps one of the most entertaining additions is the chapter devoted to “The Celebrated Breach of Promise Case of *Martinez v. Del Valle*,” in which one of Mr. Joseph H. Choate’s most subtle cross-examinations is given at length, with explanatory annotations.

This case is placed first among the examples of celebrated cross-examinations because of these annotations Wellman mentions. The explanations are intended to guide students and to indicate some methods used by great cross-examiners, in order that they may have a clearer understanding of the cross-examinations in the chapters that follow.

Unfortunately, of all the cases in Wellman, the Martinez case is the most objectionable to modern sensibilities. If you choose to not read that chapter, do not despair. Wellman continues to instruct any serious trial student (myself included) throughout all other chapters.

Extracts from the cross-examination of Guiteau, President Garfield's assassin, conducted by Mr. John K. Porter, comprise another new chapter.

In the place of Mr. Choate's cross-examination of Russell Sage in the third trial (extracts of which were given in the first edition), the far more instructive and amusing cross-examination that took place in the *second* trial has been substituted.

Whatever in the first edition was merely amusing, or, if instructive, was somewhat obscure, has been omitted; so that quite one-half the present edition is entirely new matter, and of a more serious character.

One important feature of the book is the fact that the cases and illustrations are all real, and many of them heretofore almost unknown to the profession. They have not been intentionally misrepresented or exaggerated.

This new edition of my book is submitted with the hope that my readers may take as much pleasure in its perusal as I have done in the researches necessary to its preparation.

Bar Harbor, Maine,
September 1, 1904.

PREFACE TO THE FIRST EDITION

In offering this book to the legal profession I do not intend to arrogate to myself any superior knowledge upon the subject, excepting in so far as it may have been gleaned from actual experience. Nor have I attempted to treat the subject in any scientific, elaborate, or exhaustive way; but merely to make some suggestions upon the art of cross-examination, which have been gathered as a result of twenty-five years' court practice, during which time I have examined and cross-examined about fifteen thousand witnesses, drawn from all classes of the community.

If what is here written affords anything of instruction to the younger members of my profession, or of interest or entertainment to the public, it will amply justify the time taken from my summer vacation to put in readable form some points from my experience upon this most difficult subject.

Bar Harbor, Maine,
September 1, 1903.

I

Introductory

BE ALERT to how deeply Wellman believes that cross-examination is the most important trial skill needed to return the verdict we desire. He cites English barristers from prior generations to buttress his belief. Now, we cite Wellman and others who followed him to buttress our belief that cross-examination remains the most important trial skill.

He laments three “new” problems in 1903 that we daily complain about now. Too many cases settle. The great majority of cross-examinations are poorly conducted. And the bar as a whole does not respect those who call themselves trial lawyers. Apparently, the more things change, the more they remain the same—concerns from more than one hundred years ago are still concerns to those of us who try cases.

We all acknowledge that our juries have changed. They are worldlier, better educated, and, unfortunately, distrustful of trial lawyers as a whole. In this first chapter, the concerns of trial lawyers in 1903 were the same.

Wellman shares with trial lawyers the idea that preparation is the key to successful cross-examination. That there is no shortcut to developing the skills necessary for cross-examination. That the rigors of trial ensure only a select few are suited to work in this field. And that there will be a limited number of trained trial lawyers in the years to come. This trend has not abated in the last century. Wellman’s observations were way before his time.

“The issue of a cause rarely depends upon a speech and is but seldom even affected by it. But there is never a cause contested, the result of which is not mainly dependent upon the skill with which the advocate conducts his cross-examination.”

This is the conclusion arrived at by one of England’s greatest advocates at the close of a long and eventful career at the bar. It was written some fifty years ago and at a time when oratory in public trials was at its height. It is even more true at the present time, when what was once commonly reputed a “great speech” is seldom heard in our courts—because the modern methods of practicing our profession have had a tendency to discourage court oratory and the development of orators. The old-fashioned orators who were wont to “grasp the thunderbolt” are now less in favor than formerly. With our modern jurymen the arts of oratory—“law-papers on fire,” as Lord Brougham’s speeches used to be called—though still enjoyed as impassioned literary efforts, have become almost useless as persuasive arguments or as a “summing up” as they are now called.

Wellman uses male pronouns throughout his text. In his time, all lawyers, juries, judges, and experts were men, and white men at that. Times have changed. Appropriate language has also changed. Rather than call out every instance of antiquated language in his text, we are acknowledging the issue with a blanket statement here.

Modern juries, especially in large cities, are composed of practical business men accustomed to think for themselves, experienced in the ways of life, capable of forming estimates and making nice distinctions, and unmoved by the passions and prejudices to which court oratory is nearly always directed. Nowadays, jurymen, as a rule, are wont to bestow upon testimony the most intelligent and painstaking attention, and have a keen scent for truth. It is not intended to maintain that juries are no longer human, or that in certain cases they do not still go widely astray, led on by their prejudices if not by their passions. Nevertheless, in the vast majority of trials, the modern jurymen, and especially the modern city jurymen—it is in our large cities that the greatest number of litigated cases is tried—comes as near being the model arbiter of fact as the most optimistic champion of the institution of trial by jury could desire.

The evolution and the changing of juries has not slowed down, but rather has accelerated. Even fifteen years ago, when we asked jurors in voir dire about their feelings, preferences, and how they looked at the world, we were often met with silence. It was difficult to get jurors to express themselves. Now, when many jurors are asked about most any subject, we can have difficulty getting them to stop talking. Juries have evolved to be outspoken. Most do not hide from expressing their opinions.

As I'm writing this, one of the most contentious, polarizing, and negative presidential election campaigns in memory is unfolding. However this election turns out, the strident feelings it has exposed about numerous topics will be felt by jurors in the American population for years to come. More jurors will have more strongly held opinions about a vast array of topics.

Unlike in 1903, today exquisitely organized special interest groups have for decades been conducting targeted media campaigns to influence potential jurors, particularly in "tort reform" cases. The use and application of that newly invented term (tort reform), continues to stretch to more and more types of cases. The proliferation of movies, TV programming, and entire networks devoted to real court cases and analysis, as well as simulated, fictitious, and other representations of court cases has also impacted potential jurors.

I am aware that many members of my profession still sneer at trial by jury. Such men, however—when not among the unsuccessful and disgruntled—will, with but few exceptions, be found to have had but little practice themselves in court, or else to belong to that ever growing class in our profession who have relinquished their court practice and are building up fortunes such as were never dreamed of in the legal profession a decade ago, by becoming what may be styled business lawyers—men who are learned in the law as a profession, but who through opportunity, combined with rare commercial ability, have come to apply their learning—especially their knowledge of corporate law—to great commercial enterprises, combinations, organizations, and reorganizations, and have thus come to practice law as a business.

To such as these a book of this nature can have but little interest. It is to those who by choice or chance are, or intend to become, engaged in that most laborious of all forms of legal business, the trial of cases in court, that the suggestions and experiences which follow are especially addressed.

It is often truly said that many of our best lawyers—I am speaking now especially of New York City—are withdrawing from court practice because the nature of the litigation is changing. To such an extent is this change taking place in some localities that the more important commercial cases rarely reach a court decision. Our merchants prefer to compromise their difficulties, or to write off their losses, rather than enter into litigations that must remain dormant in the courts for upward of three years awaiting their turn for a hearing on the overcrowded court calendars. And yet fully six thousand cases of one kind or another are tried or disposed of yearly in the borough of Manhattan alone.

This congestion is not wholly due to lack of judges, or that they are not capable and industrious men; but is largely, it seems to me, the fault of the system in vogue in all our American courts of allowing any lawyer, duly enrolled as a member of the bar, to practice in the highest courts. In the United States we recognize no distinction between barrister and solicitor; we are all barristers and solicitors by turn. One has but to frequent the courts to become convinced that, so long as the ten thousand members at the New York County Bar all avail themselves of their privilege to appear in court and try their own clients' cases, the great majority of the trials will be poorly conducted, and much valuable time wasted.

The conduct of a case in court is a peculiar art for which many men, however learned in the law, are not fitted; and where a lawyer has but one or even a dozen experiences in court in each year, he can never become a competent trial lawyer. I am not addressing myself to clients, who often assume that, because we are duly qualified as lawyers, we are therefore competent to try their cases; I am speaking in behalf of our courts, against the congestion of the calendars, and the consequent crowding out of weighty commercial litigations.

One *experienced* in the trial of causes will not require, at the utmost, more than a quarter of the time taken by the most learned inexperienced lawyer in developing his facts. His case will be thoroughly prepared and understood before the trial begins. His points of law and issues of fact will be clearly defined and presented to the court and jury in the fewest possible words. He will in this way avoid many of the erroneous rulings on questions of law and evidence which are now upsetting so many verdicts on appeal. He will not only complete his trial

in shorter time, but he will be likely to bring about an equitable verdict in the case which may not be appealed from at all, or, if appealed, will be sustained by a higher court, instead of being sent back for a retrial and the consequent consumption of the time of another judge and jury in doing the work all over again.¹

These facts are being more and more appreciated each year, and in our local courts there is already an ever increasing coterie of trial lawyers, who are devoting the principal part of their time to court practice.

A few lawyers have gone so far as to refuse direct communication with clients excepting as they come represented by their own attorneys. It is pleasing to note that some of our leading advocates who, having been called away from large and active law practice to enter the government service, have expressed their intention, when they resume the practice of the law, to refuse all cases where clients are not already represented by competent attorneys, recognizing, at least in their own practice, the English distinction between the barrister and solicitor. We are thus beginning to appreciate in this country what the English courts have so long recognized: that the only way to insure speedy and intelligently conducted litigations is to *inaugurate a custom* of confining court practice to a comparatively limited number of trained trial lawyers.

The distinction between general practitioners and specialists is already established in the medical profession and largely accepted by the public. Who would think nowadays of submitting himself to a serious operation at the hands of his family physician, instead of calling in an experienced surgeon to handle the knife? And yet the family physician may have once been competent to play the part of surgeon, and doubtless has had, years ago, his quota of hospital experience. But he so infrequently enters the domain of surgery that he shrinks from undertaking it, except under circumstances where there is no alternative. There should be a similar distinction in the legal profession. The family lawyer may have once been competent to conduct the litigation; but he is out of practice—he is not “in training” for the competition.

There is no short cut, no royal road to proficiency, in the art of advocacy. It is experience, and one might almost say experience alone, that brings success. I am not speaking of that small minority of men in all walks of life who have been touched by the magic wand of genius, but of men of average

1. In the borough of Manhattan at the present time thirty-three percent of the cases tried are appealed, and forty-two percent of the cases appealed are reversed and sent back for retrial as shown by the court statistics.

endowments and even special aptitude for the calling of advocacy; with them it is a race of experience. The experienced advocate can look back upon those less advanced in years or experience, and rest content in the thought that they are just so many cases behind him; that if he keeps on, with equal opportunities in court, they can never overtake him. Some day the public will recognize this fact. But at present, what does the ordinary litigant know of the advantages of having counsel to conduct his case who is “at home” in the courtroom, and perhaps even acquainted with the very panel of jurors before whom his case is to be heard, through having already tried one or more cases for other clients before the same men?

In urban jurisdictions today, jurors who are more than casually familiar with a lawyer are routinely excused. In small-population jurisdictions, judges will drill down further into that relationship, if there is one, and what the juror may know of the lawyer. Judges routinely instruct jurors to not Google or search the background of lawyers participating in the trial. Despite this, jurors can easily recognize the demeanor of seasoned trial lawyers. That seasoned demeanor never hurts.

How little can the ordinary businessman realize the value to himself of having a lawyer who understands the habits of thought and of looking at evidence—the bent of mind—of the very judge who is to preside at the trial of his case. Not that our judges are not eminently fair-minded in the conduct of trials; but they are men for all that, oftentimes very human men; and the trial lawyer who knows his judge, starts with an advantage that the inexperienced practitioner little appreciates. How much, too, does experience count in the selection of the jury itself—one of the “fine arts” of the advocate! These are but a few of the many similar advantages one might enumerate, were they not apart from the subject we are now concerned with—the skill of the advocate in conducting the trial itself, once the jury has been chosen.

When the public realizes that a good trial lawyer is the outcome, one might say of generations of witnesses, when clients fully appreciate the dangers they run in entrusting their litigations to so-called “office lawyers” with little or no experience in court, they will insist upon their briefs being entrusted to those who make a specialty of court practice, advised and assisted, if you will, by their own private attorneys. One of the chief disadvantages of our present system will be suddenly swept away; the court calendars will be cleared by speedily

conducted trials; issues will be tried within a reasonable time after they are framed; the commercial cases, now disadvantageously settled out of court or abandoned altogether, will return to our courts to the satisfaction both of the legal profession and of the business community at large; causes will be more skillfully tried—the art of cross-examination more thoroughly understood.

II

The Manner of Cross-Examination

BE ALERT how Wellman emphasizes that the concentration of cross-examination is on facts, not on the law. He starts his analysis with the accurate recognition, then and now, that any case that has made it to an actual trial will include facts that both help and hurt each side. Drawing on lessons from Socrates, he then introduces two concepts we all recognize today as sound foundations to any cross-examination.

First, phrased in my words, which are not nearly as eloquent as his: asking questions on cross that piece together specific details is far more productive and persuasive than a loose global attack. Simple facts are more readily admitted, more readily understood, and more readily accepted by a judge and jury. Wellman explores the bounds of cross-examination. His second foundation is to exhort us to not rely on destructive cross-examination (attacking our opponents' theory of the case by attacking their witness or the witness's testimony). Then and now, destructive cross-examination was and is the most instinctive reaction of a cross-examiner to any direct testimony. Wellman urges us to question their witness in a way that supports our own theory of the case—what we now call constructive cross-examination.

That two-tiered approach was largely lost between Wellman's time and our own. In the intervening generations most lawyers, most of the time, concentrated on destructive cross-examination. Our generation might think we developed constructive cross-examination, but Wellman shows he and his peers were conscious of its power.

He discusses, with vivid imagery, the importance of eye contact with the witness. This technique greatly enhances our ability to control the witness and to lead the jury. The effect of any discourtesy exhibited by the questioner toward a witness had the same result then as now. Perhaps the present day emphasis on professionalism is merely a circling back to what was then considered proper courtroom demeanor. He spotlights the effects of a demeanor that serves the jury well in contrast to the “weariness” of lawyers who just talk. He also emphasizes that even if we have the ability to do so, we trial lawyers should never misrepresent ourselves or the facts.

It needs but the simple statement of the nature of cross-examination to demonstrate its indispensable character in all trials of questions of fact. No cause reaches the stage of litigation unless there are two sides to it. If the witnesses on one side deny or qualify the statements made by those on the other, which side is telling the truth? Not necessarily which side is offering perjured testimony—there is far less intentional perjury in the courts than the inexperienced would believe—but which side is honestly mistaken? For, on the other hand, evidence itself is far less trustworthy than the public usually realizes. The opinions of which side are warped by prejudice or blinded by ignorance? Which side has had the power or opportunity of correct observation? How shall we tell, how make it apparent to a jury of disinterested men who are to decide between the litigants? Obviously, by the means of cross-examination.

If all witnesses had the honesty and intelligence to come forward and scrupulously follow the letter as well as the spirit of the oath, “to tell the truth, the whole truth, and nothing but the truth,” and if all advocates on either side had the necessary experience, combined with honesty and intelligence, and were similarly sworn to *develop* the whole truth and nothing but the truth, of course there would be no occasion for cross-examination, and the occupation of the cross-examiner would be gone. But as yet no substitute has ever been found for cross-examination as a means of separating truth from falsehood, and of reducing exaggerated statements to their true dimensions.

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, 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.

Cross-examination is generally considered to be the most difficult branch of the multifarious duties of the advocate. Success in the art, as some one has said, comes more often to the happy possessor of a genius for it. Great lawyers have often failed lamentably in it, while marvelous success has crowned the efforts of those who might otherwise have been regarded as of a mediocre grade in the profession. Yet personal experience and the emulation of others trained in the art are the surest means of obtaining proficiency in this all-important prerequisite of a competent trial lawyer.

It requires the greatest ingenuity; a habit of logical thought; clearness of perception in general; infinite patience and self-control; power to read men's minds intuitively, to judge of their characters by their faces, to appreciate their motives; ability to act with force and precision; a masterful knowledge of the subject-matter itself; an extreme caution; and, above all, the *instinct to discover the weak point* in the witness under examination.

One has to deal with a prodigious variety of witnesses testifying under an infinite number of differing circumstances. It involves all shades and complexions of human morals, human passions, and human intelligence. It is a mental duel between counsel and witness.

In discussing the methods to employ when cross-examining a witness, let us imagine ourselves at work in the trial of a cause, and at the close of the direct examination of a witness called by our adversary. The first inquiry would naturally be, has the witness testified to anything that is material against us? Has his testimony injured our side of the case? Has he made an impression with the jury against us? Is it necessary for us to cross-examine him at all?

Before dismissing a witness, however, the possibility of being able to elicit some new facts in our own favor should be taken into consideration. If the witness is apparently truthful and candid, this can be readily done by asking plain, straightforward questions. If, however, there is any reason to doubt the willingness of the witness to help develop the truth, it may be necessary to proceed with more caution, and possibly to put the witness in a position where it will appear to the jury that he could tell a good deal if he wanted to, and then leave him. The jury will thus draw the inference that, had he spoken, it would have been in our favor.

But suppose the witness has testified to material facts against us, and it becomes our duty to break the force of his testimony, or abandon all hope of a jury verdict. How shall we begin? How shall we tell whether the witness has made an honest mistake, or has committed perjury? The methods in his

cross-examination in the two instances would naturally be very different. There is a marked distinction between discrediting the *testimony* and discrediting the *witness*. It is largely a matter of instinct on the part of the examiner. Some people call it the language of the eye, or the tone of the voice, or the countenance of the witness, or his manner of testifying, or all combined, that betrays the willful perjurer. It is difficult to say exactly what it is, excepting that constant practice seems to enable a trial lawyer to form a fairly accurate judgment on this point. A skillful cross-examiner seldom takes his eye from an important witness while he is being examined by his adversary. Every expression of his face, especially his mouth, even every movement of his hands, his manner of expressing himself, his whole bearing—all help the examiner to arrive at an accurate estimate of his integrity.

Let us assume, then, that we have been correct in our judgment of this particular witness, and that he is trying to describe honestly the occurrences to which he has testified, but has fallen into a serious mistake, through ignorance, blunder, or what not, which must be exposed to the minds of the jury. How shall we go about it? This brings us at once to the first important factor in our discussion, the *manner* of the cross-examiner.

It is absurd to suppose that any witness who has sworn positively to a certain set of facts, even if he has inadvertently stretched the truth, is going to be readily induced by a lawyer to alter them and acknowledge his mistake. People as a rule do not reflect upon their meager opportunities for observing facts, and rarely suspect the frailty of their own powers of observation. They come to court, when summoned as witnesses, prepared to tell what they think they know; and in the beginning they resent an attack upon their story as they would one upon their integrity.

If the cross-examiner allows the witness to see, by his manner toward him at the start, that he distrusts his integrity, he will straighten himself in the witness chair and mentally defy him at once. If, on the other hand, the counsel's manner is courteous and conciliatory, the witness will soon lose the fear all witnesses have of the cross-examiner, and can almost imperceptibly be induced to enter into a discussion of his testimony in a fair-minded spirit, which, if the cross-examiner is clever, will soon disclose the weak points in the testimony. 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*. Alas, how often this is lost sight of in our daily

court experiences! One is constantly brought face-to-face with lawyers who act as if they thought that every one who testifies against their side of the case is committing willful perjury. No wonder they accomplish so little with their *Cross-examination*! By their shouting, browbeating style they often confuse the wits of the witness, it is true; but they fail to discredit him with the jury. On the contrary, they elicit sympathy for the witness they are attacking, and little realize that their “vigorous cross-examination,” at the end of which they sit down with evident self-satisfaction, has only served to close effectually the mind of at least one fair-minded jurymen against their side of the case, and as likely as not it has brought to light some important fact favorable to the other side which had been overlooked in the examination-in-chief.

There is a story told of Reverdy Johnson, who once, in the trial of a case, twitted a brother lawyer with feebleness of memory, and received the prompt retort, “Yes, Mr. Johnson; but you will please remember that, unlike the lion in the play, I have something more to do than *roar*.”

The only lawyer I ever heard employ this roaring method successfully was Benjamin F. Butler. With him politeness, or even humanity, was out of the question. And it has been said of him that “concealment and equivocation were scarcely possible to a witness under the operation of his methods.” But Butler had a wonderful personality. He was aggressive and even pugnacious, but picturesque withal—witnesses were afraid of him. Butler was popular with the masses; he usually had the numerous “hangers-on” in the courtroom on his side of the case from the start, and each little point he would make with a witness met with their ready and audible approval. This greatly increased the embarrassment of the witness and gave Butler a decided advantage. It must be remembered also that Butler had a contempt for scruple which would hardly stand him in good stead at the present time. Once he was cross-questioning a witness in his characteristic manner. The judge interrupted to remind him that the witness was a Harvard professor. “I know it, Your Honor,” replied Butler; “we hanged one of them the other day.”¹

On the other hand, it has been said of Rufus Choate, whose art and graceful qualities of mind certainly entitle him to the foremost rank among American advocates, that in the cross-examination of witnesses, “He never aroused opposition on the part of the witness by attacking him, but disarmed

1. Gilbert J. Clark, Esq., *Life Sketches of Eminent Lawyers* (Kansas City: Lawyers International Publishing Company, 1895).

him by the quiet and courteous manner in which he pursued his examination. He was quite sure, before giving him up, to expose the weak parts of his testimony or the bias, if any, which detracted from the confidence to be given it.”² (One of Choate’s *bon mots* was that “a lawyer’s vacation consisted of the space between the question put to a witness and his answer.”)

Judah P. Benjamin, “the eminent lawyer of two continents,” used to cross-examine with his eyes. “No witness could look into Benjamin’s black, piercing eyes and maintain a lie.”

Among the English barristers, Sir James Scarlett, Lord Abinger, had the reputation, as a cross-examiner, of having outstripped all advocates who, up to that time, had appeared at the British Bar. “The gentlemanly ease, the polished courtesy, and the Christian urbanity and affection, with which he proceeded to the task, did infinite mischief to the testimony of witnesses who were striving to deceive, or upon whom he found it expedient to fasten a suspicion.”

A good advocate should be a good actor. The most cautious cross-examiner will often elicit a damaging answer. Now is the time for the greatest self-control. If you show by your face how the answer hurt, you may lose your case by that one point alone. How often one sees the cross-examiner fairly staggered by such an answer. He pauses, perhaps blushes, and after he has allowed the answer to have its full effect, finally regains his self-possession, but seldom his control of the witness. With the really experienced trial lawyer, such answers, instead of appearing to surprise or disconcert him, will seem to come as a matter of course, and will fall perfectly flat. He will proceed with the next question as if nothing had happened, or even perhaps give the witness an incredulous smile, as if to say, “Who do you suppose would believe that for a minute?”

An anecdote apropos of this point is told of Rufus Choate. “A witness for his antagonist let fall, with no particular emphasis, a statement of a most important fact from which he saw that inferences greatly damaging to his client’s case might be drawn if skillfully used. He suffered the witness to go through his statement and then, as if he saw in it something of great value to himself, requested him to repeat it carefully that he might take it down correctly. He as carefully avoided cross-examining the witness, and in his argument made not the least allusion to his testimony. When the opposing counsel, in his close, came

2. Joseph Neilson, *Memories of Rufus Choate with Some Consideration of His Studies, Methods, and Opinions, and of His Style as a Speaker and a Writer* (New York: Houghton, Mifflin & Company, 1884).

to that part of his case in his argument, he was so impressed with the idea that Mr. Choate had discovered that there was something in that testimony which made in his favor, although he could not see how, that he contented himself with merely remarking that though Mr. Choate had seemed to think that the testimony bore in favor of his client, it seemed to him that it went to sustain the opposite side, and then went on with the other parts of his case.”³

It is the love of combat which every man possesses that fastens the attention of the jury upon the progress of the trial. The counsel who has a pleasant personality; who speaks with apparent frankness; who appears to be an earnest searcher after truth; who is courteous to those who testify against him; who avoids delaying constantly the progress of the trial by innumerable objections and exceptions to perhaps incompetent but harmless evidence; who seems to know what he is about and sits down when he has accomplished it, exhibiting a spirit of fair play on all occasions—he it is who creates an atmosphere in favor of the side which he represents, a powerful though unconscious influence with the jury in arriving at their verdict. Even if, owing to the weight of testimony, the verdict is against him, yet the amount will be far less than the client had schooled himself to expect.

On the other hand, the lawyer who wearies the court and the jury with endless and pointless cross-examinations; who is constantly losing his temper and showing his teeth to the witnesses; who wears a sour, anxious expression; who possesses a monotonous, rasping, penetrating voice; who presents a slovenly, unkempt personal appearance; who is prone to take unfair advantage of witness or counsel, and seems determined to win at all hazards—soon prejudices a jury against himself and the client he represents, entirely irrespective of the sworn testimony in the case.

The evidence often *seems* to be going all one way, when in reality it is not so at all. The cleverness of the cross-examiner has a great deal to do with this; he can often create an atmosphere which will obscure much evidence that would otherwise tell against him. This is part of the “generalship of a case” in its progress to the argument, which is of such vast consequence. There is eloquence displayed in the examination of witnesses as well as on the argument. “There is *matter* in *manner*.” I do not mean to advocate that exaggerated manner one often meets with, which divides the attention of your hearers between yourself and your question, which often diverts the attention of the jury from

3. Neilson, *Memories of Rufus Choate*.

the point you are trying to make and centers it upon your own idiosyncrasies of manner and speech. As the man who was somewhat deaf and could not get near enough to Henry Clay in one of his finest efforts, exclaimed, "I didn't hear a word he said, but, great Jehovah, didn't he make the motions!"

The very intonations of voice and the expression of face of the cross-examiner can be made to produce a marked effect upon the jury and enable them to appreciate fully a point they might otherwise lose altogether.

"Once, when cross-examining a witness by the name of Sampson, who was sued for libel as editor of the *Referee*, Russell asked the witness a question which he did not answer. 'Did you hear my question?' said Russell in a low voice. 'I did,' said Sampson. 'Did you understand it?' asked Russell, in a still lower voice. 'I did,' said Sampson. 'Then,' said Russell, raising his voice to its highest pitch, and looking as if he would spring from his place and seize the witness by the throat, 'why have you not answered it? Tell the jury why you have not answered it.' A thrill of excitement ran through the courtroom. Sampson was overwhelmed, and he never pulled himself together again."⁴

Speak distinctly yourself, and compel your witness to do so. Bring out your points so clearly that men of the most ordinary intelligence can understand them. Keep your audience—the jury—always interested and on the alert. Remember it is the minds of the jury you are addressing, even though your question is put to the witness. Suit the modulations of your voice to the subject under discussion. Rufus Choate's voice would seem to take hold of the witness, to exercise a certain sway over him, and to silence the audience into a hush. He allowed his rich voice to exhibit in the examination of witnesses, much of its variety and all of its resonance. The contrast between his tone in examining and that of the counsel who followed him was very marked.

"Mr. Choate's appeal to the jury began long before his final argument; it began when he first took his seat before them and looked into their eyes. He generally contrived to get his seat as near them as was convenient, if possible having his table close to the bar, in front of their seats, and separated from them only by a narrow space for passage. There he sat, calm, contemplative; in the midst of occasional noise and confusion solemnly unruffled; always making some little headway either with the jury, the court, or the witness; never doing a single thing which could by possibility lose him favor, ever doing some

4. R. Barry O'Brien, *The Life of Lord Russell of Killowen* (New York: Longmans, Green, and Co., 1902).

little thing to win it; smiling benignantly upon the counsel when a good thing was said; smiling sympathizingly upon the jury when any juryman laughed or made an inquiry; wooing them all the time with his magnetic glances as a lover might woo his mistress; seeming to preside over the whole scene with an air of easy superiority; exercising from the very first moment an indefinable sway and influence upon the minds of all before and around him. His manner to the jury was that of a *friend*, a friend solicitous to help them through their tedious investigation; never that of an expert combatant, intent on victory, and looking upon them as only instruments for its attainment.”⁵

5. Edward G. Parker, *Reminiscences of Rufus Choate the Great American Advocate* (New York: Mason Brothers, 1860).