Introduction

It has been said that becoming a “great” cross examiner cannot be taught, just as becoming a “great” singer cannot be taught, since the attainment of greatness requires innate talents that relatively few possess. Perhaps that is so. What is important to the practitioner, however, and particularly those of us without the innate genius, is that we can learn to be competent cross examiners, so that cross examination advances rather than detracts from our case.

Cross examination can make or break your case and thus it presents the most lethal double-edged sword in the trial lawyer’s arsenal. It is clearly the most daunting aspect of the trial. What follows in this book is an attempt to provide the practitioner with lessons, tips, and strategies which are the variegated result of lessons learned the hard way (through mistakes), observations from numerous trials, and the study of the art and science of cross examination.

John Wigmore, an early expert in the law of evidence, described cross examination as “the greatest legal engine ever invented for the discovery of the truth.”¹ For our purpose, to learn how to cross examine, we will focus on a somewhat less lofty goal, and look at cross examination as a communication and persuasion contest involving the lawyer, the witness, and the trier of fact. In short, we’ll look at how you can use cross examination to convince the trier of fact of the rightfulness of your cause and simultaneously weaken the position taken by the opposing side.

No pride of originality is offered as the substance of this book. It is an amalgam of advice from leading trial lawyers, published works, and

¹. J. Wigmore, Evidence §1367 (J. Chadbourne, rev. 1974).
personal experience. As someone once quipped, “plagiarism among lawyers is called research.”

Jury versus Bench Trials

The preponderance of the material contained herein applies equally to jury trials as well as bench trials, although at times, suggestions which are posited for dramatic effect need to be tempered somewhat during a bench trial. Nevertheless, the practitioner should be cognizant that in judging the facts of a case, and assessing credibility, judges—like lay jurors—are human and react to the same stimuli and perceptions common to the human experience. They observe the intonations, the body language, and the demeanor of the witnesses and assess reliability and credibility, just like the rest of us.

An advantage that family law practitioners have in generally conducting bench trials, as opposed to jury trials, is the opportunity to know and learn in advance the characteristics of the particular judge—his or her disposition, patience (or lack thereof), the “house rules,” and other proclivities. We can and should adjust our strategies accordingly. Contrast this to jury trials where the jurors are virtual strangers to the attorneys, save a brief voir dire prior to their selection as jurors.

A caveat: the “rules” and the “do’s” and “don’ts” contained herein are, of course, like any rules, subject to exceptions, some of which will be discussed. Seasoned veterans of many trials have learned how and when to veer from the established rules and employ the exceptions—particularly the ubiquitous use of leading questions and the total avoidance of any open-ended questions. The neophyte, however, has to walk before she runs and veering from the rules can be a perilous trek. Until you have obtained the requisite judgment and experience through a multitude of trial battles, a more prudent course of action is to adhere to the rules and change course only when totally necessary. Francis Wellman stated it aptly: “The truly great trial lawyer is he who, while knowing perfectly well the established rules of his art, appreciates when they should be broken.”

The “Study” of Cross Examination

How can one obtain proficiency at this most difficult art known as cross examination, which has a steep learning curve? Learning from the experiences recited by old warhorses of cross examination, reading transcripts of good cross examinations, and studying the art through seminars and published works is extremely helpful. As helpful as they are, they are learning by vicarious

experience. There is, of course, no substitute for the trial and error of actually conducting cross examinations.

While we can study cross examination, and learn from actual trial experience, nothing can take the place of judgment. It is impossible to script what will happen in a trial with precision, regardless of the amount of preparation. The trial lawyer is constantly called upon to make instant judgment calls. Should I go any further with this witness? Am I opening a door that should remain closed? What is the risk-reward ratio of pursuing a particular line of questioning with this particular witness? These are just a few of the formidable questions that must be dealt with instantaneously. What the trial lawyer will invariably learn is that by trial and error, our judgment improves. As the saying goes, “Good judgment comes from experience, and experience comes from bad judgment.”

**Cross Examination Contrasted with Direct Examination**

Direct examination, when properly done, presents the witness as the center of attention, the star of the show. The lawyer is little more than the director. In direct examination, the lawyer asks the witness a question and the witness then relates facts in response to the question, often in narrative form.

In cross examination, it is the lawyer who is the center of attention, the star of the show, as well as the director of the production. The lawyer chooses the topics of cross examination, determines the length of cross examination, and chooses the sequence of cross examination. In cross examination, the lawyer does not really ask questions. Rather, the lawyer relates facts, posed as questions, with the witness offering affirmation of the fact (“yes” answer) or negation of the fact (“no” answer).

In direct examination, you are directing the witness, with the witness being permitted to answer in narrative form. In cross examination, you are leading the witness, with the goal of the witness giving a monosyllabic answer of “yes” or “no.” Stated otherwise, direct examination builds, while cross examination leads. If performed correctly, in direct examination, you guide the witness; in cross examination, you control the witness.