Introduction

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Francis L. Wellman's The Art of Cross-Examination has been cited and quoted dozens of times in the literature of trial advocacy. It has been a standard work since the first edition appeared in 1903. I want to introduce you, first, to Mr. Wellman, and then to his remarkable book. Along the way, I hope to convince you to read the book carefully. I will also suggest to you *how* you should read it, because if you skip past his references to events current in his time but distant from our own, you will miss a great deal of the fun and wisdom in this book. I also tell you candidly that Wellman's writing reflects social attitudes very much of his time and social position, and I wish to prepare you to encounter some examples of this.

Francis L. Wellman

Francis L. Wellman was a trial lawyer for all of his professional life. He was born in 1854 in Brookline, Massachusetts to a comfortably well off family. He graduated from Harvard College. He was valedictorian of his Harvard Law School class of 1878. When he got out of law school in 1878, he lectured at Harvard and at Boston Law School, and practiced law with Senator Bainbridge Wadleigh. He moved to New York in 1883 to join the New York City Corporation Counsel's office, and began his trial lawyering career in earnest. He represented New York City in all manner of civil litigation for seven years, and developed a formidable reputation.

Wellman was appointed first assistant district attorney for New York County in 1891. He tried many high-profile cases. One of his specialties was forensic evidence His interest in forensic science led him to develop procedures for trying poisoning cases and he was lead prosecutor in two famous cases in which husbands had poisoned their wives. He obtained convictions in both cases by skillful use of toxicological evidence and by brilliant cross-examination of defense experts. You will find interesting details of these cases in the book.

Wellman's prosecutorial career was cut short in the midst of controversy. From contemporary newspaper reports, it is unclear just why he publicly resigned from the district attorney's office in 1894. He was in the midst of investigating police corruption, and was being impeded at every turn by police officials and the mayor's office. Then, his detractors called into question his maintaining a private civil practice along with his public job, although this sort of arrangement was quite common in New York then. A quick glance at the tumult of New York party politics at that time leads one to conclude that Wellman had made some political enemies.

From 1894 on, he had a substantial "barrister's" practice, mostly based on referrals from other lawyers of cases for trial. He mainly represented civil defendants – insurance companies, transit companies and other business enterprises. He continued in active law practice, court records show, until the 1930s. He was friend and colleague to lawyers of his own generation and of the generation to follow. He died on June 7, 1942, at the age of 87.

Wellman's Book

This book has a long history. Wellman issued the first edition in 1903. In the first dozen or so chapters, he set out a coherent theory of cross-examination, enriched with examples drawn mainly from his own practice. He also included short tales of other cross-examiners and examinations. There followed a half dozen chapters, each devoted to cross-examination in a celebrated case. A reviewer, J.J.F., in the Yale Law Journal, pronounced the book "altogether . . . instructive" and "unusually entertaining." A 1910 Yale Law Journal writer praised Wellman's work on cross-examination of medical experts, and found his book "delectable."

This reprint is of the second edition, which appeared in 1904. Wellman did two later versions, but he did not make any significant changes in the body of his work. Rather, he dropped some of the famous cross-examinations and substituted others. I have read all four editions, and agree with the editors that the one you are holding is the best. The cross-examinations reproduced here are instructive, and some of them evoke memories of cases that played a significant role in United States and English history.

Until I re-read this book, I had not realized how much I had gained from studying Wellman's approach. He is not formulaic. He does not, for example, preach that leading questions are always to be preferred, or that brevity is always wise. He recognizes that we may disagree with what a witness has said for many reasons, having to do with all the defects in human testimony – failure of memory, inadequate observation, or even simple misunderstanding. He reminds us that there is "far less perjury than the inexperienced would believe." He urges us to study each opposing witness carefully to see not only the source and nature of our disagreement with the witness's testimony but also the most profitable way of approaching cross-examination.

Wellman makes an eloquent distinction between "discrediting the testimony" and "discrediting the witness." A witness may be honestly mistaken for many reasons, and yet will cling to his or her "truth." Another witness may be a deliberate falsifier who must be exposed as such. One of the extended examples of cross-examination in a later chapter is from a breach of promise case tried in New York in 1875. Broken promises of marriage were a favorite subject of 19th century litigation in England, Ireland and the United States. They called forth the skill and eloquence of the greatest trial lawyers of them time, with opposing themes of the injured innocence of a Victorian woman, or the alleged effort to pillage the fortune of a wealthy man. Such cases are no longer heard in our courts, but their lessons about cross-examination remain. Modern cases have issues every bit as emotional. For example, many workplace gender discrimination lawsuits call out social attitudes reminiscent of those at issue in those older cases.

Wellman shows us Joseph Choate's cross-examination of the plaintiff in Martinez v. del Valle. He reminds us that when a witness is attractive, composed and well-spoken, a destructive, heavy-handed cross-examination may backfire. The risk, Wellman says, is that "owing to the unwise conduct of the defendant's lawyer at the trial in unnecessarily attacking the woman plaintiff, the verdict of the jury in her favor is for *slander*."

To be sure, one must disembed from the Martinez case, as from many parts of this book, Wellman's social attitudes. There is a ring of sexism in his warning, but that should not obscure the truth that an overly dominating cross-examination can turn juror sympathy towards the witness and against the lawyer – regardless of the respective genders of the antagonists.

Wellman recognizes that Choate may have paid a price for not going harder on the plaintiff, but rather getting her to repeat versions of events that he would with later evidence and in summation show to have been falsified. If you have a piece of evidence that contradicts what a witness has just told the jury, the temptation is to use it immediately. Sometimes, however, you have only given the witness a chance to weasel and explain. I recall Edward Bennett Williams' cross-examination of Jake Jacobson, the main government witness in the trial of Treasury Secretary John Connally. Williams took Jacobson over a half-dozen inconsistent versions of his dealings with Connally. Many courthouse observers said they thought the cross-examination was boring. Williams was making points for summation, as he brilliantly showed.

Another magnificent cross-examination is in Chapter XIII, that of the perjurer Richard Piggott by Sir Charles Russell. Here, as with all of these cases, Wellman's advise is cogent:

> In order to appreciate thoroughly the examples of successful cross-examinations which her follow, the reader must give full vent to his imagination. He must try to picture to himself the crowded court room, the excitement, the hush, the eager faces, the silence and dignity of the court . . . .

The Piggott cross is a brilliant example of using a document to ensnare the witness, not showing it to him but confronting him piece by piece. The witness proffers an explanation, only to find that the next portion the examiner reads out makes that explanation seem factitious. As you read, you will want to have access to Federal Rule of Evidence 612, which governs this sort of examination these days. Also, look up Parnell's story in Wikipedia or some other handy source, to see the dramatic context in which Russell's advocacy took place. Russell defended Parnell brilliantly and with success, but Parnell's reputation mortally suffered because just as vindication was occurring, Parnell was found to be having an adulterous relationship.

I will not spoil your pleasure by summarizing Wellman's insights. He sets out a theory of cross-examination with which I agree. In my book Examining Witnesses, also published by ABA, I set out some complementary ideas, and in a more modern context. In my opinion, too much writing about cross-examination suffers from two defects: First, many people take a one-dimensional view of cross-examination, as though it can be reduced to invariable rules rather than adapted to the myriad settings in which trials really happen. Second, many writers treat cross-examination as a witness-by-witness exercise, rather than seeing it in the context of all the witnesses, exhibits and arguments of the entire case. Wellman commits neither fault.

Wellman devotes Chapter XVIII, the final one, to "Golden Rules for the Examination of Witnesses." These "rules" were written by David Paul Brown; Wellman simply reproduces them. The rules deal with both direct and cross-examination. They are brilliant. Brown was one of the great 19th Century American advocates, and lived from 1795 to 1872. At the bar, he represented many unpopular defendants in high-profile cases. He was one of the lawyers for the nascent early 19th Century labor movement, which the law tried to crush with conspiracy prosecutions.

A Caveat About Social Position and Historical Time

Wellman, like all of us, was a product of his life and times. There are passages in this book that are "time-bound," and even some that unfortunately reflect wrong-headed attitudes towards those not lucky enough to be wealthy white males.

Most of Wellman's rather dated observations can easily be translated into modern conditions. For example, he writes

> 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 . . . .

Today, "modern juries" are much more a cross-section of the community, but that is no reason to reject Wellman's basic premise. He is saying that a trial is an event involving speakers and hearers, and that the advocate must know the intended audience of his or her work.

When he seems a little old-fashioned, not to say sexist, in his characterization of female witnesses, we can nonetheless take his point: Jurors have attitudes towards witnesses based on the witnesses' (and the jurors') occupation, race, ethnicity, and social status. Those attitudes may have changed over time, but must be considered.

Some of Wellman's anecdotes about trial events and lawyer behavior are more interesting for historical knowledge than as insights into what happens today in courtrooms.

There is one reference that one hopes Wellman came to regret, and I cannot overlook it. He sets out the cross-examination of Charles J. Guiteau, on trial for assassinating President James Garfield. Wellman notes that the trial was a public spectacle, and says that "the courtroom was daily filled with the scum of Washington – negroes, prostitutes and curiosity seekers of all kinds." This is an odious sentiment. Before we throw down Wellman's book, we should note that atavistic racial attitudes are still a feature of trials in our country. In 2008, the Supreme Court decided Snyder v. Louisiana, and Justice Alito's opinion for seven Justices recounts the prosecutor's overtly racist approach to jury selection and forensic argument.

Conclusion

I think you will find this book worthy of your time.

Perhaps the most quoted excerpt from this book is taken from David Paul Brown's "rules," and not from Wellman's original work:

> Be mild with the mild; shrewd with the crafty; confiding with the honest; merciful to the young, the frail, or the fearful; rough to the ruffian, and a thunderbolt to the liar. But in all this, never be unmindful of your own dignity. Bring to bear all the powers of your mind, not that *you* may shine, but that *virtue* may triumph, and your *cause* may prosper.

You may well ask, "yes, but how do I know into which category this witness fits?, and then "of what shall my mildness, shrewdness , confiding, mercy, or roughness consist?" In this book, you obtain not simply answers, but a way of answering the questions.