

On Cross-Examination

By Alfred S. Julien

The public is obsessed by the television coverage of the Watergate hearings. It considers the questioning of witnesses to be cross-examination. Indeed, the members of the Select Committee have occasionally referred to their examinations of witnesses, present and future, as "cross-examination."

Thus far, the only thing that approaches cross-examination is the keen-eyed camera itself. No experienced trial lawyer would classify examinations by the Senators or their counsel as cross-examination.

A true cross-examiner abrades, forces and challenges a witness with pointed, limiting questions. It is inconceivable that a witness such as John Dean should have been permitted to use each question as a springboard to say what he pleased within or without the ambit of the question. But Dean did that for four days.

The point of all this is not that Dean as a witness could not be credited, or that adequate examining could have produced better information; the trouble is that an experienced listener does not see Dean exposed to the soundest test that has ever been devised to reach for truth: *adequate* cross-examination.

In any trial practice course, students are warned against the type of cross-examination which simply has the witness repeating the answers he originally gave. Yet, this is so much the style of the Select Committee and counsel, almost to the point of boredom. Repetition of questions to a knowledgeable witness inevitably develops the same answers.

On the rare occasions where a questioner went outside Dean's statement, Dean's responses became wary, unnecessarily laden with uncalled-for detail and his demeanor somewhat changed.

For example, Senator Gurney questioned Dean on a relatively subordinate item: whether his meetings with Herbert Kalmbach had been at the Mayflower or the Statler-Hilton Hotel. Even though the questioning was not skillfully done, the reaction of Dean was extraordinary.

The Florida Senator showed Dean hotel bills indicating that Kalmbach was at the Statler-Hilton, rather than the Mayflower. It was at the latter hotel where Dean placed his confer-

ences with the President's personal lawyer. When confronted with the palpable error, Dean did not admit that he might have been mistaken; he began to embroider. First, he said he often mistakes one hotel for another, which was straight out of Alice in Wonderland. Then he said Kalmbach may have used an assumed name, a piece of improvising hardly worthy of him, since his true name was used at the Statler-Hilton. Then, his lawyer advises him that the coffee shop at the Statler-Hilton is called the Mayflower, and he falls back on, and uses this information, as his now answer. He then blithely ignores the improvisations he had used a few minutes before.

To a knowing listener, this is a very telling demonstration. When Dean is cornered he does "cover up." This is not to be taken as a feeling on the part of this writer that Dean's basic facts are untrue. Our only point is that those basic facts should have been adequately tested by proper cross-examination.

Let us take the same hotel passage. An experienced examiner might have done it as follows:

Q. Would you refresh me as to the name of the hotel where you met with Mr. Kalmbach?

A. The Mayflower Hotel.

Q. Oh, yes. You mentioned that several times. You are familiar with that hotel?

A. Yes. (Or as Dean seemed to be doing it: "I have been there many times. Mr. Kalmbach stops there all the time.")

Q. So there is no question in your mind as to where this meeting took place?

A. None at all. (Or in "Dean" style, the answer "No, I even remember the particular table we sat at," or "I remember the number of his room.")

Then, after pinning down the witness in this fashion and giving him an opportunity to buttress his testimony, the written information that Kalmbach was registered at another hotel for the same period might produce the following result:

Q. Do you still say it was the Mayflower?

A. I may have been mistaken.

Q. You were just as sure of many other things you testified to, correct?

A. Yes.

Q. You may be equally mistaken as to some of these other things.

A. (The answer he does not

matter. There might be a change in the Dean composure more calculated to bring out truth.)

Some obvious areas of cross-examination would have done much to really test Dean: Why was he so often looking at his written statement? Did he need the statement to refresh a recollection, when the statement itself had been made from recollection? What person or persons did he consult with in preparing his statement? Did he corroborate or attempt to corroborate his material with other persons? Since he so willingly accepted his counsel's statement that the coffee shop was known as the Mayflower, did he get any other suggestions of this type? Did he confer with counsel over this statement? How long? How many times? Was the statement originally done in draft? How many times was it revised? Where are the original drafts? What corrections were made? By whom? After conferring with whom?

It is really too bad a Ray Jenkins or a Joseph Welch could not have effectively employed cross-examination to still the disturbing questions that linger after Dean's bravura performance.

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