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The why of cross-examination

By: F. Dennis Saylor IV and Daniel I. Small June 29, 2017

Our next series of columns will address the subject of cross-examination. Dan Small recently returned from his second trip to Uzbekistan, talking with judges and lawyers there about the adversarial system.

We'll give Dan the floor to share some thoughts.

"Why have cross-examination?" It seems an odd question, given our justice system's longstanding and fundamental reliance on the process. Yet before we discuss the "how" of cross-examination, let's consider the "why."

This process that we take for granted in court is, after all, somewhat unnatural: You would not subject a friend or co-worker to intense grilling before deciding whether to believe something he told you. Why do so here?

The adversarial system is not the system of justice in Uzbekistan. Instead, it has a version of the Byzantine-era inquisitorial system, in which the judge is responsible for searching for and determining the truth, and questioning of witnesses by opposing counsel is virtually unknown.

They are looking for ways to improve and open up their system, but remain skeptical as to whether cross-examination is a legitimate fact-finding aid or a TV and movie stunt, like in "My Cousin Vinny" and the other American movies that make it over there. There is, after all, only one "truth." Why does the judge need lawyers interfering with his search to find it?

What underlies our acceptance of cross-examination are several basic beliefs.

First is the belief that "truth" is not that simple, that there is often more than one version, or at least more than one perspective. The Greek fabulist Aesop, writing in the sixth century BC, put it remarkably well:

"Every truth has two sides,
It is well to look at both,
before we commit ourselves to either."

And so we believe that the finder of fact ought to be presented with both sides, and that the most effective presenters are the advocates for each side. Part of that process is allowing both sides to question the witnesses, who are the most important source of information.

Second is our recognition that human beings are not perfect. All people make mistakes. And too many of them are willing to fabricate testimony, even in a formal, sworn courtroom setting. Because those mistakes (and lies) may favor one side of a dispute, it is the advocate for the other side who has the strongest motive and understanding to bring them to light.

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Martin Luther King Jr. said: "Darkness cannot drive out darkness. Only light can do that."

In a court of law, we rely on the advocate for the opposing side to shine the light on false statements and other forms of darkness.

Everything about cross-examination reflects that basic reliance on the lawyer as advocate and truth-seeker. The focus of cross is on the lawyer, including the form of questions (leading), the positioning and attitude in court (the

lawyer on center stage), and the subject matter (the lawyer choosing specific points of substance or credibility, not just having the witness repeat or tell a story).

The word "trial" is from the Gallo-Roman "triare," from the 12th century, which meant to "separate out (the good) by examination." A 15th century definition was "the act or process of testing."

Cross-examination is one of our system's essential means for testing the evidence, and thus finding the truth. It is written into the Constitution, in the Confrontation Clause of the Sixth Amendment, and we could not imagine having a trial in our system without it.

Yet we need to understand that others see the flaws in what we take for granted: that it can be abused or misused, that it can at times distort or distract from the truth, and that it can detract from the central truth-finding intent of the process.

We need to take the time to understand cross-examination, respect its value and its limits, and learn how to do it effectively and properly.

Judge Saylor:

In the words of John Henry Wigmore, cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth." 3 Wigmore, Evidence §1367, p. 27 (2d ed. 1923).

Unfortunately, our belief in an adversarial system marked by vigorous cross-examination is beginning to fray around the edges. For example, on many college campuses, tribunals for handling sexual-assault claims (and sometimes race and gender discrimination claims) provide no right of confrontation or opportunity to cross-examine the accuser. (For an excellent review of this topic, I strongly commend "The Campus Rape Frenzy" by Stuart Taylor Jr. and K.C. Johnson, published earlier this year.) The basic premise is that cross-examination can be intimidating, or even traumatic, for a victim; but of course that presupposes that the witness is telling the truth.

A witness who is telling the truth need not be cross-examined. Unfortunately, human beings often make mistakes and sometimes lie. So until human beings become substantially more perfect, cross-examination will be necessary to ascertain the truth.

Indeed, if justice cannot be achieved without a means to establish the truth, justice cannot be achieved without the right to cross-examination.

Previous installments of Tried & True can be found here. Judge F. Dennis Saylor IV sits on the U.S. District Court in Boston. Prior to his appointment to the bench, he was a federal prosecutor and an attorney in private practice. Daniel I. Small is a partner in the Boston and Miami offices of Holland & Knight. He is a former federal prosecutor and teaches CLE programs across the country.