Chapter 7

CROSS-EXAMINATION[1]

§ 7.01 INTRODUCTION

Hollywood dramas portray cross-examinations as exercises in pyrotechnics: the lawyer asks hostile and sarcastic questions, mixed with clever asides to the jury, and the witness gives evasive answers. Cross-examination causes Captain Queeg to reveal his mental instability in The Caine Mutiny; it wrings a confession from the defendant's wife in Witness for the Prosecution that she has been lying to frame her husband. Perry Mason used cross-examination as an investigative tool to search for the real murderer. This may make good theater — the struggle between good and evil — but it hardly paints an accurate portrait of cross-examination. Rarely in a lawyer's career will he or she ever have to battle a scheming, dishonest witness, knowing that the witness's testimony must be broken in order to save an innocent client.

If cross-examination is not usually a battle of wits between a scheming witness and a clever attorney, how should it be understood? Like direct examination, it is primarily a method of proving your case by eliciting testimony from a witness. That witness has given information on direct examination that favors your opponent, and now you must pick over what remains to find the few nuggets that favor your own theory of the case. Its success depends not on your ability to ask clever questions, but on your ability to control the flow of information so that the witness's testimony is limited to the selected items you want to bring out. Some witnesses will be hostile, some suspicious, and some defensive. None will react with gratitude when you attack their credibility. If you fail to control the cross-examination, the chances are that the witness will end up repeating the harmful direct examination and explaining away the weaknesses in it that you wanted to emphasize.

On direct examination, witnesses are controlled through preparation and rehearsal. On cross-examination, however, it is usually impossible to rehearse, so you will have to rely on meticulous preparation. Cross-examination is a dangerous foray behind enemy lines. The only way such incursions can be successful is if they are carefully planned, tightly controlled, and thoroughly disciplined.

§ 7.02 EXAMPLE OF A CROSS-EXAMINATION

The next few pages contain an illustrative example of cross-examination in a hypothetical personal injury case, *Hartzog v. Roberts*. The plaintiff has alleged that as he was crossing a street he was struck and injured because of the defendant's negligent driving. The defendant claims that the plaintiff stepped out suddenly from between two parked cars. An eyewitness, Laura

[1] Some of the material in this chapter was previously published in J. Alexander Tanford, *Keeping Cross-Examination Under Control*, 18 AM. J. TRIAL ADV. 245 (1994).

Boeckman, is called by the plaintiff. She says on direct examination that she saw the accident, the defendant was traveling seventy miles per hour, the victim was knocked fifty feet, the defendant's car traveled 150 feet before it stopped, and when the defendant got out of his car, he appeared to be drunk. The defendant's cross-examination follows:[2]

Q: Ms. Boeckman, I'll try not to take too long. On the day of the accident, you were looking out your window at about 7:15 p.m, right.?

A: Yes, when the accident happened.

Q: And you kept watching immediately after the accident?

A: Yes.

Q: You saw the driver get out of his car?

A: Yes.

Q: Did you get a good look at him?

A: Yes.

Q: You're sure it was my client, Mr. Roberts?

A: Oh, yes.

Q: So, did you watch him for several seconds, then?

A: Yes. He got out of his car and walked quickly over to where Mr. Hartzog's body was.

Q: Would you say it took four or five seconds for him to get there? One — two — three — four — five?

A: Uh, yes, that's about right.

Q: Did Mr. Roberts go straight to where Mr. Hartzog was lying?

A: Yes.

Q: He didn't fall down did he?

A: What?

Q: Mr. Roberts didn't fall down, did he?

A: No.

Q: And he didn't stagger around?

A: No.

Q: And he appeared to be walking quickly but normally, is that right?

A: Yes.

Q: Just before the accident, were you looking at the street in front of your house?

A: I don't know. I guess so.

Q: That's Woodlawn Street, correct?

[2] Adapted from FRANCIS X. BUSCH, LAW AND TACTICS IN JURY TRIALS vol. 3: 847–53 (1960). Much of Mr. Busch's original cross-examination has been quoted directly.

A: Yes, where I live? Yes.

Q: And your house is in the middle of the block, right?

A: Yes.

Q: There are three houses between you and the intersection where the accident occurred?

A: Yes, I think so.

Q: There were cars parked on Woodlawn, weren't there?

A: Yes.

Q: There were cars parked on the far side of the street?

A: Yes.

Q: That would be the south side, wouldn't it?

A: Yes.

Q: Between your house and the corner?

A: Yes.

Q: Weren't they parked close together?

A: Yes.

Q: Woodlawn runs west to east, doesn't it?

A: I think so, I'm not very good at directions.

Q: Ms. Boeckman, you knew the plaintiff before the accident, correct?

A: Yes. Well, I didn't know him very well before the accident.

Q: But you do know him?

A: Slightly, yes.

Q: You know where he lives?

A: Yes, sir.

Q: Do you know any members of his family?

A: I know he has a wife and daughter.

Q: You knew his wife, didn't you?

A: I had met her.

Q: Was it in connection with school activities?

A: Yes. At a PTA meeting a few years ago.

Q: Do you know their daughter?

A: Yes.

Q: How old is she?

A: Sixteen.

Q: You have a fifteen-year old daughter, don't you?

A: She will be sixteen in June.

Q: Your daughter and the plaintiff's daughter are friends, aren't they?

A: Yes, I think you could call them friends.

Q: The Hartzog girl visited in your home before the accident, correct?

A: Yes.

Q: More than once, correct?

A: Oh, I don't know how many times.

Q: Give us some idea — a dozen times, maybe?

A: Well, possibly that many; maybe more.

Q: Now about the collision. Isn't the window in your house that you were looking out of an ordinary window that slides up and down?

A: Yes.

Q: What they call a double-hung window?

A: I'm not sure.

Q: But it's an ordinary window you can raise or lower, not a big picture window?

A: That's right.

Q: Would you say about this wide (indicating with hands)?

A: Yes.

Q: Can we agree that that distance is between 2½ and 3 feet?

A: Yes, a little less than 3 feet, I would say.

Q: That window faced south, didn't it?

A: Yes.

Q: Faced the street?

A: Yes.

Q: And the window itself is to the west of the entrance to your house?

A: I'm not sure.

Q: It's to the left of your door as you face the house, is that right?

A: Yes. Coming up the walk, it would be on the left.

DEFENDANT'S ATTORNEY: May I approach the witness with an exhibit?

COURT: Yes.

Q: Showing you defense exhibit A (photograph of front of house), this accurately shows your house and that window, doesn't it?

A: It shows the house and two windows.

Q: The window you were looking out of is this one, right?

A: Yes.

Q: That's the second window, counting right to left?

A: Yes.

Q: And you were standing right in front of that window?

A: Yes.

Q: Standing in the front of that window, you could not see all the way down to the crosswalk. Is that correct?

A: I don't know. You have probably tried that out, and I don't want you to mix me up.

Q: I am not trying to mix you up, Ms. Boeckman. I am just asking you if from where you were standing at that window you could see all the way to the end of the block, to the west crosswalk?

A: Maybe not. I don't know.

Q: This whole thing — the accident I mean — happened very quickly, didn't it?

A: Yes, it did.

Q: The defendant's car was in your view for only a second or two, correct?

A: Yes. Not very long.

Q: Now, you said you thought Mr. Roberts might have appeared drunk. Did you go out of your house after this accident occurred?

A: No.

Q: Of course, from where you were, with the window between you and the man out in the street, you could not smell his breath?

A: Of course not.

Q: And you could not hear the driver say anything, could you?

A: No.

Q: Nor see whether his eyes were bloodshot?

A: No.

Q: Your statement then that he might have been drunk is simply your conclusion, not based on anything specific that you saw, heard, or smelled?

A: Yes.

Q: You didn't know at first who had gotten hurt, did you?

A: No.

Q: You didn't talk to the police right away, did you?

A: No. I was reluctant to get involved, and it looked like there were plenty of witnesses to tell them what had happened.

Q: You later learned that it was Mr. Hartzog that was hurt?

A: Yes.

Q: From whom did you hear it?

A: My daughter told me, and then I went to see Mrs. Hartzog and she told me.

Q: And then you told her that you had seen the accident?

A: Yes.

Q: And that you would be a witness for Mr. Hartzog?

A: Not then, but later. Mrs. Hartzog and their lawyer came to see me, and told me I would be a witness for them.

Q: And you said you would be glad to be a witness for Mr. Hartzog, isn't that right?

A: Well, not until after the lawyer talked to me and told me I could help Mr. Hartzog.

DEFENDANT'S ATTORNEY: That is all, Ms. Boeckman.

NOTE

Sample cross-examinations. Several sample cross-examinations can be found in JAMES E. DURST & FRED QUELLER, ART OF ADVOCACY — CROSS-EXAMINATION OF LAY WITNESSES (1992); Scott Baldwin, *Cross Examination of Law Witnesses*, in MASTER ADVOCATE'S HANDBOOK 105 (D. L. Rumsey ed. 1986); JAMES JEANS, LITIGATION §§ 15.33–15.34 (2d ed. 1992); and ROBERT L. MCCLOSKEY & RONALD L. SCHOENBERG, CRIMINAL LAW ADVOCACY — WITNESS EXAMINATION vol. 5 (2001).

§ 7.03 THE RIGHT TO CROSS-EXAMINE

It is safe to say that all litigants have the right to cross-examine witnesses who give adverse testimony. For defendants facing criminal charges, this right is found in the Sixth Amendment guarantee that the accused has the right "to be confronted with the witnesses against him." In civil cases the right to cross-examine is part of the fundamental due process to which all parties are entitled. However, this does not mean that cross-examination is completely unbridled in scope and duration. A party is entitled to a full and fair opportunity[3] to cross-examine, but not to raise irrelevant issues, mislead the jury, or browbeat witnesses.

In *Mattox v. United States*,[4] the Supreme Court held that under no circumstances shall a criminal defendant be deprived of the right to subject prosecution witnesses to the ordeal of a cross-examination. In *Pointer v. Texas*, the Court stated: "[I]t cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him."[5] This right includes the opportunity to test the recollection and sift the conscience of the witness, and to give the jury the chance to view the witness's demeanor. In *Davis v. Alaska*,[6] the Court held that the right extends to cross-examination designed solely to impeach the credibility of a prosecution witness.

Other parties also have the fundamental right to cross-examine witnesses called by their opponents. The prosecutor is entitled to cross-examine defense

[3] *See, e.g.*, *Flores v. United States,* 698 A.2d 474 (D.C. Ct. App. 1997) (time limit imposed on cross-examination of government's key witness was improper).

[4] 156 U.S. 237, 244 (1895).

[5] 380 U.S. 400, 404 (1965).

[6] 415 U.S. 308 (1974).

witnesses, including the accused if the defendant has waived the privilege against self-incrimination by giving direct testimony.[7] In civil cases, cross-examination is also a fundamental right. While a judge has more discretion to limit cross-examination in civil cases, the judge may do so only after a party has had a fair and substantial opportunity to exercise the right.[8]

The right of cross-examination encompasses not merely the right to ask questions, but also the right to elicit testimony. A witness can and should be compelled by the judge to answer proper questions. Continued refusal to answer may subject the witness to punishment for contempt. In extreme cases, where cross-examination is effectively denied, the court may strike out all or part of the direct examination[9] or grant a mistrial — even if the denial of an opportunity for full cross-examination is no one's fault. Whether the direct examination must be stricken because of the witness's failure to submit to cross-examination is largely a discretionary decision for the trial judge. It depends not on whether the witness was justified in not answering, but on whether it is fair to permit the direct to stand unchallenged.[10]

NOTES

1. *Confrontation and the rules of evidence.* The courts have been inconsistent on whether the right to cross-examine overrides rules of evidence and permits a defendant to ask about otherwise inadmissible evidence. In general, the courts draw two distinctions: between essential and non-essential evidence, and between traditional rules of evidence and recent ones. Essential evidence is more likely to be permitted, especially if it is a recent rule. Laws shielding or privileging relevant information cannot be invoked at the cost of depriving the defendant of a fair trial. For example, in *State v. Lessley*, 601 N.W.2d 521 (Neb. 1999), the defendant was charged with rape. He claimed the sexual act was consensual. The victim denied consent and said she was a lesbian. To rebut this evidence, the defendant tried to cross-examine her about prior consensual sexual behavior with men. The court rules that the state's rape shield law did not permit inquiry into past sexual behavior. The state supreme court reversed, holding that since consent was the sole issue, the evidence was so important that it violated the defendant's right to cross-examine by not allowing it. By contrast, the court in *Windham v. State*, 800 So.2d 1257 (Ct. App. Miss. 2001), held that when the defendant sought to override the doctor-patient privilege to obtain evidence going only to the victim's credibility, the privilege controlled.

2. *Confrontation of child witnesses.* In *Maryland v. Craig*, 497 U.S. 836 (1990), over a vigorous dissent, the Supreme Court held that the Confrontation Clause of the Sixth Amendment did not prohibit a child witness in a child

[7] *See State v. Lea,* 934 P.2d 640 (Ct. App. Or. 1997); *Trawick v. State,* 431 So.2d 574 (Ala. App. 1983).

[8] *See, e.g.*, *Dubreuil v. Witt,* 781 A.2d 503, 508 (Conn. App. 2001).

[9] *E.g., see State v. Lea,* 934 P.2d 640 (Ct. App. Or. 1997); *Lawson v. Murray,* 837 F.2d 653 (4th Cir. 1988).

[10] *See Crump v. Commonwealth,* 460 S.E.2d 238 (Ct. App. Va. 1995) (eight-year-old child refused to answer questions on cross that merely asked her to repeat what she said on direct; direct need not be struck).

abuse case from testifying by one-way closed circuit television, although such a procedure infringed the defendant's right to confront the witnesses against him. The Court held:

> We observed in *Coy v. Iowa* that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." 487 U.S. at 1016. . . . This interpretation derives not only from the literal text of the Clause, but also from our understanding of its historical roots.
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> We have never held, however, that the Confrontation Clause guarantees criminal defendants the absolute right to a face-to-face meeting with witnesses against them at trial . . .. The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing [of] cross-examination, the 'greatest legal engine ever invented for the discovery of truth.' [For that reason,] we have repeatedly held that the Clause permits, where necessary, the admission of certain hearsay statements against a defendant despite the defendant's inability to confront the declarant at trial . . . . [O]ur precedents establish that "the Confrontation Clause reflects a preference for face-to-face confrontation at trial [that] must occasionally give way to considerations of public policy and the necessities of the case.
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> [Under] Maryland's statutory procedure . . . the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies. . . . We are therefore confident that use of the one-way closed circuit television procedure, where necessary to further an important state interest, does not impinge upon the truth-seeking or symbolic purposes of the Confrontation Clause. . . . Accordingly, we hold that, if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.
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> The requisite finding of necessity must of course be a case-specific one: The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma. In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the

> defendant present. Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than de minimis, i. e., more than "mere nervousness or excitement or some reluctance to testify." (citations omitted).

Cf. Commonwealth v. Ludwig, 594 A.2d 281 (Pa. 1991) (holding that Pennsylvania's state constitution does not permit closed-circuit child testimony and requires face-to-face confrontation).

§ 7.04 THE CONTENT OF CROSS-EXAMINATION

[A] SCOPE

The scope of cross-examination is more limited than direct. You may go over any of the topics covered on direct examination, repeating favorable facts and bringing out new information related to them; and you may test the perception, memory, and credibility of the witness.

> [T]he potential bias or partiality of a witness may always be explored on cross-examination, as may matters that touch upon the witness's own testimony, and the right to a thorough and sifting cross-examination on these subjects should not be abridged.[11]

However, your ability to raise new issues not brought up in the direct examination is controlled by the rule that the scope of cross-examination "should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness." Fed. R. Evid. 611(b). Courts interpret the limited scope rule differently. The strict view, which originated in *Philadelphia & T.R. Co. v. Stimpson*,[12] is that your right to cross-examine a witness only extends to facts and circumstances connected to matters brought up on direct and to the credibility of the witness. If you wish to inquire into other relevant matters, you must call the witness on direct examination in your own case. The current federal rule is similar, but gives the judge discretion to permit cross-examination into new matters "as if on direct examination," Fed. R. Evid. 611(b); but without putting the witness through the inconvenience of waiting several days to be re-called to the stand. Another common variation is the so-called "Michigan rule,"[13] that permits inquiry into matters raised on direct and anything that will modify, explain, or rebut what was said or implied. Under this rule, it is the tendency of the direct examination that determines the scope of cross, not the particular facts and circumstances to which the witness testified. A few states purport to allow wide-open cross examination into any matter that is relevant.[14] Under any of these rules, the actual scope is going to be a matter for judicial discretion.

All jurisdictions permit cross-examination that tests the credibility of the witness and the weight to be given his or her testimony. The courts recognize at least eight categories of permissible impeachment:

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[11] *Carswell v. State,* 491 S.E.2d 343, 347 (Ga. 1997).

[12] 39 U.S. (14 Pet.) 448 (1840).

[13] So called because it is traced back to *Campau v. Dewey,* 9 Mich. 381 (1861).

[14] *See Zoerner v. State,* 725 So. 2d 811 (Miss. 1998) (scope of cross is wide open on any relevant matter but judge has discretion to limit it).

- Lack of opportunity or physical inability to reliably perceive the events about which the witness testified,[15] e.g., a witness's intoxication at the time of the event.[16]
- Memory problems, either inherent in an event long past or particular to the witness, including psychiatric history affecting ability to recall events accurately.[17]
- Possible distortions caused by a witness's poor communication skills.[18]
- Bias, interest, prejudice, or other emotional traits that could cause a witness to testify falsely.[19]
- Prior criminal convictions.[20]
- Prior acts of misconduct or dishonesty reflecting adversely on veracity.[21]
- Prior inconsistent statements.[22]
- A bad reputation in the community for truth and veracity.[23]

The rule limiting the scope of cross-examination to matters raised during direct is premised in part on the ability of the cross-examiner to call the witness for direct examination. What happens under limited-scope rules if a criminal defendant takes the stand, but limits his or her testimony to only one of the material issues? The prosecution would seem to be prohibited by the Fifth Amendment from calling the defendant as a witness against himself or herself for direct examination (although one can argue that the defendant waived this protection by testifying), and by the rules of scope from pursuing the other issues during cross. In practice most judges probably would allow broader cross-examination of a defendant than of other witnesses because a defendant cannot be re-called.[24] However, appellate courts tend to state that the rule is the same for defendants as for other witnesses.[25]

All cross-examination is subject to two provisions in the Rules of Evidence. Rule 403 permits the court to exclude evidence of slight probative value if

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[15] *E.g.*, *State v. Dardon, People v. Montes,* 635 N.E.2d 910 (App. Ct. Ill. 1994) (cross-examination of police officer who took defendant's confession about his ability to understand Spanish).

[16] *People v. Spreyne,* 628 N.E.2d 251, 256 (Ct. App. Ill. 1993).

[17] *E.g.*, *People v. Baranek,* 733 N.Y.S.2d 704 (App. Div. 2001) (history of delusions).

[18] *See People v. Plummer,* 743 N.E.2d 170 (Ct. App. Ill. 2000) (defendant could impeach on mental health history only if it was shown to affect witness's ability to communicate accurately).

[19] *E.g.*, *United States v. Harris,* 185 F.3d 999 (9th Cir. 1999) (witness risked losing money if suit against husband's estate was successful); *State v. Green,* 38 P.3d 132 (Id. 2001) (prosecution witness had pending felony charge, motive to cooperate).

[20] *See* Fed. R. Evid. 609 (felonies and crimes of dishonesty committed within past ten years admissible)

[21] *See* Fed. R. Evid. 608(b).

[22] *See Roberts v. State,* 712 N.E.2d 23 (Ct. App. Ind. 1999).

[23] *See* Fed. R. Evid. 608(a).

[24] *See United States v. Raper,* 676 F.2d 841 (D.C. Cir. 1982) (scope of cross of accused very broad).

[25] *Portuando v. Agard,* 529 U.S. 61, 69 (2000) (when defendant becomes witness, he is subject to same rules as other witnesses).

there is a substantial risk of "unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[26] Rule 611(a) permits the court to curtail cross-examination to "protect witnesses from harassment or undue embarrassment."[27]

[B] THE GOOD-FAITH BASIS RULE

On cross-examination, a lawyer ethically may only ask about or refer to evidence if the lawyer has a good-faith basis for the question. This is a two-part standard requiring both a *factual* and a *legal* basis for your questions.

You must have a factual basis for asking about, suggesting the existence of, or alluding to evidence at trial.[28] That requires some objective indication that the fact you seek to elicit is true, such as a deposition, statement, interview, or document that leads you reasonably to believe the witness you are cross-examining will confirm it.[29] For example, before you ask a witness if she was drunk, you must have some concrete basis for believing that she was.[30] Wishful thinking, intuition, impressions based on demeanor, and simple curiosity are not adequate to justify asking a leading question that suggests the evidence might be true.[31] Your basis does not have to be admissible evidence in its own right — it can be unsubstantiated rumors, anonymous phone calls, or confidential information gained from your client.

You must also have a legal basis for asking a question.[32] The evidence you seek must be admissible, you must lay the proper foundation, and you must put your questions in proper form.

> A lawyer should not attempt to get before the jury evidence which is improper. In all cases in which a lawyer has any doubt about the propriety of any disclosures to the jury, a request should be made for leave to approach the bench and obtain a ruling out of the jury's hearing, either by propounding the question and obtaining a ruling or by making an offer of proof.[33]

For example, it would violate this principle to ask a witness if he or she has been convicted of drunk driving (even if true) because the rules of evidence limit impeachment to felonies and crimes of dishonesty.[34] It would also violate

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[26] *See State v. Dugas,* 782 A.2d 888 (N.H. 2001) (evidence that another person was on trial for sexual assault to show he had a motive to cause fire for which defendant was charged with arson was marginally relevant but excluded under Rule 403).

[27] *See Zoerner v. State,* 725 So. 2d 811 (Miss. 1998).

[28] *See* ABA Model Rule of Prof. Conduct 3.4(e) (lawyer in trial may not "allude to any matter that . . . will not be supported by admissible evidence").

[29] *See, e.g., Duncan v. State,* 776 So.2d 287, 288 (Fla. App. 2000).

[30] *See Reno v. State,* 514 N.E.2d 614 (Ind. 1987) (improper insinuation that witness was "stoned out of her mind" unless attorney had good-faith basis).

[31] WILLIAM H. FORTUNE, RICHARD H. UNDERWOOD & EDWARD J. IMWINKELRIED, MODERN LITIGATION AND PROFESSIONAL RESPONSIBILITY HANDBOOK 402-04 (1996).

[32] *See, e.g.*, *Flowers v. State,* 773 So.2d 309, 326 (Miss. 2000)

[33] American College of Trial Lawyers Code of Trial Conduct. *Accord State v. Smallwood,* 594 N.W.2d 144, 150 (Minn. 1999)

[34] *See, e.g.*, Fed. R. Evid. 609. See also *Hawk v. Superior Court,* 116 Cal. Rptr. 713 (Cal. App, 1974) (lawyer held in contempt for deliberately asking a question about an inadmissible misdemeanor conviction).

this principle to ask a question alluding to inadmissible evidence and then "withdraw" it if the other side objects.[35] As one court put it, it is improper for an attorney to ask a question "which he knows and every judge and lawyer knows to be wholly inadmissible and wrong."[36]

[C] CREATING A FALSE IMPRESSION

A recurring problem of cross-examination is the propriety of intentionally creating a false impression through the selective use of evidence, trickery, and half-truths. For example, is it proper to discredit a witness whom you know to be telling the truth, leaving the jury with the false impression that the witness is mistaken? Suppose you represent a client accused of a robbery committed at 16th and P Streets at 11:00 p.m. The client tells you he was one block away at 10:55, but was walking in the opposite direction and was at least six blocks away from the scene at 11:00 p.m. At trial, the prosecution calls an elderly woman with thick glasses to the stand who testifies truthfully that she saw your client on 15th Street at 10:55 p.m.[37] Can you use cross-examination to show the witness's poor eyesight and that she is easily confused, thereby destroying her credibility and creating the false impression that she is mistaken in her identification? There is no legal rule against it, but is it ethical?

Some attorneys think there is nothing unethical about presenting and relying on truthful but misleading evidence if it is genuinely beneficial to the client and increases his chances of acquittal. Monroe Feedman writes:[38]

> [I]f you should refuse to cross-examine her because she is telling the truth, your client may well feel betrayed, since you knew of the witness's veracity only because your client confided in you, under your assurance that his truthfulness would not prejudice him. [T]he same policy that supports the obligation of confidentiality precludes the attorney from prejudicing his client's interest in any other way because of knowledge gained in his professional capacity. [If] a lawyer fails to cross-examine only because his client . . . has been candid with him, [the lawyer is using those confidences against his client.] The client's confidences must "upon all occasions be inviolable," to avoid the "greater mischiefs" that would probably result if a client could not feel free "to repose [confidence] in the attorney to whom he resorts for legal advice and assistance"[39] Destroy that confidence, and "a man would not venture to consult any skillful person, or would only dare to tell his counsellor half his case."[40]

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[35] *See, e.g., State v. Lawton,* 667 A.2d 50, 55 (Vt. 1995).

[36] *People v. Wells,* 34 P. 1078, 1079 (Cal. 1893).

[37] The hypothetical comes from Monroe Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1474–75 (1966).

[38] *Id*., at 1474–75. *See also* MONROE FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975).

[39] The quote is from ABA COMM. ON PROFESSIONAL ETHICS AND GRIEVANCES, Formal Op. 150.

[40] The quote is from *Greenough v. Gaskell,* 1 Myl. & K. 98, 103, 39 Eng. Rep. 618, 621 (Ch. 1833).

Therefore, Freedman concludes, the attorney is not only permitted but may actually be required to attack the reliability or credibility of the victim.

Yet, doesn't intentionally creating a false impression violate the good-faith basis principle? If the client has correctly identified your client, you do not have a good faith basis for insinuating that she is wrong because of poor eyesight, and it is hard to imagine that poor eyesight is relevant to any other purpose. Poor eyesight is not a material issue in its own right. Proving that she has poor eyesight or other physical defect "just for the heck of it" violates both the part of the good faith basis principle that requires a believe that evidence is relevant,[41] and the prohibition against using "means that have no substantial purpose other than to embarrass" a witness.[42]

Francis Wellman's classic THE ART OF CROSS EXAMINATION sets a higher ethical standard. The purpose of cross-examination is to "catch truth," not to make the false look true and the true, false:

> The purpose of cross-examination should be to catch truth, ever an elusive fugitive. If the testimony of a witness is wholly false, cross-examination is the first step in an effort to destroy that which is false. . . . If the testimony of a witness is false only in the sense that it exaggerates, distorts, garbles, or creates a wrong sense of proportion, then the function of cross-examination is to whittle down the story to its proper size and its proper relation to other facts. . . .[But if] the cross-examiner believes the story told to be true and not exaggerated . . . then what is indicated is not a "vigorous" cross-examination but a negotiation for adjustment during the luncheon hour. . . . No client is entitled to have his lawyer score a triumph by superior wits over a witness who the lawyer believes is telling the truth.[43]

NOTES

1. ***Using diagrams and exhibits.*** Although exhibits normally are associated with direct examination, in some situations they may be used on cross-examination as well. Any document, photograph, chart, map, model, or other exhibit introduced during the direct may be referred to on cross-examination. Such an exhibit may be shown again to the witness and further questions may be asked about it. If the direct examiner used a blackboard or other illustrative exhibit without formally introducing it, that exhibit similarly may be referred to. But the right to use your opponent's exhibits does not give you the right to mark them up or have witnesses draw on them without the court's permission.

The more difficult question is whether new exhibits may be offered into evidence during cross-examination. Objects and documents referred to during direct, but not introduced, usually can be produced and offered into evidence on cross-examination. Certain types of collateral exhibits usually are permitted, *e.g.*, prior inconsistent statements, Fed. R. Evid. 613(b); and certified

[41] ABA Model Rule of Prof. Conduct 3.4(e).

[42] Model Rule 4.4.

[43] FRANCIS L. WELLMAN, THE ART OF CROSS-EXAMINATION 204–05(4th ed. 1936).

records of criminal convictions offered to impeach. Fed. R. Evid. 609. However, there may be restrictions on your ability to introduce new substantive exhibits. Some judges think that a new exhibit is per se beyond the scope of the direct, and therefore must wait until the cross-examiner's case-in-chief or rebuttal; others will allow new exhibits related to the subjects brought out during direct testimony. It is entirely within the judge's discretion.

2. *Interpretation of limited scope rules.* The degree to which the limited scope rule is enforced varies considerably from jurisdiction to jurisdiction and from case to case. A pair of classic cases from the same state illustrate this point: In *McNeely v. Conlon*, 216 Iowa 796, 248 N.W. 17 (1933), the court took a very narrow view. A witness testified on direct about the facts of an accident and about going up to the victim, who was lying in the street. The court held that the victim's spontaneous statement overheard by the witness at that time was beyond the scope of the issues raised by the direct. However, the same court a few years later took a broad view. In *Eno v. Adair County Mut. Ins. Ass'n*, 229 Iowa 249, 294 N.W. 323 (1940), the court adopted a broad view. A witness testified on direct about the existence of an insurance contract and about having seen plaintiff's severely damaged barn. Questions about the origin of the fire that caused the damage were held to be within the scope of that limited direct examination.

3. *No right to recross-examination.* If your adversary conducts a redirect examination, then you may ask the court for permission to conduct recross examination. The court has discretion to permit or refuse it. Unlike the primary cross-examination, recross is not a matter of right unless new matters have been raised by the redirect. *See State v. Lyons*, 802 So.2d 801 (La. App. 2001); *Fisher v. United States*, 779 A.2d 348 (D.C. 2001). When permitted, recross usually is limited strictly to issues raised on redirect. It is also within the discretion of the judge to allow recross on matters inadvertently omitted from the primary cross-examination. *See Sullivan v. State*, 749 So.2d 983, 991 (Miss. 1999).

4. *What constitutes a good faith factual basis?* Opinions differ on what constitutes a sufficient factual basis for asking a question. In *State v. Williams*, 297 Minn. 76, 210 N.W.2d 21 (1973), the Minnesota Supreme Court stated that an FBI "rap sheet" indicating that a witness had been convicted was *not* a sufficient factual basis for asking the witness about those convictions. The court held that a properly certified record from the court in which the conviction occurred was necessary. The District of Columbia Court of Appeals took the opposite view in *Hazel v. United States*, 319 A.2d 136 (1974), requiring only that a question not be totally groundless. Under this more lenient view, you may cross-examine as long as you can point to any source that is not inherently incredible. This latter view is probably the more common interpretation.

§ 7.05 THE FORM OF CROSS-EXAMINATION

[A] QUESTIONS

Like direct examination, cross-examination is a question-and-answer process in which the attorney must ask proper questions and the witness provide

responsive answers. Also like direct examination, the trial judge has discretion to control the mode and order of questioning.[44] Unlike direct examination, however, cross-examination may be conducted (and usually is) by leading questions,[45] although the judge has discretion to curtail questions that become misleading or abusive.

The right to ask leading questions carries with it an obligation that you will ask clear, coherent questions. If a question is incoherent, vague, compound or ambiguous, and if it is likely to confuse the witness or jury, the other attorney may object and the judge can force you to rephrase the question in a clearer manner. For example:

a) The question "Weren't there other young black men in the shopping center on the night of the murder?" could be objected to as *ambiguous* because it is not defined as to time.[46]

b) The question "And you did, didn't you, when asked if you weren't hurt, reply in the affirmative?" could be objected to as *incomprehensible.*

c) The question "Did you type this letter and send it to Mr. Pratter in the usual way?" could be objected to as *compound* because it contains three separate questions rolled into one, which is likely to result in a misleading answer.

Leading questions are permitted, but not *misleading* questions. Contrary to what we see on television, an attorney may not ask misleading or trick questions, misquote or distort the evidence, nor frame questions in such a way as to elicit half-truths or make unproven factual insinuations.[47] Such questions are objectionable. For example:

a) Q: The defendant was drinking?

A: Yes, he had two drinks.

Q: And then this drunken man got in his car to drive home, correct?

OBJECTION. The question misstates the witness's testimony.

b) Q: Have you stopped using drugs?

OBJECTION. The question assumes a fact not in evidence, namely that the witness ever used drugs in the first place.

If you ask a simple, clear, leading (but not misleading) question, you have the right to insist that the witness give direct, responsive and limited answers. If your question was fair and simple, you usually may have all unresponsive and evasive portions of an answer stricken from the record. However, if your question was potentially misleading, the witness generally will be allowed to give a relevant explanation if neither a "yes" or "no" would be accurate. The

[44] Fed. R. Evid.. 611(a) (court shall exercise reasonable control so as to (1) make the interrogation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment)

[45] *See* Fed. R. Evid. 611(c) ("Ordinarily leading questions should be permitted on cross-examination").

[46] *State v. Lindsey*, 543 So. 2d 886, 900 (La. 1989).

[47] *See Beasley v. State*, 803 So. 2d 1204, 1212 (Miss. App. 2001); *Hopkinson v. Chicago Transit Auth.,* 570 N.E.2d 716 (Ill. App. 1991).

witness has sworn to tell the truth, not answer questions in a misleading manner. Consider the following examples. In the first, the witness tries to evade the implication of a plain, simple question. In the second, the witness responds to an unfair question in which the attorney has tried to exaggerate the facts.

a) Q: Isn't it true that you drank two beers?

A: Yes, but I wasn't drunk or anything.

OBJECTION. I move to strike everything after "Yes" as unresponsive to my question.

COURT: Sustained.

b) Q: Isn't it true that you had been drinking at Nick's for two hours?

A: Yes, but I only had two beers.

OBJECTION. I move to strike everything after "Yes" as unresponsive to my question.

COURT: Overruled. The witness is allowed to explain his answer.

[B] ARGUING AND BADGERING

Despite what you see on television, sarcastic comments, asides to the jury, and the browbeating of witnesses are not permitted on cross-examination. Asking rhetorical questions, making speeches and comments instead of asking questions, and stating one's personal conclusions are prohibited as being "argumentative." The word argumentative refers not to arguing with a witness, but to making remarks that belong in closing argument. Arguing with the witness, making personal comments to the witness, shouting or engaging in intimidation of the witness is referred to as "badgering." Both are prohibited.

To be argumentative, a question must be more than just leading. A leading question seeks information — the lawyer who asks it wants the witness to agree to the lawyer's version of the facts. An argumentative question is one in which the lawyer wants to make a speech to the jury and does not care what the witness says. For example:

a) ***Proper***.

Q. You were at the bar for two hours?

A. Yes.

Q. You had five shots of Jack Daniels?

A. Yes.

Q. *You were drunk, weren't you?*

b) ***Argumentative***

Q. You were at the bar for two hours?

A. Yes.

Q. You had five shots of Jack Daniels?

A. Yes.

Q. *You must have been pretty drunk.* Did you at least have anything to eat during this time?

There are five common types of argumentative questions:

- ***Speech-making***[48] (always recognizable, because lawyers turn toward the jury with smirks on their faces and raise their eyebrows just before asking the question).

  Q: So, Mr. Moutardier, since you testified you were looking the other way, you really have no idea what color the traffic light was, do you?

- ***Summarizing testimony.***

  Q: You were fifty feet away?

  A: Yes.

  Q: It was night?

  A: Yes.

  Q: There was no moonlight?

  A: No.

  Q: And you saw the scar on his cheek?

  A: Yes.

  Q: So you are asking the jury to believe you could see a scar on a man's cheek from fifty feet away on a dark night?

Summarizing is not always objectionable. The judge may allow it when you are asking transitional questions, or refreshing the witness's and jurors' memories so that subsequent testimony will be in context. A summary question is also common when testimony is resumed after a recess.[49]

- ***Pursuing a line of questions despite witness's denial of knowledge.***[50]

  Q: Weren't you the one who robbed the store?

  A: No, I wasn't even in town.

  Q: You pulled the gun on the clerk, didn't you?

  A: No.

  Q: And you asked for money?

  A: No.

  Q: And you pulled the trigger, didn't you?

- ***Comments to the jury*** (usually attempts at sarcasm not in question form).[51]

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[48] *See, e.g.*, In re *Kemp,* 236 N.C. 680, 73 S.E.2d 906 (1953).

[49] *See* Mark P. Denbeaux and D. Michael Risinger, *Questioning Questions: Objections to Form in the Interrogation of Witnesses*, 33 ARK. L. REV. 439, 485 (1980).

[50] *E.g.*, *Mathis v. State,* 543 S.E.2d 712, 715 (Ga. 2001).

[51] See, e.g., *State v. Blount,* 167 S.E.2d 444 (N.C. App. 1969).

Q: You claim to have seen the scar on his cheek from fifty feet at night?

A: Yes.

Q: You have remarkable vision, Mr. Pryor. Did you see anything else?

- "**Would-it-surprise-you" questions**, in which the attorney states facts either not yet in the record or testified to by other witnesses.[52]

Q: Is it your testimony that the defendant was driving normally?

A: Yes.

Q: Would it surprise you to know that he had .08 percentage of alcohol in his blood that day?

Badgering a witness consists of making an irrelevant personal attack on or trying to intimidate the witness. It is also objectionable.[53] For example:

Q: You were a witness to the accident?

A: Yes.

Q: You went back to your S.U.V. to get your video camera?

A: Yes.

Q: Why didn't you help the poor victim?

A: I don't know.

Q: You just left her lying in the road bleeding?

A: I guess.

Q: You didn't even bother to see if she were dead?

A: No

Q: You just walked away from a bleeding woman?

A: Yes.

Q: You never even tried to help her?

A: No.

Q: You didn't even have the human decency to see if she needed help?

NOTES

1. ***Distinguishing leading questions from assuming facts not in evidence***. The fact that a lawyer uses a leading question to suggest the existence of a fact not yet in evidence does not make the question objectionable. How else can the lawyer get the fact into evidence unless he or she asks? As long as the witness has a fair chance to admit or deny the facts, the question is merely leading. To be objectionable, the question must be *misleading* — it must first assume an unproven fact, and then ask about a second event based on the first. Note the difference between the following two questions:

[52] *Commonwealth v. Latimore,* 393 N.E.2d 370 (Mass. 1979).

[53] *See* ABA Model Rule of Prof. Conduct 4.4 ("a lawyer shall not use means that have no substantial purpose other than to embarrass" a witness).

Leading: You are an alcoholic, aren't you?

Assuming a fact not in evidence: You are *still* an alcoholic, aren't you?

The first question merely suggests that the witness is an alcoholic, but gives the witness the opportunity to deny it. The witness may say "No." The second assumes the existence of the alcoholism. The witness cannot deny the premise by simply answering the question.

2. *Repetitious cross-examination*. The rules of direct examination prohibit repetition. If you seek to elicit the same item of evidence more than once, it may be objected to as "asked and answered." On cross-examination, particularly of evasive witnesses, greater leeway is allowed to go over testimony several times. The process is sometimes called "sifting" the witness. The judge has unlimited discretion to determine when cross-examination has become pointlessly repetitive. *Kier v. State*, 543 S.E.2d 801, 804 (Ga. App. 2001).

3. *Asking about depositions or the testimony of other witnesses.* Can you ask a question that includes a reference to a deposition or other testimony? For example:

a) In your deposition, you said it was raining hard, is that true?

b) Emily Glatfelter testified it was raining hard. Do you agree?

In one sense these are just poorly phrased leading questions, in which the attorney really is just asking the witness to confirm that it was raining hard. But they also may assume facts not in evidence (the existence of a deposition), and include argumentative summaries of testimony (what another witness said). A question referring to another witness's testimony is also a violation of the witness separation rule. Whether to allow these questions is a matter of judicial discretion. *See* RICHARD UNDERWOOD & WILLIAM FORTUNE, TRIAL ETHICS 350–51 (1988) (may be proper in some jurisdictions).

4. *"Withdrawing" an argumentative remark.* In the movies, lawyers make argumentative comments all the time, and then slyly withdraw them if they are objected to. For example, in the movie *Adam's Rib*, Amanda Bonner defends a woman charged with the attempted murder of her husband and Beryl Caine. In one scene, she cross-examines Beryl Caine seeking to establish that she was having an affair with her client's husband:

Q: Were you wearing a black silk lace negligee?

A: Yes.

Q: Speak up, Miss Caine, we're all very interested in what you have to say.

A: Yes.

Q: What else?. . . Shoes? Slippers?

A: Yes.

Q: Which?

A: Slippers.

Q: Stockings?

A: Yes.

Q: Think again.

A: No.

Q: Nothing else?

A: Yes!

Q: What?

A: A hair ribbon.

Q: Is this your usual costume for receiving casual callers?

PROSECUTOR: Objection.

DEFENSE: Withdrawn.

Ruth Gordon and Carson Kanin, *Adam's Rib* (MGM 1949). Withdrawing an improper remark may satisfy the law by removing improper matter from the jury's consideration, but it does not address the ethical problem. Rule 3.4 (c) of the Rules of Professional Conduct states that a lawyer shall not "knowingly disobey an obligation under the rules of a tribunal," and that includes intentionally making gratuitous sarcastic remarks and asking argumentative questions.

§ 7.06 PLANNING A CROSS-EXAMINATION

With the requirements of the proper scope and question form in mind, let us turn to planning a cross-examination. Despite the apparent spontaneity of cross-examinations, the best ones are as meticulously planned as any other aspect of a trial. Effective cross-examination is the result of thorough investigation, research, and preparation done well in advance, not of some sixth sense for detecting human weaknesses.

[A] SHOULD YOU CROSS-EXAMINE?

Too many lawyers automatically cross-examine every witness called by the other side. No rule of trial practice requires it. If there is nothing specific you want to accomplish, then cross-examination is likely to be an unfocused rehash of the direct, or a poorly planned attack on the witness's character, both of which are ill-advised. Good tacticians pick their battles carefully.

There are a number of reasons to forgo cross-examination:

- The witness has no helpful or corroborating testimony to offer.
- The witness has testified on an uncontested issue or otherwise has not hurt your theory of the case.
- Even if the witness has hurt you, you have no ammunition for an attack.

However, if the witness has helpful information, can corroborate your own key witnesses, or if damaging testimony can be impeached, then cross-examination is strongly indicated.

[B] SELECTING A PURPOSE

The first step in preparing a cross-examination is to decide what you hope to gain from it. How will cross-examination further your theory of the case? What evidence can you elicit that will help you in closing argument?

There are two very different goals you may try to accomplish: eliciting testimony which will help you build your own case; and attempting to weaken your opponent's case. Testimony that will help build your own case may take the form of important information that you need to prove your case, or facts that will corroborate the testimony of your witnesses. Cross-examination that will weaken your opponent's case also has different forms. You may decide to attack the personal credibility of a lying witness, expose the uncertainty of a mistaken witness's testimony, or emphasize inconsistencies between this witness and other witnesses called by your opponent. You also may decide that there is more than one purpose for cross-examining a witness.

[1] Constructive Cross-Examination

Despite the popular conception of cross-examination as an attack on a witness, the primary purpose of cross-examination, like any other aspect of the trial, is to help build your own theory of the case. Few witnesses possess information useful solely to one side. A search of the statements and depositions of opposing witnesses probably will yield potential testimony that will aid your own cause. It may even be that a jury is likely to remember and give special credence to evidence favorable to your case that comes from a witness called by the other side. You should look for:

- ***Favorable testimony on a contested issue***. Occasionally, a witness called by your opponent to testify against you on one issue will also possess significant information you need to help prove your case. If the favorable testimony was mentioned on direct, you can reemphasize it on cross. If the matter was avoided, then you should bring it up on cross-examination unless the topic cannot be raised because of limited scope rules.
- ***Testimony corroborating your main witnesses***. It often will be possible to elicit testimony on cross-examination that enhances the credibility of your witnesses by corroborating parts of their testimony. The possibilities are endless. It can be as simple as eliciting testimony that your witness was present at the scene, or as complex as bringing out evidence of the truthful character of one of your witnesses. The most fruitful line of inquiry is likely to concern the opportunity for your own witnesses to observe the events. An adverse witness, especially one who uses a diagram of the scene to aid his or her direct examination, always should be able to corroborate that there would have been a good line of sight from another location. Using opposing witnesses to corroborate the actions of your client also is important. For example, if opposing witnesses saw your client trying to avoid an accident, rendering assistance to the victim, or driving safely just before it occurred, or if they overheard your client's explanation of the events, you should bring out these facts.

- ***Testimony consistent with your theory of the case***. Rarely are more than a few issues really contested in a trial. The controversy usually boils down to a few disputed facts. Even if nothing else is possible on cross-examination, you always can elicit testimony about those uncontroverted facts that form part of your theory of the event. Prof. Bergman uses the example of a defendant charged with petty theft for shoplifting a calculator. On direct, the defendant admits putting the calculator in his pocket, but denies intent, claiming he stepped out of the store only to get his checkbook from his wife. The cross-examination of the defendant could consist of the following questions on uncontested facts:

  Q: So you did pick up the calculator?"

  Q: And you put it in your pocket?"

  Q: Then you walked to the nearest exit?"

  Q: And left the store?"

  Q: And all the time you never took the calculator out of your pocket?"[54]

[2] Destructive Cross-Examination

Cross-examination is used most commonly as a destructive technique through which the cross-examiner attempts to weaken his or her opponent's case. This form of cross-examination probably is overused. Lawyers have a tendency to attack every witness called by their opponents, just because it is cross-examination. However, some witnesses may be called who are neutral or even helpful to you. To attack them is unnecessary and may be counterproductive. For other witnesses, you may not have the ammunition for a successful attack. You therefore should choose to attack cautiously and infrequently, saving it for those witnesses who really hurt your case and using it only when you are sure of success. Since jurors tend to identify with witnesses more than lawyers, they are likely to resent an unsuccessful attack. Also, if you attack every witness, the jurors can tell that you are only playing the game. Like the little boy who cried "Wolf!" you may find that no one pays any attention when it comes time to attack a witness who is a real threat to your case. Convincing a jury that a witness is not believable requires two things: facts showing a *likelihood* that the witness is wrong, plus some *actual evidence* that he or she is wrong.

[a] Proving a likelihood that the witness is wrong

You may be able to convince a jury that a witness is likely to be wrong for any of four reasons: 1) the witness is an evil, lying perjurer; 2) the witness has forgotten the truth; 3) the witness has been influenced or told what to say; or 4) for some understandable reason, the witness did not perceive events correctly in the first instance.

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[54] Paul Bergman, *A Practical Approach to Cross-Examination: Safety First*, 25 U.C.L.A. L. REV. 547, 550–51 (1978).

One form of cross-examination is to attack the personal veracity of a witness by proving the witness is lying. Even if the witness is a liar, the witness is not likely to admit it, so this is rarely a productive line of inquiry. Nevertheless, lawyers persist in personal attacks, hoping to convince the jury that a witness is not to be trusted. Some common forms of impeachment fall into this category:

- The witness has a personal motive to testify falsely based on bias, prejudice, or interest
- The witness has previously been convicted of a crime, which shows the witness to be the type of person who would lie.
- Prior inconsistent statements may indicate that the witness has lied on one occasion.

For this type of attack to be successful, you must have an appropriate situation where an obvious motive and partisanship will readily allow the jury to believe it possible for the witness to commit perjury;

It is somewhat easier to convince a jury that the witness's testimony is unreliable because of faulty memory. This is still a personal attack on the witness, but no longer requires that you convince a jury the witness is evil, so it is easier to sell it to the jury. You can attack memory in several ways:

- Prior inconsistent statements cast doubt on how well the witness is able to remember the events.
- Inability to recall collateral details *of similar importance* may cast doubt on the reliability of a witness's memory. The most famous example of this kind of cross-examination is from the early nineteenth century British trial of Queen Caroline for adultery. The star witness testified that on a certain voyage the queen slept every night in a tent occupied by another man. The cross-examination was as follows:

  Q: Where did Hieronimus (another passenger) sleep?

  A: I do not recollect.

  Q: Where did Countess Oldi sleep?

  A: I do not recollect.

  Q: Where did the maids sleep?

  A: I do not know.

  Q: Where did Captain Flynn sleep?

  A: I do not know.

  Q: Where did the livery servants sleep?

  A: I do not remember.

  Q: Were not you yourself a livery servant?

  A: Yes.

  Q: When her Royal Highness was going to sea on her voyage from Sicily to Tunis, where did she sleep?

  A: This I cannot remember.

Q: When she was afterwards going from Tunis to Constantinople on board the ship, where did her Royal Highness sleep?

A: This I do not remember.

For this kind of cross-examination to be successful, the facts forgotten must be of equal importance to the facts remembered. If a witness claims to remember a startling event ("I saw the defendant pull a shotgun and shoot two people."), it probably will be a waste of time to ask if the witness remembers what other people were doing.

The third line of inquiry is that a witness has been influenced. All witnesses may have talked to neighbors, read about the case in the paper, and been prepped by attorneys. Any one of these events may influence the witness's testimony. In extreme cases, the witness may actually have been asked to testify to a particular fact by an interested party. Such a cross-examination might go like this:

Q: Two days after the robbery, the police asked you to come to the jail, correct?

A: Yes.

Q: They said they had a suspect?

A: Yes.

Q: You talked to Detective Wilhite?

A: Yes.

Q: And he told you they were pretty sure they had the right guy?

A: Yes.

Q: They showed you a line-up of five people, right?

A: Yes, I think it was five.

Q: And told you it was very important that you identify the robber?

A: Yes.

Q: Sometime later, you were called by Assistant District Attorney Malavenda about being a witness, is that right?

A: Yes.

Q: And you went over your testimony with him?

A: Yes.

Q: You rehearsed several times?

A: Yes, three, I think.

Q: And he told you that your testimony was going to be important?

A: Yes.

Q: That you were the main eyewitness?

A: Yes.

Q: That they couldn't make a case without you?

A: Yes.

Q: That you had to be positive in your identification?

A: Yes.

Q: And then you actually rehearsed how you would identify Mr. Meisenhelder, didn't you?

A: Yes.

Fourth, instead of (or in addition to) attacking the witness personally, you may decide to attack the accuracy of the particular testimony given. This involves implying to the jury that for some excusable reason the witness perceived matters inaccurately from the beginning. You can establish likelihood of error in several ways:

- Prove the witness was at an unfavorable vantage point from which to view the events.
- Demonstrate that the witness has physiological limitations, such as poor eyesight or hearing.
- Show that the witness was in poor condition to observe at the time of the event due to intoxication or fatigue.
- Show physical conditions limiting the witness's opportunity to observe the events, such as objects obstructing the witness's view, inadequate lighting, a great distance separating the witness from the event, distractions, or a very short time in which to make observations.

[b] Proving the witness has in fact testified incorrectly

Once you have established a likelihood that the witness could make mistakes using one of these four methods, you must prove that the witness has in fact testified incorrectly at least once. You may establish that a witness is mistaken either by showing that the witness's testimony is inconsistent with common sense, or that it is inconsistent with the testimony of more credible witnesses.

You can convince a juror that a witness is wrong by bringing out facts that make the testimony inconsistent with ordinary human experience or with physical evidence. If the witness's version of the events is improbable, you can set up an effective closing argument by making sure that all of the unlikely details have been brought out. This is particularly effective for pointing out exaggerations in a witness's estimates of speed and distance. For example:

Q: You estimated that the car was going about sixty miles per hour?

Q: You watched it for a distance of two hundred feet?

Q: You watched the car for at least ten seconds?

You can then do the math during closing argument to show that the testimony is impossible.[55] Note that there is no suggestion that you should ask the *witness* to do the math during cross-examination and then confess to being a bald-faced liar.

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[55] A car traveling sixty miles per hour would cover about ninety feet per second (lawyers use a standard formula: mph $\times$ 1.5 = feet per second). A car taking ten seconds to drive 200 feet is going twenty feet per second, or approximately fourteen miles per hour.

If your opponent's witnesses are in disagreement among themselves on specific facts, then someone must be wrong. This is an extension of the principle underlying impeachment by prior inconsistent statements: two different versions of the events cannot both be correct. This tactic is especially effective when the other side has the burden of proof. If the inconsistency already has been testified to on direct, there is a risk in reemphasizing it on cross-examination: the witness may change it or explain it away. The tactic is dangerous, however, when *both* versions hurt you. The net result of your attack may be that the jury picks one of the two versions and decides against you anyway.

The other reason to establish inconsistencies, however, is to convince the jury that an opposing witness is wrong because the witness is contradicted by your own, more credible, witnesses. This tactic should not be attempted unless you can also successfully impeach the witness by proving one of the four reasons the witness is likely to make mistakes. Otherwise, establishing inconsistencies is a two-edged sword. The jury may choose to believe your opponent's version of the inconsistent events rather than yours, especially if the witness being cross-examined offers satisfactory support for his or her version.

[C] WHAT TOPICS TO INCLUDE

At the early stages of preparation, you must distinguish between "topics" and "questions." A topic is a discrete issue you want to raise on cross-examination because you expect to be able to establish something helpful to your theory of the case. A question is a means of achieving that end. To maintain control of a witness will usually require many specific questions to pursue a single topic. For example, you may want to prove that the witness and the defendant got into a fight last year, to show bias against the defendant. That is a *topic* you will pursue on cross-examination. However, you will immediately lose control of the examination if you just ask:

Q: Aren't you biased against Jason Scheele because of a fight you had?

When you turn that topic into specific questions, it will look more like this:

Q: Directing your attention to August 14, 1990, you attended a party at Marc Malooley's house, correct?

Q: You saw Jason Scheele at that party, didn't you?

Q: About 10:00 pm, you and Mr. Scheele began arguing?

Q: And you punched him?

Q: And then you told Mr. Scheele you hated him, correct?

Deciding which topics to cover on cross-examination is a two-step process: 1) Generating a list of potential topics, and 2) Winnowing it down to the more important ones. Generating a list of potential topics is the easy part. Winnowing is hard. Lawyers are often reluctant to abandon any potentially productive line of inquiry, however unlikely the success. The following suggestions might help.

[1] Does a Topic Advance Your Theory of the Case?

You should not pursue a topic on cross-examination just because it is available. You may possess a certified copy of a witness's prior conviction for perjury, but unless your theory calls for a personal attack on the witness, there is no reason to bring it up.

[2] How Important is a Topic in Relation to Others?

In some cases, there may be only one or two potentially productive topics that advance your theory, so you can pursue them all. However, if you have a large number of potentially productive topics that could be raised, you will have to choose which ones to include in your cross-examination. The general advice of experienced advocates is that you should limit cross-examination to a few important issues rather than take the "shotgun" approach. After all, jurors have finite capacities to retain information, so they may forget your main points if you bury them among less significant issues.

[3] Is a Topic Consistent with Others You Want to Raise?

In general, you can categorize witnesses as reliable, unreliable, or evil. Rarely can you make a convincing case that a witness falls into more than one of these categories. If your theory of the case relies on the testimony of a witness, there is little point in impeaching. If the witness is a nice old lady with bad hearing and vision, and a dozen loving grandchildren, there is no point bringing up evidence of her bad character.

Choice of approach is not always easy. For example, you may need to elicit helpful testimony from a witness who also helped your opponent. If you also impeach that witness, you weaken the effect of the favorable testimony. If you choose not to impeach, then the adverse testimony goes unchallenged. If you leave out the helpful testimony, you might not have enough evidence to prove your case. The best approach often will be to do both, but to develop the affirmative evidence first. There are two reasons for this approach: 1) The witness undoubtedly will become less cooperative once the witness realizes he or she is under attack; and 2) experiments have shown that jurors pay less attention to testimony after the source of it has been shown to be unreliable.[56] If the favorable testimony is particularly important, then some consideration should be given to forgoing impeachment altogether.

A similar dilemma arises when your only real goal on cross-examination is impeachment. You need to decide why the jury is supposed to discount the witness's testimony. Is she unreliable because of a faulty memory, poor eyesight, because she viewed the events from an obstructed vantage point, or because she was influenced by the attorney and her friendship with the plaintiff? Or is she a cold-blooded liar with a motive to harm your client? It usually is unwise to mix theories.

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[56] *See* Brian Sternthal, Lynn W. Phillips and Ruby Dholakia, *The Persuasive Effect of Source Credibility*, 42 PUB. OPINION Q. 285, 289 (1978).

[4] How "Safe" Is the Topic?

One key element to an effective cross-examination is selecting "safe" topics. Adverse witnesses possess information favorable to your opponent, may be hostile, and may react defensively to any attempts to impeach them. If you fail to control the topics raised on cross-examination, the chances are that the witness will end up repeating the direct examination and avoiding or explaining away the weaknesses in it and the impeachment of it.

In order to accomplish this elusive goal of control, trial lawyer folklore teaches that you should never ask a question to which you do not already know the answer.[57] However, this advice cannot be taken too literally. You never will know for certain what answer a witness will give. No matter how many times the witness has said something before trial, and no matter how many sworn statements have been made, the witness still may say something completely unexpected when asked about it at trial.

What this aphorism means, therefore, is something slightly different: *you have the greatest control over a witness when you are asking for evidence that the witness has previously given in an interview, statement, deposition, or prior trial*. If a witness said it once, the witness is likely (but not certain) to say it again, and you have the ability to impeach or refute testimony if it is unexpectedly different. If a witness made a prior statement that the traffic light was green, she cannot now say it was red, she did not see it, or she cannot remember, without being impeached. It is therefore *relatively*, but not completely, safe to try to elicit that the light was green.[58]

High safety topics are those where you have a reason to believe that the witness will give particular evidence, and have the ability to refute contrary testimony. A topic is of high safety if:

- The witness has previously provided the information in a statement or deposition.
- The information can be found in admissible exhibits, such as photographs or records of criminal convictions, and the witness logically should know about the matter.
- You are asking about information the witness should know that other more credible witnesses will testify to.

Medium safety topics are those where the nature of the case raises a likelihood that the witness will testify a certain way, but you have no direct way to refute contrary testimony. The following are medium safety topics:

- Asking about facts consistent with human experience where unfavorable testimony would contradict common sense.
- Questioning a witness about an issue on which the witness assumes that an independent refutation witness is available.
- Asking the witness to confirm something implied in or inferable from a witness's prior statement, but something the witness has not previously been asked to confirm or deny.

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[57] The advice is most often attributed to Irving Younger. *See* IRVING YOUNGER, THE ART OF CROSS-EXAMINATION (1976).

[58] See Bergman, *supra* note 53, at 555–56.

- Hoping the witness will testify that something did *not* happen because the witness says nothing about it in an otherwise detailed prior statement. For example, if a police officer's accident investigation report is silent on whether your client had been drinking, there is a likelihood that the officer will admit that there was no evidence of intoxication. Common sense tells us that a police officer would have reported intoxication.

Low safety topics are those where you engage in wishful thinking, hoping that a witness will give favorable testimony, but having no way to be sure. Circumstances may suggest that a witness might know something relevant, but the witness has never said anything one way or the other. Thus, you have no reasonable basis to believe the witness's testimony will actually help you, but the witness also has never explicitly said anything to the contrary, so (you think) *maybe* the witness will unexpectedly provide favorable evidence. These are the kinds of topics lawyers caution against pursuing when they warn you not to ask questions if you do not know the answer. The risk is especially high under the following circumstances:

- The witness acted inconsistently with the fact sought. For example, you may be trying to corroborate your client's testimony that the victim pulled a knife on him. A written statement by the victim's roommate indicates that he was "eating pizza and watching TV" just before the shooting. Asking the roommate whether he saw the victim pull a knife is a low-safety topic. It is unlikely that the roommate would have continued calmly eating pizza while knives were being waved about.
- The weight of the testimony of other witnesses is to the contrary. For example, if four witnesses claim the victim had no knife, it is risky to ask the fifth to testify that the victim had a knife, even if her statement is silent on the point.
- The evidence would contradict common sense. For example, if you are cross-examining an eyewitness to a crime that occurred at night but in a well lighted parking lot, it would be risky to ask whether it was too dark to see clearly.

Completely unsafe topics are those where you ask a witness to change his or her testimony. You want the witness to agree to elements of your version of the story, despite the fact that the witness has given prior statements or testimony to the contrary. It is almost impossible to pursue such a topic without being argumentative, and it is just plain silly to try it. Bergman writes:

> The "your story" mode of cross-examination is often used in dramatic works [and] would result in asking these kinds of questions of the defendant [claiming self-defense]:
>
> "Mr. Jones, you actually struck the first blow, didn't you?"
>
> "And then you picked up a stick?"
>
> "And you chased Mr. Smith with this stick?"

> In drama, the witness breaks down and admits that the cross-examiner is correct. In actual trials, however, the witness usually just keeps saying "No." After all, the implicit question, "Aren't you an abject liar?" is rarely answered in the affirmative.[59]

[D] ORDER OF CROSS-EXAMINATION TOPICS

Most lawyers agree that cross-examination should not follow the chronological order of direct examination, especially if you intend to impeach the witness. The witness, through pretrial preparation, is likely to have learned this sequence well and be ready with damaging testimony before you have even asked your questions. Each question you ask may trigger a prepared paragraph of testimony rather than the one-word answer you hoped for. If the order is changed so that it jumps around in the chronology, then the witness will not have time to anticipate the direction of the examination. There is a risk in this approach, however. Judge Keeton criticizes the "hop, skip, and jump" organization as having the same effect on the jurors as it does on the witness: they will have so much difficulty following the sequence that they will not think about the answers.[60]

Judge Keeton's criticism assumes that the jury will have difficulty following a non-chronological cross-examination because it will be in no particular order. This need not be the case. You can deviate from chronological order and yet still allow the jury to follow the cross-examination. Most cross-examinations will contain only a few topics, which can easily be arranged according to the purpose for which they are offered. You might consider the following order:

1. High safety favorable evidence on contested issues.
2. High safety evidence that corroborates your main witnesses.
3. Medium safety favorable evidence.
4. Low safety topics if absolutely necessary.
5. Medium safety impeachment evidence.
6. High safety impeachment attacking the witness's testimony.
7. High safety impeachment attacking the witness personally.

This organization helps minimize damage caused by losing control of a cross-examination. You are more likely to lose control of medium-and low-safety topics than high safety ones, so you put the riskier topics in the middle. This also takes maximum advantage of our overall persuasion strategy of starting strong and ending strong.

Some lawyers recommend that the cross-examination end with one or more summary, or wrap-up questions. They argue that the jury needs to be told, in conclusory form, the point of your cross-examination.[61] The better wisdom is usually to save your summaries for closing argument. If you summarize in question form, you give the witness a wide-open opportunity to debate the proper conclusions to be drawn from the facts. Summary questions also may

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[59] *Id.* at 572–73.

[60] Robert Keeton, Trial Tactics and Methods 139 (2d ed. 1973).

[61] *See* F. Lee Bailey & Henry Rothblatt, Successful Techniques for Criminal Trials § 193 (1971).

be objected to as argumentative. In either situation, you have lost control of the crucial final moments of your examination.

A second concluding tactic sometimes recommended is to start to sit down, and then ask an "afterthought" question. This approach is based on the assumption that an antagonistic witness will relax when the witness thinks the examination is over, and will therefore be more likely to give a favorable answer if caught off guard. This tactic has two dangers: 1) the jurors also may have thought the cross had ended and miss the final point, and 2) the maneuver may appear too staged, especially if you try it more than once during a trial.

NOTES

1. ***When to use prior convictions***. Many lawyers automatically bring up prior convictions on cross-examination. Is this a good practice? Research by social psychologists suggests that this may be a waste of time, unless the prior convictions are serious or relate directly to truth-telling. Minor convictions not directly related to credibility have no effect on jurors' assessments of witnesses' credibility. *See* Roselle Wissler and Michael Saks, *On the Inefficacy of Limiting Instructions*, 9 LAW & HUMAN BEHAVIOR 37, 43–44 (1985). Of course, many prosecutors use impeachment as an excuse to prove the prior criminal record of a defendant when they really want it as substantive proof that the defendant is a "criminal type" (once a criminal, always a criminal), an ethically questionable practice.

2. ***Attacking witness vs. attacking testimony of witness.*** Choosing a cross-examination that attacks a witness personally, instead of one that attacks the probability that his or her testimony is accurate, is dangerous. In BYRON ELLIOTT AND WILLIAM ELLIOTT, THE WORK OF THE ADVOCATE 316–17 (1888), the authors point out that cold-blooded liars are rare:

> Witnesses are often mistaken, but they are seldom guilty of perjury. It is unintended error rather than deliberate falsehood that makes human testimony unreliable. There are, it is true, many false witnesses, but there are many more whose deviation from the truth is attributable to mistake rather than intentional wrong. If, therefore, there is nothing known of the character of a witness that subjects him to suspicion, and nothing in his demeanor or the substance of his testimony that justly excites a belief that he is testifying falsely, the better course is to assume that he is mistaken, and cross-examine on that assumption.

A personal attack also may not go over well with the jury. *Consider* SYDNEY SCHWEITZER, CYCLOPEDIA OF TRIAL PRACTICE, vol. 2: 634 (2d ed. 1970):

> The type of witness being cross-examined will also govern to a large extent your cross-examination as to possible motive to distort or exaggerate. Where the witness is of the superior type, as a clean-cut young executive who is able to impress the jury with his ability and inherent honesty, it would be folly to over-stress his friendship or relation with the other side in your cross-examination.

3. ***Argumentative cross-examination.*** Some lawyers occasionally employ deliberately argumentative cross-examination in which they insinuate a set of facts that does not exist. This kind of cross-examination by innuendo has become infamous because of the "Isn't it true you really enjoyed it?" kind of question asked of rape victims. One attorney proudly claims that he won an acquittal for the renowned blues singer Billie Holiday because the jury believed her to have been framed based on his own questions that were objected to or stricken from the record. JOHN ERLICH, THE LOST ART OF CROSS-EXAMINATION 142–47 (1970). The empirical evidence suggests that this kind of cross-examination is rarely successful. Saul Kassin, Lorri N. Williams and Courtney Saunders, *Dirty Tricks of Cross-Examination: the Influence of Conjectural Evidence on the Jury*, 14 LAW & HUMAN BEHAVIOR 373, 381 (1990). It also is obviously unethical.

Other litigators believe you should directly confront a major witness for the other side with your own theory of the case, and ask the witness to agree to it, even when you know the witness will not. For example: "Isn't it true that what really happened was that my client acted in self-defense after you pulled a knife on him?" Those who support this as a legitimate purpose point out that it gives you the opportunity to preview your closing argument. *See* F. LEE BAILEY & HENRY ROTHBLATT, SUCCESSFUL TECHNIQUES FOR CRIMINAL TRIALS § 193 (1971). *But see* ROBERT KEETON, TRIAL TACTICS AND METHODS 141 (2d ed. 1973): "[I]t is a crude way of doing what generally can be done more effectively through other means. Long before cross-examination you have ample opportunity to present your theory of the case . . . when you are examining the jury panel, reading your pleadings, or making an opening statement." By asking such a question, you give a witness the chance to refute your theory, which is likely to be more detrimental than beneficial.

4. ***Should you ever go fishing?*** It is hardest (perhaps impossible) to maintain control of cross-examination when you pursue low safety topics. For that reason, most effective trial lawyers do not use cross-examination as a fishing expedition. If you did not pursue the issue in discovery, and have no idea what the witness will say, you probably should not pursue it on cross-examination. However, William Gallagher suggests that there are times when one should plan a "fishing trip," or exploratory cross-examination. This consists of having the witness repeat the direct testimony, as damaging as it may be, probing for a weak spot. He suggests using this as a last resort for a witness who tips the scales in favor of the opponent. WILLIAM GALLAGHER, TECHNIQUE OF CROSS-EXAMINATION, IN CIVIL LITIGATION AND TRIAL TECHNIQUES 552–72 (H. Bodin ed. 1976). Before attempting this path, you should ask yourself what your chances are of discovering anything new that did not appear during pretrial investigation, interviews, and depositions of the witness.

> Where the witness has left no loophole in his direct examination, and you know of no weak points that could profitably be exploited on cross-examination, do not attempt to cross-examine. Dismiss the witness with a curt gesture that says: "too unimportant to bother about." [Do not] trust to providence that your interrogation will develop one or more weak points. [Unfavorable testimony] carries more weight than it would have had it been elicited on direct examination[62] .

[62] Sydney Schweitzer, Cyclopedia of Trial Practice 614 (2d ed. 1970).

5. ***Should you ever try to convince a witness to change testimony?*** Some lawyers suggest that it may be possible to compel an adverse witness to change his or her testimony by the inexorable logic of facts from which he or she cannot escape. *E.g.*, HARRY S. BODIN, PRINCIPLES OF CROSS-EXAMINATION, IN CIVIL LITIGATION AND TRIAL TECHNIQUES 444 (1976). They recommend laying out the facts before such a witness, and demanding that the witness confirm the attorney's conclusion about those facts. Is this a realistic possibility? Isn't it far more likely that the witness will simply argue with your conclusions, dig in, and become more stubbornly committed to his or her original testimony?

> 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 . . . they resent an attack upon their story as they would one upon their integrity.

FRANCIS L. WELLMAN, THE ART OF CROSS-EXAMINATION 10 (1923).

6. ***Should you ever try to introduce exhibits?*** On appropriate occasions, you may want to use diagrams or other exhibits during cross-examination, assuming the rules of evidence in your jurisdiction permit it. This tactic should be employed cautiously. Obviously, you can go over exhibits introduced or referred to by your adversary — they are part of the direct examination However, remember that before introducing a *new* exhibit, you must lay a foundation, and the witness may not be cooperative. The witness may find fault with it, denying an illustration is accurate or claiming it contains selective distortion. Not only does this foundation failure mean that you cannot use the exhibit, it taints future use by your own witnesses.

§ 7.07 PREPARING CROSS-EXAMINATION QUESTIONS

After selecting and ordering topics, you must turn them into questions. This may be the most important step in preparing an effective cross-examination. Good questions are leading, simple, brief, non-argumentative, and use the witness's own words whenever possible.

[A] WRITE OUT YOUR QUESTIONS

Contrary to the usual advice about minimizing notes and appearing spontaneous, you probably will have to write out your questions word for word if you seriously expect to maintain control during cross-examination. If you use no notes, or only sketchy and inadequate ones, the cross-examination may become disorganized or a topic omitted. Worse, a question that is not phrased precisely can disrupt your entire examination if it is objected to by your opponent or if it is broad enough to provide the witness with an opportunity to repeat damaging testimony. Ask yourself whether you are certain you can remember the exact foundation questions necessary to impeach with a

criminal conviction, or exactly how many feet away from an accident scene each of several witnesses was. If not, then you would be well advised to write out your questions.

[B] USE THE WITNESS'S OWN WORDS WHENEVER POSSIBLE

A corollary of the principle that a topic is of highest safety if you can impeach a bad answer, is that your questions should stick to the exact words used in the prior statement whenever possible. Save the inferences, explanations and exaggerations for closing argument. For example, imagine that you are cross-examining a witness who said in a deposition that he had consumed five beers before the accident. Suppose you ask:

Q: You were drunk the night of the accident, weren't you?

A: No.

What has happened to your high safety topic? You converted it to a low safety one by asking about something that did not appear anywhere in the witness's deposition. You may eventually be able to convince a judge that "five beers" is inconsistent with "not drunk," so that you can impeach the testimony, but you have lost control of the examination. If you had stuck to the words the witness used in the deposition, you would have been in a much better position.

Q: You had five beers the night of the accident, is that right?

A: Yes.

If the witness tried to deny this statement, you can impeach by proving where he said exactly that in his deposition.

[C] INDEX THE DEPOSITIONS AND PRIOR STATEMENTS

The main reason for carefully preparing specific questions based on the witness's own prior statements is for control. If the witness deviates from his or her prior version of the events, at least as to material issues, you have the ability to impeach that inconsistent statement. However, this ability is lost if you cannot *find* the specific prior statement. Looking through a hundred pages of a deposition to find the place where the witness said there were two people present, not three, can be an impossible task. For that reason, you need to develop some kind of indexing method. The simplest way is to note beside each question you prepare exactly where it came from — something you can only do if the questions are written out.

For example, if you have prepared a high safety question that comes directly from lines 11–13 on page forty-six of the witness's deposition, you might make some notation like "D46/11-13" in the margin beside your question. That way, if you need to impeach, you can pick up the deposition and go right to the appropriate sentence without dropping a beat. If you have prepared a medium safety question that cannot be refuted, you could put an "X" in the margin.

That tells you just to move on if the witness gives a bad answer — not to press the point because you have no way to refute it.[63]

[D] BREAK YOUR TOPICS DOWN INTO THE SMALLEST POSSIBLE UNITS.

The central concept of successful cross-examination is that a *topic* and a *question* are different things. Your must divide your topics up into their smallest practical "fact units", and ask about each one separately. For example, suppose you represent the defendant in a personal injury action. Your expert will testify that most of plaintiff's medical problems were the result of a pre-existing injury. To corroborate your expert, you intend to elicit from the plaintiff on cross-examination the fact that she had the preexisting injury. You could just ask:

Q: Ms. Amir, isn't it true that your back had previously been injured in an automobile accident in 1995?

Unless your adversary is an idiot, the witness will be well prepared to respond on this topic. She might answer:

A: Not in the same place. That was an upper back injury that went away after a few weeks. This was a lower back injury.

If you break this topic down into small fact units which can be strung together in a fast-paced cross-examination, you may never give the witness a chance to give her prepared speech:

Q: Ms. Amir, after the February 15th accident, you experienced back pain?

A: Yes.

Q: Stiffness?

A: Yes.

Q: Difficulty sleeping?

A: Yes.

Q: Difficulty walking?

A: Yes.

Q: You were also in an accident in March, 1995, is that right?

A: Yes.

Q: That's two years before the collision with Todd Kelting, right?

A: Yes.

Q: In 1995, you were hit by a city bus, weren't you?

A: Yes.

Q: And you went to the hospital?

[63] If the depositions are numerous, it is becoming common to enter them into a laptop computer, so an associate can conduct word searches for prior inconsistent statements that arise unexpectedly.

A: Yes.

Q: In fact, you spent two weeks in the hospital, isn't that right?

A: Yes.

Q: Following that first accident, you experienced back pain, didn't you?

A: Yes.

Q: Stiffness?

A: Yes.

Q: Difficulty sleeping?

A: Yes.

Q: Difficulty walking?

A: Yes.

Q: And you were treated by Dr. Anthony Yorio?

A: Yes.

Q: Is he a back specialist?

A: Yes.

Q: Isn't it true that he told you in early 1996 that these symptoms might never go away completely?

A: Yes.

[E] ASK ONLY ONE FACT PER QUESTION.

Questions should be narrowly tailored, each one containing a single fact. For example, if you ask "At 11:00 pm, you went downstairs to the kitchen to get a drink of water, but you forgot your glasses, is that right?" the witness could answer the entire question "no" if the witness went to get an apple, despite the fact that the witness in fact forgot her glasses when she went down to the kitchen at 11:00 o'clock. You will be especially prone to asking compound questions in situations in which most of the facts are uncontested or unimportant. However, good cross-examination breaks this topic down into single fact questions:

Q: Were you home at 11:00 pm?

Q: You went downstairs, didn't you?

Q: You went to the kitchen?

Q: You got a drink of water?

Q: You were not wearing your glasses, were you?

[F] ALWAYS ASK LEADING QUESTIONS

Each question should suggest the desired answer. That is the only way you can be reasonably certain the witness will provide the evidence you need — you cannot prep adverse witnesses. A second advantage of leading questions is that you can choose the most persuasive words available. Word choice can affect how the jurors conceive the events. In one famous experiment, subjects

were shown a film of a car accident. Some then were asked how fast the cars were going when they "hit," and gave estimates averaging thirty miles per hour. When another group was asked how fast the cars were going when they "smashed," answers averaged over forty miles per hour.[64]

The best form of a leading question states a fact and asks the witness to agree with it:

Q: You went downstairs, is that right?

However, a whole series of questions ending in "is that right?" will drive the jury crazy.

Q: You went downstairs, is that right?

Q: You went to the kitchen, is that right?

Q: You opened the knife drawer, is that right?

Q: You took out a butcher knife, is that right?

Q: You cut an apple with it, is that right?

If you break your questions down into small units and ask them one after another, you can omit the suggestion part of the question while remaining in control. Your voice inflection can make the statement of fact sound like a question. For example:

Q: You went downstairs, is that right?

Q: You went to the kitchen?

Q: You opened the knife drawer?

Q: You took out a butcher knife?

Q: You cut an apple with it?

[G] KEEP YOUR QUESTIONS SIMPLE

Your questions must be understandable to both the witness and jurors. Keep the language simple and universal, especially when cross-examining a witness who speaks in jargon. Compare the following:

a) Q: Did you then proceed to exit your patrol vehicle?

b) Q: Did you get out of your car?

[H] ASK ABOUT FACTS, NOT CONCLUSIONS.

The time for drawing conclusions is closing argument, not cross-examination. Asking conclusory questions will sometimes draw an objection as argumentative, and is always a bad idea. It is not the *witness* who must agree to your conclusions, but the jury. One common type of conclusory question asks the witness to agree to your characterization of the facts. The problem is that the witness probably does *not* agree with you, and will gladly tell the jury so.

Q: It was 2:00 a.m.?

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[64] Elizabeth Loftus et al., *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, 13 J. VERBAL LEARNING & BEHAVIOR 585 (1974).

A: Yes.

Q: It was raining?

A: Yes.

Q: There were no streetlights, are there?

A: Nope. The power was out.

Q: *So it was very dark that night, wasn't it?*

A: No, I could see all right.

The other common type of conclusory question is one that summarizes testimony. Because a summary must be in question form, it again opens the door to a witness explanation.

Q: It was 2:00 a.m.?

A: Yes.

Q: It was raining?

A: Yes.

Q: There were no streetlights, are there?

A: Nope. The power was out.

Q: You were in your car?

A: Yes.

Q: You were a block away from the scene?

A: Yes.

Q: *So it's your testimony that on a dark rainy night you could clearly identify the defendant from a block away when there were no streetlights?*

A: Yes, there was enough light.

[I] DON'T ASK THE WITNESS TO EXPLAIN AN ANSWER

As soon as you ask a witness "Why?," you have given the witness free rein to say anything the witness wants. The classic illustration of this problem is the story about a case in which the defendant was charged with battery for biting off the complaining witness's ear. On cross-examination, the eyewitness admitted that he did not actually see the defendant bite off the victim's ear, but was nevertheless certain the accused had done so. The defense attorney asked the fatal question:

Q: If you didn't see the defendant bite the victim's ear, how can you say you are certain he did so?

A: Because I saw him spit it out.[65]

[65] I first heard the story from the late Irving Younger. It also appears in FRED LANE, GOLDSTEIN TRIAL TECHNIQUE § 19.30 (3d ed. 1984).

NOTES

1. ***Asking non-leading questions.*** Is there ever a justification for asking a non-leading question during cross-examination? Most trial practitioners take the position that you never should ask anything but a leading question, whether you are impeaching or eliciting helpful testimony. *See, e.g.*, IRVING YOUNGER, THE ART OF CROSS-EXAMINATION 22–23 (1976). Others suggest that open questions sometimes may be appropriate to break up the monotony of leading questions, or may be necessary when you are on a desperate fishing expedition and lack a good-faith basis for inserting a particular factual suggestion into your question. *See* Paul Bergman, *A Practical Approach to Cross-Examination: Safety First*, 25 UCLA L. REV. 547, 553 n.12, 573–74 (1978).

2. ***Disguising the purpose of your questions.*** A more sophisticated technique for turning a topic into a series of questions is to build in some misdirection to disguise your true purpose. For example, suppose in a criminal case that an alibi witness says he and the defendant went to a particular movie between 9:00 p.m. and 11:00 p.m. The prosecutor is convinced he is lying, and has a rebuttal witness (the theater manager) who will say that the particular movie was not playing on that date. If the prosecutor confronts the alibi witness directly about the name of the movie, he may answer, "We go to movies all the time, so I might have the title confused." There goes the value of the rebuttal witness! Instead, the prosecutor might have asked some initial questions that suggest that the witness is wrong as to the day of the week they went to the movie. In order to strengthen the alibi, is it not reasonable to expect that the witness will become increasingly positive about his memory, more and more certain that he and the defendant went to that movie on the day of the crime? The rebuttal is now set up.

3. ***Being subtle***. You can sometimes catch more flies with honey than with vinegar. In the following example, suggested by FRANCIS X. BUSCH, LAW AND TACTICS IN JURY TRIALS, vol. 3: 563–64 (1960), the plaintiff brought suit for damages for his unlawful discharge from employment. The defense called a witness who testified that the plaintiff was incompetent and therefore deserved to be discharged. Cross-examination was designed to reveal that this witness was biased against the plaintiff because of a broken romantic relationship. One possibility would have been to have asked the witness bluntly:

Q: Isn't it true that you are making all this up just to get even with Ted Fisher, who left you for another woman?

It is not likely that the witness would have admitted this. Instead, the plaintiff's attorney asked the following questions in a friendly and non-threatening way:

Q: Prior to your complaining about Mr. Fisher's competence, you had gone out socially with him a few times, correct?

A: What do you mean by that?

Q: Gone out to the movies or dinner?

A: Yes, a few times.

Q: How many?

A: I don't remember.

Q: I am not suggesting anything improper, because you were divorced and the plaintiff was single, isn't that so?

A: Yes.

Q: The last time you went out with him was in the spring of 2001, correct?

A: Yes.

Q: Now, the first time that you complained to the manager about Mr. Fisher's competence was in the summer, 2001, was it not?

A: Yes, that's true.

Q: And that was after he had stopped going out with you?

A: The two had no relationship.

Q: I am sure of that. One last question, Mr. Fisher got married in May, 2001, didn't he?

A: I think so.

§ 7.08 CONDUCTING THE CROSS-EXAMINATION

[A] LAST-MINUTE PREPARATION

In order to conduct an effective cross-examination, there are several last minute matters you should attend to.

- **Listen to the direct examination.** Never assume a witness will testify in exactly the same way at trial as the witness did in a deposition. If you already have your cross-examination prepared, you can devote direct examination to listening carefully to the testimony rather than thinking up questions. Witnesses occasionally will say extraordinary things or open the door to previously inadmissible evidence, which you may miss if your attention is focused elsewhere.
- **Decide whether to abandon any planned questions.** Based on the direct examination, you may face a decision whether to forgo questions because they were covered on the direct examination. Generally, of course, you should proceed with your planned cross-examination. Repetition of favorable evidence is a good idea. However, in three situations you may choose to forgo a line of questions: 1) You may have to drop some topics because your opponent limits the scope of the direct examination; 2) You may decide to forgo impeachment if the impeaching effect of some prior act is explained away; or 3) The witness may unexpectedly put evidence in a *more* favorable light than you expected, and might retract it or dilute it if you repeat the question on cross-examination.
- **Decide whether to impeach by prior inconsistent statement.** Obviously, you cannot know in advance whether a witness will give direct testimony inconsistent with prior statements. Listen during

direct examination, and decide whether it is worth impeaching any inconsistencies. In general, the only testimony worth impeaching is testimony that contradicts something favorable the witness said in a prior statement, and which you had planned to elicit during your cross. If you organized your cross-examination with favorable testimony first, it will be an easy matter to drop the topic from the beginning of your cross and move it to the middle. After all, it has just become a medium safety topic. If you have done your preparation, you already have noted in the margin where the matter was covered in the deposition, so you will be able to impeach effectively. If the witness gives inconsistent statements on unimportant issues, you probably should forgo impeachment, unless you can string together a lot of small inconsistencies. The problem will be finding the original versions of these small details among dozens of pages of deposition. The task may be impossible unless you have a recess before the cross-examination.

[B] MAINTAINING CONTROL

[1] The Single Most Important Technique for Maintaining Control

Talk fast.

[2] Controlling Runaway Witnesses

If you ask the short, simple, one-fact, leading questions you have written out, keeping a fast pace, the issue of runaway witnesses should rarely arise. When it does, how do you handle a witness who is evasive, keeps volunteering information, or insists on explaining or justifying "yes/no" answers? You can harm yourself in many ways if you try to bully the witness into stopping these explanations; the witness can harm your case if you do not. Should you try to limit a witness's answers? There is probably less agreement among lawyers on this point than on any other.

Some lawyers favor trying to limit a witness's answers and prevent the witness from volunteering testimony. They argue that you must do *something* to try to control a hostile, loquacious witness, or risk losing complete control of your cross-examination. Three tactical approaches are available:

- ***The preventive approach***. Some lawyers recommend that you begin your cross-examination with a question such as, "I am going to ask you some specific questions, so please answer them with a simple 'Yes' or 'No' if possible; can you do that?"[66]
- ***The formal-objection approach.*** Other lawyers recommend that you do not try to deal with a difficult witness yourself, but that you enlist the help of the judge by objecting to anything beyond a "yes"

[66] *But see* Jeffrey H. Hartje, *Cross-Examination — A Primer for Trial Advocates*, 8 AM. J. TRIAL AD. 11, 51–52 (1984) (may draw an objection because witnesses usually permitted to explain answers).

or "no" answer, such as "If the Court please, I object to the volunteered portion of the witness's answer and ask that the portion of it following the answer 'yes' be stricken."[67]

- ***The self-help approach.*** Some lawyers suggest that you appear weak and inexperienced if you have to go crying to the judge for help. They recommend that you handle the matter yourself. You may simply cut off volunteered testimony by stating, "Thank you, you have answered the question," or "Your lawyer can ask for explanations on redirect." Alternatively, you can be more sarcastic, saying something like, "Perhaps you did not hear my question. All I asked you was [repeat the question]. Do you think you can try to answer it?"

Others assert that the better approach is to tolerate the explanations and evasions, for several reasons:

1) Many judges feel that witnesses should be allowed to give explanations. You do not want to be rebuked by the judge.
2) You run the risk of giving the jurors the impression you are trying to keep something from them. There is some psychological data that an attorney who appears too one-sided is less persuasive than one who appears to consider both sides.[68]
3) Your opponent is likely to elicit the explanation on redirect examination anyway.
4) You may not realize that you have phrased the question in a way that it is not answerable by "Yes" or "No", in which case you will look like an idiot.

My own advice is that you do nothing, at least at first. This may seem to contradict the basic premise that cross-examination must be tightly controlled, but it does not. If you have carefully chosen and organized your topics, broken them down into safe questions which are written out, and indexed the deposition for impeachment purposes, then you have minimized the likelihood that this issue will arise at all. The concept of control and safe questions assumes merely that you have the ability to impeach a witness who testifies differently; it has nothing to do with a witness who amplifies, explains, or rambles. If a witness actually changes her answer, you can impeach; if she merely tries to explain away the damaging parts, you probably should do nothing. The witness's own obvious attempts at evasion will be a more effective impeachment.[69]

There comes a time, however, when the witness's continual evasiveness and hostility may deserve response because it has been a consistent pattern over several questions. In such situations, it is best to try to control the witness yourself, rather than asking the judge. The self-help techniques suggested above should be tried first. Only if a witness is completely out of control should you seek the judge's assistance.

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[67] F. Lane, *supra* note 64, at §§ 19.78.

[68] *See* JEFFREY T. FREDERICK, THE PSYCHOLOGY OF THE AMERICAN JURY 188 (1987).

[69] If you have any doubts, watch the cross-examination of Captain Queeg in *The Caine Mutiny*.

[3] Knowing When to Abandon a Line of Questions

There are two reasons for deciding to stop pursuing a line of questions, one good and one bad. It will occasionally happen that the witness will give you an unexpectedly *favorable* answer partway through a planned line of questions. If you continue to press, the witness may retreat from that position and the point is lost. For example, suppose the defense attorney had prepared the following cross-examination of an eyewitness to a car-pedestrian accident, focusing on the witness's poor opportunity to observe the details of the accident:

Q: You did not see the defendant's car before the collision, did you?

Q: You were talking to a friend?

Q: You were looking at your friend?

Q: Then you heard brakes squeal?

Q: You did not look toward the car until after the sound of the brakes, right?

Q: So you did not see whatever it was that caused the driver to slam on the brakes, did you?

Suppose the actual cross-examination went like this:

DEFENSE ATTORNEY: You did not see the defendant's car before the collision, did you?

A: No.

Q: You were talking to a friend?

A: Yes.

Q: You were looking at your friend?

A: Yes — well, except for when my friend pointed out the plaintiff who was walking down the middle of the street with a bottle of vodka in his hand.

You probably should not continue the line of questions! It can't get any better than this.

The second reason to stop cross-examining is because you were pursuing a medium safety topic, and the witness starts giving bad answers. Continuing the example above, suppose the cross-examination went like this:

Q: You did not see the defendant's car before the collision, did you?

A: Yes.

Q: But weren't you talking to a friend just before the accident?

A: No, that was several minutes before the accident.

It is probably time to abandon this line of questions.

[4] Know How to Impeach with a Prior Inconsistent Statement[70]

The reason that high safety questions are recommended is because you can impeach a witness who changes testimony. This will only work if you know how to effectively carry out the impeachment. To do this, you must understand seven things:

- ***Impeachment is not the same as refreshing recollection.*** If, in answer to a safe question taken directly from a prior statement, a witness testifies he or she does not remember, then you may choose to refresh recollection. However, if a witness gives an answer unexpectedly different from one contained in a prior statement, it does not mean the witness has forgotten the facts. You cannot refresh memory when the witness claims to be able to remember (nor has a proper foundation been laid to allow it); you must impeach and show the current memory to be unreliable.
- ***You impeach inconsistencies, not differences.*** Witnesses do not have to use exactly the same words every time they tell a story. They may say a car was going "around 60 m.p.h." one time, was going "50–60 m.p.h." another time, and was going "fast" a third time. These are different, but consistent. You will only look silly if you try to impeach. If a witness says a car was going 60 m.p.h. in the deposition and 30 m.p.h. at trial, *that* is an inconsistency.
- ***You are not trying to talk witnesses into changing their testimony, but to prove they are unreliable.*** You are supposed to be impeaching, not trying to talk the witness into changing his or her testimony. You must accept the fact that the witness's memory has changed. No matter how sure you are that it was just an inadvertent misstatement, you will not convince the witness to testify differently, no matter how many times you ask the witness to re-read a prior statement. The only thing that will happen if you try is that the witness will repeat and emphasize the unfavorable testimony, you will have completely lost control of the examination, and you will have wasted the opportunity to impeach. If it turns out the witness actually had made only an inadvertent misstatement, the witness probably will make the correction anyway when confronted with a prior inconsistent statement, so you lose nothing by assuming the worst and impeaching accordingly.
- ***Inconsistent testimony does not mean the witness is evil.*** When a witness testifies to facts different from those contained in a prior statement, it may be an inadvertent misstatement, a result of the natural process of erosion of memory. It might be an intentional change due to deliberate perjury, but is not necessarily so.
- ***You impeach direct examination testimony, not cross-examination.*** The general rule governing impeachment by prior inconsistent statements is that you may impeach testimony directly

[70] *See also* Louis M. Natali, *Cross-Examination,* 7 AM. J. TRIAL AD. 19, 26–41 (1983) (with several examples).

related to the topics brought up on direct examination only. If you bring up an issue for the first time on cross-examination and get bad answers, your only recourse is to abandon the line of testimony.

- ***You impeach specific factual assertions, not inferences.*** You can impeach a witness who disagrees with a specific fact or opinion written down in a previous statement. However, if the witness disagrees with your *interpretation* of those facts, you cannot impeach. For example, suppose a witness stated in a deposition that the defendant's car was traveling 60 miles an hour. If she testifies the car was going 30 miles per hour, you can impeach. If you ask for an interpretation, such as "Was the car going very fast?" and the witness says "No," you cannot impeach her by proving that she once said the car was going 60 miles per hour.
- ***Impeachment always entails risk.*** Witnesses will often be able to explain away an apparent inconsistency, and you will often be unable to successfully complete the impeachment. Therefore, conduct this kind of impeachment at the same time as other risky cross-examination — in the middle.

The technique for impeachment is as follows:

Step one: lock the witness into a definite answer. You cannot impeach unless the witness has first committed him-or herself to particular testimony. Assume you represent the defendant in a personal injury case who is accused of running a red light and striking a pedestrian. The plaintiff calls a witness who said in a prior statement that the light was still green when your client drove through. On direct examination, suppose the witness cannot remember the color of the traffic signal. Can you impeach? No; the witness has not given any testimony on the matter. On the other hand, if the witness testifies on direct examination that the light was red, this is an inconsistency. Are you ready to impeach? No.

Your first step in the impeachment process is to lock the witness into a definite answer to a specific question. Try to do this without unnecessarily repeating the unfavorable testimony. It is probably a bad idea to ask the witness, "Are you certain of your testimony?" For example:

Wrong.

Q: You said the light was red?

A: That's right.

Q: Are you sure?

A: Oh yes, I looked at it very carefully.

Q: Could you be mistaken?

A: No.

Instead, remember you are laying a foundation for impeachment, in which you will suggest that the witness has recently changed his or her testimony. Emphasize the *old* version (the one that was changed), not the trial version. For example:

Right.

Q: The light was green, wasn't it?

A: No, it was red.

Q: Not green?

A: No.

Sometimes a witness who is aware of the inconsistency will refuse to be pinned down. For example:

Q: The light was green, wasn't it?

A: No, I think it was red.

Q: Are you saying definitely it was not green?

A: No, I'm not saying that, only that it might have been red. I wasn't paying close attention.

Can you impeach by prior inconsistent statement? No. But all is not lost. You may ask the witness to confirm that her memory does not appear to be very good. This was the purpose of the impeachment in the first place anyway — proving that the witness's memory is unreliable— and the witness has made it easy for you! Recall that you are *not trying to get the witness to change his or her testimony*. If you press the matter, the witness will probably only explain away the prior statement by repeating that the witness is uncertain.

Step two: Prove that a prior statement on the subject was made. Once you have the witness locked into a specific answer, you must prove that the witness made a prior statement concerning the same issue. You can do this by asking the witness about it, being specific about the time, place, and circumstances. For example:

Q: Do you remember talking to an investigator named Patricia Luna at your house?

A: Yes.

Q: That was on September 16?

A: Yes.

Q: She asked you about the facts of this case, right?

A: Right.

Q: Do you remember answering questions about the scene of the accident?

A: Yes.

In most jurisdictions, you are required to inform the witness of the time, place, and circumstances of the prior statement before you can refer to it. Even if not strictly required, it is good tactics to do so. It shows the witness and jury that you have a specific prior statement to which you are referring, and are not just fishing.

At this point in the process, some trial attorneys ask additional questions to build up the reliability of the prior statement. While most prior statements are hearsay unless they were made under oath,[71] and you cannot argue that

[71] Fed. R. Evid. 801(d)(1)(A).

the jurors should believe a prior statement for its truth, you may demonstrate that the prior statement is equivalent to trial testimony. This strengthens your impeachment, because it eliminates any logical explanation for the inconsistency other than bad memory or dishonesty. For example:

Q: Two days later, Ms. Luna returned to your house, is that right?

A: Yes.

Q: She showed you a typed summary of your earlier conversation?

A: Yes.

Q: She asked you to read it over and sign it if it was accurate, correct?

A: Yes.

ATTORNEY: May I approach the witness?

COURT: Yes.

Q: Handing you defense Exhibit G for identification, is that your signature at the bottom?

A: Yes.

Q: This is the statement to Ms. Luna?

A: Yes.

Q: You read the statement over before signing it, correct?

A: Yes.

Q: You were being truthful when you made this statement?

A: Yes.

Step three: Reveal to the jury that the prior statement on this specific subject was materially different. The final phase of this impeachment is to prove the contents of the prior statement and expose the inconsistency. Remember that you are proving this to the *jury,* not the witness. You must reveal the contents of the prior statement to the jury; it is irrelevant whether you reveal it to the witness. The easiest way to do this is to read aloud the precise inconsistent passage and ask the witness to confirm that he or she made it. For example:

Q: Directing your attention to the second line in the second paragraph of that statement, didn't you say: "When the car drove through the intersection, it had a green light?"

If you are impeaching based on a deposition, the process is slightly more cumbersome:

Q: Directing your attention to page twenty-six, lines four through seven, isn't it true that you were asked these questions and gave these answers: Question: "What color was the light?"; answer: "Green"; question: "Are you certain?"; answer: "Yes"?

As a courtesy, you might lean over and show the witness the page and line you are referring to, *but do not hand the document over to the witness and ask the witness to peruse it.* You are not refreshing memory or trying to convince the witness to change her testimony.

If the witness admits the inconsistency, then the impeachment is complete, and you usually are not permitted also to introduce the statement into evidence unless you can lay the foundation for a hearsay exception.[72] However, if the witness denies or does not remember making the statement, you may introduce it and read the inconsistent portion to the jury. Under Federal Rule of Evidence 613, the statement is admissible without further foundation, but in some jurisdictions, the statement must first be shown (not merely read) to the witness.

[5] Know How to Impeach with a Prior Inconsistent Omission

The most difficult kind of impeachment is to attack unexpected damaging trial testimony on the grounds that it is inconsistent with what was *not* said in a prior statement. For example, a police accident report may be silent on three key facts: whether the defendant was intoxicated, whether the plaintiff appeared hurt, and what speed the defendant was traveling. Because it is an experienced police officer preparing the report who is trained to look for signs of intoxication, injury and vehicle speed, the absence of any affirmative report suggests that there probably was nothing unusual about any of these things. In all likelihood, the officer did not think the defendant was drunk or speeding, nor that the victim was seriously hurt, or he would have written it down.

Suppose that the officer testifies unexpectedly at trial that the defendant appeared intoxicated and had been driving 80 m.p.h., and the plaintiff appeared seriously hurt. You cannot impeach this testimony with prior inconsistent statements, because the police report contains no inconsistent statement. It contains no statement at all. Before you can impeach by the omission, you first must establish that the failure to mention a fact in the prior statement is an implied statement that the fact did not exist. This may be a difficult task, especially if the witness is aware of the problem and has a logical explanation for why some observations were omitted from an otherwise detailed statement.

Your first step is to use some common sense, and ask yourself whether the prior omission really amounts to an inconsistency. Two factors affect the likelihood of this: how detailed the prior statement is and how important the omitted fact is in relation to facts included. Thus, if the police report consisted only of a general one-paragraph summary, then it would not mean much that facts were omitted. But if the accident report were detailed, failure to include any reference to a driver's intoxication (surely an important fact to the police) logically suggests that the officer saw no evidence of it.

The second step is to decide whether there is a significant inconsistency, even assuming the prior statement represents all of the witness's knowledge. In our example, there is certainly an inconsistency between testifying to intoxication and the report's implication that there was no evidence of intoxication. There is also an inconsistency between the testimony that the plaintiff appeared seriously hurt and the report's implication that there were no significant injuries. But suppose the statement noted the defendant was

[72] *E.g.*, Fed. R. Evid. 801(d)(2) (statement made by party-opponent).

traveling at an "excessive speed," but was silent on the exact amount. Testimony at trial that he was going "eighty miles per hour" is not significantly inconsistent with the absence of such an estimate in the report, given that the report does mention "excessive speed." Even assuming that the officer's failure to be specific in the statement meant he was unsure of the exact speed, that is not inconsistent with — in fact it corroborates — the trial testimony. The giving of further consistent details at trial that make prior damaging statements even more damaging is not making inconsistent statements, nor is it wise to emphasize such damaging testimony by going over it.

If you decide to attempt to impeach based on a prior omission, you must add a preliminary step to the impeachment technique discussed for prior inconsistent statements. You must eliminate (as far as possible) the possibility that the fact testified to was inadvertently omitted, or omitted because the witness thought it unnecessary to include it. For example:

Q: Officer Pryor, you investigate many similar cases, don't you?

A: Yes.

Q: You testify often about accidents?

A: Yes.

Q: Do you prepare an accident investigation report for each one?

A: Yes.

Q: You use the reports to refresh your recollection about a particular case before trial, correct?

A: Yes.

Q: They help you keep the facts straight?

A: Yes.

Q: So it is important that you be accurate in these reports?

A: Yes.

Q: You include all important facts you observe, don't you?

A: Yes.

Q: You include all facts that might have some bearing on who was at fault?

A: Of course.

Q: And you would include any facts that showed one driver might have violated a traffic law, isn't that correct?

A: Yes.

Q: Do you also write down if anyone was seriously injured?

A: Yes.

Now you are ready to begin the three step impeachment for prior inconsistent statements. First, lock the witness into specific trial testimony. You will have no choice but to emphasize the unfavorable evidence, because there is no prior version to use

Q: It is your testimony today that the defendant was intoxicated, is that right?

A: Yes.

Second, prove the prior statement

Q: You prepared an investigative report on this accident, didn't you?

A: Yes.

Q: You signed that report?

A: Yes.

ATTORNEY: May I approach the witness?

COURT: Yes.

Q: Handing you defense Exhibit F for identification, is that your signature at the bottom?

A: Yes.

Q: This is your report?

A: Yes.

Q: You were being truthful and accurate when you made this statement?

A: Yes.

Third, reveal the inconsistency.

Q: Please look over your report and answer this question: Did you make any mention whatsoever of any evidence of intoxication?

A: No.

Then stop. Resist at all costs the temptation to try to get the witness to *change* his testimony by asking, "So that means he wasn't intoxicated, right?" The witness will say, "No, it means I forgot to write it down."

Bear in mind throughout this kind of impeachment that it is a low safety topic. If the witness will not give you the answers you want, you will have to be prepared to abandon the attempt.

[6] Choreography: Control Through Movement

In conducting a cross-examination, you should give some thought to where you will sit, stand or move during stages of the examination. Although some courts have local rules that restrict a lawyer's ability to move around the courtroom, most permit you to do pretty much what you want, except that *you may not approach too close to the witness.* Despite what you see on television, most judges will not permit you to lean on the edge of the witness box or get right up into the witness's face.

Standing and using fully the available space in the courtroom enables you to emphasize and focus the jurors' attention on certain questions by moving to the blackboard, picking up an exhibit, or changing your position. During the first part of your cross-examination, when you are eliciting helpful information, you can stand at the side of the jury, where you would for direct

examination. This way the witness looks in the direction of the jury. During the impeachment phase, you can move closer to the witness and away from the jury. This may increase the tension on the witness and cause the witness to look away from the jurors. Either move may lessen the perceived credibility of that witness.[73]

[C] HANDLING INTERRUPTIONS BY OPPOSING COUNSEL

Some lawyers will try to interrupt cross-examination and tip off their witnesses to "correct" answers. They may make a vague objection that your question is misleading:

> I object. Counsel's question might mislead the witness. Counsel is obviously trying to insinuate that if the witness is talking to a friend, she cannot also be watching traffic. This witness was doing both at the same time.

This is unethical, of course, and you should object to this tactic. You might say:

> I object to the interruption by opposing counsel. He appears to be telling the witness what to say.

[D] HANDLING INTERRUPTIONS BY THE JUDGE

The trial judge has a right to interrupt a cross-examination and ask questions to clarify testimony and bring out points overlooked by the attorney. The judge is not required to sit by and permit a miscarriage of justice. The judge's interruption must be brief and non-partisan, and he or she cannot completely take over the cross-examination of a witness.[74] If the judge's interruption interferes with your cross-examination, you must object to it. Objecting to the judge's intervention is a tricky business, of course, especially if you must do so in the presence of the jury. Goldstein suggests you phrase your objection as follows:

> If the Court please, I don't believe your Honor intended to prejudice our case but I am afraid that the jury might take your questions to this witness in the wrong way. I feel that the record should show that we object to your Honor's questions and the witness's answers.[75]

[E] MANNER AND STYLE

[1] Fairness Toward the Witness

You should remember to maintain an attitude of fairness toward the witness. Most people seem innately to distrust lawyers (probably with good

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[73] Psychologists have found that some witnesses appear less credible when tense, Albert Mehrabian and Martin Williams, *Nonverbal Concomitants of Perceived and Intended Persuasiveness*, 13 J. PERSONALITY & SOCIAL PSYCHOLOGY 37 (1969), or when they look away from the jury. Gordon Hemsley and Anthony Doob, *The Effect of Looking Behavior on Perceptions of a Communicator's Credibility*, 8 J. APPLIED SOCIAL PSYCHOLOGY 136 (1978).

[74] *See* Annot., *Manner or Extent of Trial Judge's Examination of Witnesses in Civil Cases*, 6 A.L.R.4th 951.

[75] F. Lane, supra note 64, at § 19.89.

reason) and feel that they deliberately use tricks and loopholes to create misimpressions. Thus, jurors may penalize a lawyer who attempts to confuse or mislead a witness. They will usually side with the witness against a lawyer who takes advantage of his or her training to trick the witness into distorting the testimony by a cleverly phrased question.

Many lawyers seem unable to resist taking matters out of context, putting unrelated facts together, and trying to stretch the testimony of a witness beyond the truth. Misstating or distorting facts to try to create an incorrect impression is a bad tactic. It may cause the witness to argue with you, it will be resented by the judge and jury, and it is improper both legally and ethically. Whenever you are tempted to try it, remember that your adversary has an opportunity for redirect. Not only can he or she put things back into their proper context, but your opponent also can show the jury how unfair you were.

[2] Style

Just because lawyers are aggressive, hostile, arrogant and sarcastic on television does not mean you should try to adopt such a style.

> The style of an advocate's cross-examination will necessarily depend to a greater or lesser extent upon the natural disposition of the examiner. The trained advocate, however, will cultivate and employ the style which he thinks is best calculated to produce effective results. Speaking generally, there are two prevailing styles: the savage, slashing, "hammer-and-tongs" method of "going after a witness to make him tell the truth"; and the smiling, soft-spoken, ingratiating method directed to lulling the witness into a sense of security and gaining his confidence. Neither style can be adopted to the exclusion of the other for every situation that may be presented. There are many situations where a vigorous, rapid-fire examination is likely to produce the best results, just as there are many situations where a quiet, easy, friendly examination will elicit more that is favorable to the examiner. The experienced advocate, like the seasoned baseball pitcher, relies upon his ability to change the pace to suit the varying conditions in the game. It is submitted that in most cases the gentler approach is better calculated to elicit the concessions which the examiner desires. The savage, vehement style of cross-examination ordinarily makes the hostile witness more hostile. In some cases, such an examination angers the witness to the point of impelling him to make vicious answers. While this may weaken the effect of his direct testimony by emphasizing his partisanship and hostility, the content of the answer may be such as to lead the jury to believe that the witness is beating the examiner at his own game. Only the complete success of such an examination will keep the advocate in the jury's good graces. The repeated failure of such examinations is incalculably prejudicial. The witness is the "under dog" and the jury's sympathies are ordinarily with him.[76]

[76] Francis X. Busch, Law and Tactics in Jury Trials, vol. 3: 533 (1960).

NOTES

1. *Using sarcasm*. The temptation to use a sarcastic tone or make sarcastic remarks when cross-examining a witness who has testified to absurd or ridiculous facts often is irresistible. It is one of the most dangerous tactics to adopt, since it depends entirely for its success on the jurors' agreeing with you that the testimony was as ridiculous as you thought. If the jurors disagree, you have accomplished "negative persuasion." *See generally* Robert Abelson and James Miller, *Negative Persuasion Via Personal Insult*, 3 J. EXPERIMENTAL SOCIAL PSYCHOLOGY 321 (1967). Sarcastic remarks also violate the rule against being argumentative during cross-examination, and any persistent use of sarcasm is ground for being held in contempt. *Hawk v. Superior Court*, 42 Cal. App. 3d 127, 116 Cal. Rptr. 713 (1974). In most cases, it is better to wait until closing argument to point out the improbability in the testimony. Still, there are successful trial lawyers who believe that occasional sarcasm, when you are certain the jurors will agree with you, can be effective. Consider the following suggested cross-examination from DAVID COHEN, HOW TO WIN CRIMINAL CASES BY ESTABLISHING A REASONABLE DOUBT 631 (1977):

Q: Mr. Johnson, isn't it a fact that you are approximately six feet tall?

Q: And offhand, I would say that you weigh about 200 pounds, is that correct?

Q: You have testified that you are a construction worker, isn't that so?

Q: So then you do heavy manual work in your occupation?

Q: You are not a weak man, are you?

Q: Mr. Johnson, do you know that my client is only five feet seven inches in height?

Q: And do you know that he weighs 160 pounds?

Q: And did you know that he is a music teacher at Monroe High School?

Q: And it is your testimony, is it, that this puny five-foot-seven-inch, 160-pound music teacher savagely beat a six-foot 200-pound construction worker?

2. *Maintaining composure.* It is important that you maintain your composure during cross-examination. Not all cross-examination will be successful. Situations frequently will arise in which you will get hit with an unexpected and damaging answer. The impact of the answer is not lost on the jury. Since most jurors are convinced that the lawyers know the real truth about the case, they may look at you to observe your reaction. If you seem unperturbed, the jurors may think that the answer was not as damaging as it first appeared. *See, e.g.*, F. LEE BAILEY & HENRY ROTHBLATT, SUCCESSFUL TECHNIQUES FOR CRIMINAL TRIALS § 182 (1971). Getting angry is never a good idea. MARK A. DOMBROFF, DOMBROFF ON DIRECT AND CROSS-EXAMINATION 210 (1985).

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