

Cross-Examination Primer

The primer is divided into three parts. Part I is about how to cross-examine; Part II about controlling difficult witnesses; and Part III about using a witness's pretrial statement to impeach. When you come to illustrations in the text, you will most often find that only the questions are written out. That's because almost always the answer you want from the witness is "yes."

Part I - How to Cross-Examine

● *Purpose of Cross-Examination.*

The purpose of cross-examination is to argue your case to the jury through the witness. You argue your case by asking leading questions, each question stating a fact. The questions together present facts in an order that builds to a point you want jurors to get. The goal is to present facts to the jury, not to get the witness to agree with what you think the facts prove. You let facts persuade.

The purpose is not to argue with a witness. When a cross-examiner tries to force a "mock trial" witness to agree with the examiner's conclusions or inferences, the witness concedes nothing, offers explanations, and repeats testimony that hurts the cross-examiner's side. In a spat between attorney and witness, jurors identify with the witness. In the end, the witness may look bad, but the cross-examiner looks worse.

The purpose is not to help the adversary. The worst cross-examiners take careful notes of the witness's testimony and then plow through the entire direct examination, in the same order as the direct. In the course of the cross-examination, the witness repeats damaging testimony, and often adds damning detail omitted on the first go around.

● *Three Perspectives.*

Sharpshooter. A cross-examiner's biggest advantage is the opportunity before trial to select her targets and choose the best ammunition. She does not aim at the armor plate. She aims for the weak spots. She chooses words carefully and puts them into questions arranged to do the most damage.

Teacher. Her students are the jurors. She needs them to think she is careful, fair, and honest. She does not quarrel with a witness because she knows her students don't like quarrelling. She is polite and occasionally smiles at the witness. She never looks cross or angry. She always strives to look good.

Witness. A cross-examiner uses leading questions to make statements of fact to the jury. In effect, she's a witness. To get the jury to believe her statements, she needs the jury to see that she knows the facts. She needs the jury to trust her. She needs to be more credible than the actual witness. As long as the jury believes what she says, it doesn't matter what the actual witness says.

- *Identify Possible Topics.*

As used here, a topic is an organizing tool. You can have several topics. Each is defined by a conclusion stating a point you want the jury to get. The path to a conclusion will be questions presenting the facts that prove the conclusion, with no distracting detours. When the case materials come out, you search them for clues suggesting possible topics. Then working backward, you pick out the pieces you can use to prove a conclusion and each step along the way to the conclusion. There are three categories of topics.

Hitchhiking. Testimony that helps prove your case. It's testimony you would get from the witness on direct examination if he were your witness. It's testimony the opponent will omit or downplay. So, you get it out on cross-examination. And a jury is more likely to believe testimony that you get from an opponent's witness. For example, you want the jury to conclude that the road was wet at the time of an accident. You see from the witness statement that the opponent's witness can be made to admit that it rained shortly before the accident.

Limiting. Testimony showing that what the witness can say on direct examination does not hurt your case. For example, you want the jury to conclude that the driver of a car did a "jackrabbit" start, jumping into an intersection before the traffic light turned green. The opponent has an eyewitness, but you see in the witness' statement that he did not see when the traffic light turned from red to green. On cross examination, you can show that the witness is unable to say that the driver did not jump the gun.

Impeachment. Testimony showing that the jury should not believe the witness. You look for facts showing that the witness has a bias for or against a party, an interest in the outcome, or a propensity to lie based on a history of lying or a criminal conviction. You look for anything that would allow you to impeach the witness' credibility. For example, if you want jurors to conclude that the opponent's expert is a "hired gun" whose testimony they should not trust, you look for facts showing that the expert is highly paid, makes a living by testifying, and testifies solely for one side.

- *Pick the Best Topics.*

From the possibilities, pick the ones you expect to use at trial regardless of what the witness says on direct examination. Pick a few topics. Given mock trial time limits, the maximum number of topics you can realistically use is three. Two topics or even one can be best, if well-developed.

Pick important topics, ones that connect to your theme or rebut the opponent's likely theme. As a guideline, think about the closing argument. If a topic is not important enough to get mentioned in closing argument, it's a waste of time to pursue it in cross-examination. Too many cross-examiners chase after minor points. Time spent on minor points is distracting and sends a bad message. It prompts jurors to think: "Is that the best they can do?"

Pick topics for which you have the goods to force the witness to give you the answers you want. If you don't have the goods, it's best to avoid the fight. A cross-examiner has two sources of leverage against a witness. (1) A witness's pretrial statements give the examiner the means to impeach the witness who testifies inconsistently. (2) Witnesses feel compelled to give believable answers. They don't like being caught pedaling nonsense.

Pick topics that will have the most impact. Not all topics will be equally impactful. For example, impeachment for bias or interest, is often unnecessary and usually has low impact. Unnecessary because the bias or interest is obvious. A jury does not need the cross-examiner to tell them that the criminal defendant's mother might lie to save her son from jail. Low impact because you are not proving that the witness lied or is mistaken. You are only proving that the witness has a reason to lie or stretch the truth. To become impactful, an attorney needs to show that the motivation to lie is overwhelming. Or the attorney must couple the showing of bias or interest with a showing that the witness, while on the stand, told a lie.

Pick topics you can develop. One question is never enough to cover a topic. You must develop a topic, turning one question into many questions. You can find a raw gem, but it's nearly worthless if you cannot polish it, make it sparkle, and display it in a beautiful setting. Skilled cross-examiners can turn a piece of coal into a diamond ring.

Give priority to topics that can be completed within the available time. Mock trial has time limits. Sometimes you can make a point quickly. Others require time, because the reasoning involves multiple steps, or the witness is likely to resist giving you direct answers. You need to calculate how much time you can afford pursuing a line of questioning at the risk of not having sufficient time to pursue other lines.

Resolve conflicts between topics. Say you've got good impeachment material. You will be tempted to use it. However, if a witness has important information that helps your case, you may want to enhance the witness's credibility, not destroy it. You can avoid the conflict by discarding the impeachment material. If you choose to both hitchhike and impeach, you must work on presenting the material in a way that minimizes the conflict.

Listen intently to a witness's direct examination for new opportunities to pursue on cross-examination. If you hear an opponent make a mistake, you do not want to miss the chance to pounce. If an opponent fails to ask her witness about an obvious weakness, the omission may be an opportunity. "Mr. Kelly. Your lawyer asked you a lot of questions, but I noticed she didn't ask you 'How many clowns were in the car before you tried to get in?'"

- *Order of Topics*

Jurors are most attentive during the first minute of the examination. Primed by movies and TV, they lean forward in anticipation of fireworks. The psychological

principle of “primacy” teaches that what a listener first comes to believe is what she will likely continue to believe. The psychological principle of “recency” teaches that a listener will remember best what she hears last. First and last are the important positions

If you have chosen three cross-examination topics, you must present one first, one in the middle, and one last. Choose the order before trial but be ready to shuffle the order based on what happens at trial. To be able to shuffle, your notes and other materials must be organized by topic. If you have three topics, you need three piles of paper.

As between first or last position, it’s ordinarily best to put the topic that’s most important in the last position. Because jurors remember better what’s said at the end, and because it’s what scoring judges will be thinking about when writing down their scores. You always want to leave scoring judges with the impression that you won the last round of the fight.

Ordinarily you should put your second most important topic in first position. However, form here is more important than substance, especially in mock trial. At the start, a cross-examiner needs to demonstrate to the judges that she knows what she is doing. She must assert control over the witness, while remaining likeable and trustworthy. If the situation permits, start with a topic where the witness is not likely to fight too hard. It should make an important point that the jury gets easily. Aim for a quick victory. First impressions count.

What the witness said last on direct examination will be on jurors’ minds. You can gain an advantage if you can confront it immediately. You may start the battle on this ground if you are sure of winning the point.

You can gain an advantage if your cross-examination does not track the sequence of the witness’s testimony on direct. A witness can feel disoriented if made to approach a subject from an angle different than the one he used to learn the material. And a different order keeps jurors from thinking about the cross-examination within the frame of the direct examination. You must be sure that jurors see an orderly presentation. It just doesn’t have to be the order of the direct.

A topic that involves hitchhiking, getting from the witness facts helpful to your case, should go before a topic in which you call the witness a liar. If you start with the impeachment, you give the jury a reason to disbelieve everything the witness says, including the part that helps your case. And you put the witness in a mood to resist everything you say, making it harder to get out the helpful stuff.

● *Introductions & Transitions.*

Introductions and transitions are absolutely necessary. They allow a cross-examiner to mentally move jurors backward and forward in time, and from place to

place. They help jurors keep things straight. Effective introductions and transitions require both words and pauses.

Once the judge gives you permission to begin, briefly pause. Look at the jurors, and then at the witness. Everybody will be looking at you. You've got the jury's attention. Your first question should introduce the first topic of the examination. You tell the jury where you are going. You get the witness to focus and get a quick "yes" answer. For example:

Q. Mr. Bailey. My first questions are about what you found outside the Big Banana Circus tent on July 4th last year, a little before dawn. Do you understand?
A. Yes.

After finishing a topic, transition to the next topic. Start with a pause. Don't rush to the next topic. Give jurors a chance to think about what they have just heard. Use your body to signal the transition. For example, take a couple of seconds to look at your notes, re-establish eye contact, and then ask the transitional question.

Q: You've just told us about finding a clown's dead body. My next questions are about the last time you saw the clown alive. Do you understand?
A: Yes.

After you finish the last topic, pause. Don't immediately break eye contact. Don't ruin the impact by rushing off stage. Give the jury a moment to think about what they've just heard. Then say, "Your Honor, I have no further questions of the witness at this time." Turn and walk confidently to your seat.

Never use the transitional phrase "Now moving on." It's a bad transition. It doesn't tell the jury where you have been or where you are going. It often sounds like a concession of defeat. The underlying message is: "Oh, s---t. I'm in trouble. Let me get the h--- out of here."

- *Drafting Questions.*

Use plain language. No lawyer lingo! Talk like a real person. In a jury trial, the word "big" is better than the word "enormous." The word "after" is better than the word "subsequently." The word "before" is better than the words "prior" or "previously." "You saw" or "You heard" are better than "You observed." And so on.

Use the witness' own words. As much as possible, use the exact words from the witness' pretrial statement or a document the witness wrote. Using the exact words makes it more likely that the witness will give you the answer you want. It also makes it easier to impeach a witness who gives an answer that is inconsistent with the case materials.

Keep your questions short. Short questions are easier to understand. They demand short answers. They limit the ability of the witness to be evasive. As a guideline,

your questions should have a maximum of fifteen words, preferably eight or ten words, or even one word.

Ask leading questions. Rule 611(c) of the Rules of Evidence says leading questions are ordinarily allowed on cross-examination. Take full advantage of the rule. The vast majority of your questions should be leading. Start with the mindset that you are probably making a mistake if you begin a cross-examination question with the words “who,” “what,” “when,” “where,” “describe” or “explain.” And you are almost certainly making a mistake if you begin a question with the words “why” and “how.”

Eliminate traditional tags. To help keep your leading questions short, eliminate the tag words that many cross-examiners habitually use. Tags at the beginning include phrases such as “It’s true that,” “Do you agree that,” and “Am I correct that.” Tags at the end include words such as “right” and “that’s correct.” They are unnecessary. They add verbal clutter to an otherwise simple question. They become annoying when constantly repeated. When you don’t habitually use tag words, you can use them for emphasis.

Use declarative statements. They are the purest form of leading question. They allow a cross-examiner to declare the truth of facts that help her case. They do more than suggest an answer; they declare it.¹

Q. You saw Mr. Mort?

Q. He was standing over a body?

Q. With a gun?

Q. In his right hand?

Q. The barrel of the gun was pointing at the body?

Q. You saw smoke?

Q. The smoke was coming from the barrel of the gun?

Q. Mr. Mort was smiling?

Speak your questions authoritatively. Your tone of voice should signal jurors that you know the answer to each leading question. You express doubt anytime you end a declarative statement with the rising-pitch intonation that orally signals a question mark. The uptick in your voice says that you are not sure what the answer is. You signal jurors that you need the witness’ help. You credit the witness with better knowledge of the facts.

As far as possible, make affirmative statements. They are easier to understand than negative statements. For example, it’s better to say, “That was the first time you met the defendant?” than “You had not met the defendant before?”

String negative statements together. When you need negative phrasing, try to string several in a row. And an added tag can help make clear that the witness’s “yes”

¹ Sometimes, a witness will not recognize that your declarative statements require a response. When that happens, use a tag word like “It’s true that,” at the beginning, or “right” at the end, to prod the witness along. Once the witness gets going, you should be able to drop the tags.

answer affirms your negative statement. For example, you would use negative phrasing to get a police investigator to describe what he did not see or do.

Q: I'm right that you didn't see Mr. Barnum at the circus?

Q: Mr. Barnum did not hand you any cocaine?

Q: You did not hand Mr. Barnum any money?

Q: When you made the deal, Mr. Barnum's name was not mentioned?

Avoid compound questions. Each question should ordinarily contain just one new fact. A question can contain old facts for context, but just one new fact. The question "You got there around 6 am and the circus tent's lights were off?" is a compound question. It should be broken into two questions. "Q. You got there around 6 am?" and "Q. The circus tent's lights were off?" However, you should not apply the idea too rigidly. Don't get bogged down. Each statement should sound natural and move the testimony along.

Strike or rephrase a question that begins with the words "so," "but," "therefore," and the like. Your goal is to get facts from witnesses, not to get witnesses to agree with what you think the facts prove. Questions using these linking words are almost always argumentative. They provoke witnesses to argue.

Where possible, delete adjectives and adverbs in favor of additional facts. For example, the adverb "clearly" asserts a conclusion and invites an argument. Consider the potential responses to the question, "I'm right that you couldn't see the collision clearly?" The witness might answer: "No. I had a great view." The witness takes control and makes himself the center of attention. In place of a conclusion, the cross-examiner should substitute the facts that lead to the conclusion.

Q: You saw the collision?

Q: When the collision happened, you were standing across the street?

Q: About ten feet from the curb?

Q: The collision happened on the other side of the street?

Q: The street has five lanes total – four plus a turning lane?

Q: There is a shoulder on both sides?

Q: It was raining at the time of the accident?

Q: The rain had just started?

Q: You were concerned about getting wet?

Q: You were heading towards a McDonald's to get out of the rain?

Q: And traffic was passing in front of you when the collision happened?

This series of questions paints a picture of a person who is hurrying through the rain and observed an accident from far away while traffic was passing in front of him. The jury gets it. The witness does not get an immediate opportunity to challenge it.

Mix in a few non-leading questions, but only for good reason and when it's safe. One good reason is the simple need to vary an examination's pace. Another occurs when an attorney does not want to put into her leading question derogatory words such as a

racial slur; she wants the witness to speak the words. A non-leading question is safe if the attorney knows what the witness must answer and is ready to impeach the witness who departs the text. Or knows that nothing the witness can say will hurt.

● *Back load “impact points.”*

The impact point is the word or phrase that conveys the question’s intent. On cross-examination, place it at the end. Assume, for example, the examiner wants the jury to focus on the witness seeing the body of a deceased, not the time. Instead of “You saw the ringmaster’s body, right after you walked into the room,” the examiner says, “Right after you walked into the room that you saw the ringmaster’s body.” The phrasing focuses the jury’s attention on the sentence’s last words, and it gives the witness no time to think how to answer. You can backload cross-examination questions by giving them no front. Slice the questions into the smallest possible fragments that make sense. You keep the witness off balance and unable to think about anything but answering your questions – with no time to consider tone, advantageous wording, and wiggling.

- Q. You drove to the circus grounds?
- Q. Got there at 6am?
- Q. Before the circus opened?
- Q. Went to the ringmaster’s office?
- Q. The door to the office was locked?
- Q. You had a key?
- Q. You used it?
- Q. Let yourself in?
- Q. You saw a body?
- Q. On the floor?
- Q. It was the body of the ringmaster?
- Q. He was dead?

● *Tool for Emphasis - Looping*

You are looping when you take words from one question (or answer) and use them in the next question. “Looping” does two things. By connecting questions, looping creates a feeling that the examination is moving forward one step at a time. It can also be used for emphasis. Assume a cross-examiner has the goods to get the accused to admit to beating up his victim. She could ask just one question “You beat him up?” and get one answer “Yes.” Instead, she asks seven questions.

- Q. You hit him.
- Q. You hit him with your fists?
- Q. You hit him in the face?

- Q. You kicked him?
- Q. You kicked him in the stomach?
- Q. You kicked him in the stomach when he was on his knees?
- Q. You kicked him in the stomach even after he was lying on the ground?

● *Tool for Emphasis – Trilogies*

To create a trilogy, you craft three (or more) separate ways of expressing a fact. In the following example, the cross-examiner uses a trilogy to build the idea of continued negligence in the face of increasing danger.

- Q. You were driving on I-94 heading east?
- Q. You were going 70 miles per hour?
- Q. You were texting?
- Q. *It started to snow?*
- Q. You kept on texting.
- Q. *The road started icing up?*
- Q. You kept on texting.
- Q. *You saw a car skid off the highway?*
- Q. You kept on texting?
- Q. You stopped texting when you plowed into the back of Mr. Kelly's car?

● *Know When to Quit.*

What should the last question for a topic be? You might stop after you've gotten out the facts that support the conclusion you want the jurors to reach, trusting that the jurors will get it. Or you might add a question, one that summarizes the facts or boldly states the conclusion. Before adding this kind of question, you need to ask yourself: Is it necessary? Is it helpful? Is it safe? And be cautious because many mock trial judges believe two of several so-called cross-examination commandments: "Avoid one question too many" and "Save the explanation for summation."

For each line of questioning, you want to be sure that jurors get the point. The point must be crystal clear. Jurors must know that you hit "pay dirt." While you shouldn't underestimate the ability of jurors to see your point without help, there are times they may need a nudge, or even a shove. Or they may need help finding the words that best express the conclusion.

You can add one more question if you are confident that the jurors trust you as a source of truth, and in the micro-seconds between question and answer they will be thinking "yes" is the correct answer. If jurors are mentally answering "yes," they will not believe the witness who answers "no."

- Q. When you saw the person who robbed the circus box office, you were standing about 50 feet away?
- Q. It was 10:30 p.m. at night?
- Q. It was dark?
- Q. It was quite dark?
- Q. The thief was wearing a mask?
- Q. A clown mask?
- Q. Now, the accused, Emmett Kelly is of average height?

Q. Average weight?

Q. There is nothing particularly remarkable about his appearance?

Q: *In sum, you are testifying that you were able to identify this unremarkable person, in the dark, with a mask on, at a distance of fifty feet. Is there any chance that you could be mistaken?*

A. No.

● *Preparing and Delivering the Goods*

Draft your questions, but practice using outlines. You draft a script of questions for each cross-examination topic in order to check that your questions clearly and logically build to each conclusion you want the jurors to draw, with no distractions or detours. However, you cannot score well if you read your questions. Scoring judges penalize cross-examiners who rely excessively on notes. To score high, you must free yourself from your script. In addition, any script has to be considered tentative. You can't count on the witness giving you the exact answers or using the exact words you hope to hear. The witness may say things that allow you to omit, or require you to change, part of the script. You may be able to take the witness's words and put them into your next question. You are expected to engage with the witness and adapt to the situation. That makes it important from the start to memorize ideas, not exact words. You should fairly early reduce a cross-examination script to an outline. The outline highlights the facts you need and the key language you want to use. You know the goal and are ready to do whatever zigzagging is required to get you there.

Listen carefully to the direct examination, but minimize note taking. As you listen to the direct examination, only take notes that relate to topics you intend to use on cross-examination or involve an unexpected gift from the opponent that you want to accept and exploit. There's no point in writing down what you will not use. Your notes should be the words of the witness (as close to verbatim as possible). You can then ask a question like, "On direct examination you said, and I wrote it down, etc." You read the words and hold up the paper.

Be ready to go. When you stand up, have at hand everything you need. You never want to interrupt your cross-examination to search for something at counsel table. What you need includes, for each topic, an outline or script of your questions, and the tools you need to impeach the witness who strays, including both marked and clean copies of the witness's statement. Have ready any exhibits you plan to use. If an exhibit is already in evidence, retrieve it from the judge before you begin. Have at hand a copy of the rules of evidence, along with any notes on objections you anticipate the opponent making.

Get to Work Immediately. Don't waste the precious first seconds of your cross-examination by introducing yourself to the witness. Don't waste time on pleasantries. Introduce the first topic of your cross-examination.

Look confident. If you don't look confident, jurors lose confidence in your ability to guide them to a just verdict. You may not feel confident, but you must look confident. Pretend, if you must! Always act as if you are getting somewhere. Stay composed and

calm at all times no matter what the witness says. When you finish, walk back to your table and sit down. As you walk back, put in mind the image of a race's winner – a smile and arms raised over head in the familiar sign of victory.

Eye-contact. You must make eye-contact with both the witness and the jurors. Jurors expect a battle between two contestants, going eyeball to eyeball. With a difficult witness you must maintain eye-contact when you ask a question and the witness is answering. To look away conveys weakness. With other witnesses, looking away just seems impolite. Nonetheless, you must draw jurors into the conversation. As a general guide, as you ask a question, begin looking at the witness and end looking at the jury. “Q. You saw [looking at witness] a green car [looking at jury]?” After you get enough “yes” answers, it can be effective to look less at the witness, and more at the jury.

Listen to a witness's answers before asking the next question. When you listen, you signal jurors that they should be listening. And you listen because you must be alert to when the witness says anything more than the desired one-word or other response. You can't simply ignore what a witness says. That looks bad. You must decide what to do. Can I push ahead because the extra words don't matter? Or do I need to adapt? Maybe use the extra words in my next question? Drop some questions? Rephrase some questions? Is the witness being evasive? Do I need to force him to give me a simple “yes” answer? Is it time to drop the impeachment hammer?

Don't fall into the habit of saying “Okay” between a witness's answer and the next question. It quickly becomes annoying. You may only mean that you have heard and understood the answer, but the jury may think you accept the witness as a source of truthful testimony.

Time Limits. A team must complete its three cross-examinations in a fixed amount of time. In high school, the typical limit has been 18 minutes per side. In college, it's been as much as 25 minutes per side. A team's first and second attorneys must exercise self-control. If they try to do too much, they steal time from the third attorney, who ends up with too little or even no time to perform. If the first attorney to cross-examine hogs time, her colleagues have cause to shoot her on the spot.

Part II - Controlling Difficult Witnesses

What's at Stake

A cross-examiner should rejoice when a mock trial witness is difficult. A cross-examiner who maintains, and when necessary reasserts, effective control of a difficult witness gets high marks. A cross-examiner gets control primarily by asking short leading questions that call for “yes” or “no” answers. The witness who decides to resist control loses points by slipping out of character, by becoming an obvious partisan whose testimony cannot be trusted, and by simply looking bad.

A cross-examiner's control should not be obvious. Jurors think cross-examiners hold all the cards and are capable of forcing witnesses to say things that are misleading or even untrue. When jurors see the control, they give less weight to, and may even discount entirely, a witness's answers. To keep the control out of sight, a cross-examiner must not bully the witness. She must not be sarcastic or rude in any way. She must not interrupt the witness except when absolutely necessary. She must stay respectful and appropriately nice. She must deliver her leading questions in a relaxed manner and throw in some non-leading questions to make it appear the witness is not on a tight leash.

Primary Control Tactic: Repeat the Question

In mock trial, the most common form of resistance occurs when the witness, instead of answering “yes” or “no,” gives a non-responsive answer that volunteers facts beyond what is necessary to answer. You ask a simple question; the witness goes blah, blah, blah. Your response to the evasion depends on whether the answer includes statements that are admissible or inadmissible under the rules of evidence.

If the witness blurts out inadmissible hearsay, improper opinions, or anything else that the rules of evidence make inadmissible, you must object and move to strike the inadmissible testimony.

If the answer is merely nonresponsive, you do not want to object, at least not immediately. You can't be sure at this stage that the presiding judge will sustain the objection. And you want to demonstrate to the scoring judges that you are capable of bringing the witness under control without the presiding judge's help.

The best way to deal with a runaway witness is to repeat the question – word for word. You patiently and persistently repeat the question until the witness gives you the answer you want. The repetition calls attention to the evasion. After several attempts the jury gets the message. The witness is uncooperative and a partisan for the other side whose testimony the jury cannot trust.

It's important to assert control every time a witness is evasive, especially at the beginning when witnesses are testing the water to see how much they can get away with.

A cross-examiner cannot let a witness think it's okay to be a little bit unresponsive or volunteer whatever he likes. She must get the witness into the habit of answering "yes."

With the first repetition, you should give the witness the benefit of the doubt. Play nice. You might introduce the repetition with words like "I'm sorry. Maybe I wasn't clear. Let me try again." Then look the witness in the eye and repeat the question but more slowly. Possibly insert a tag word for emphasis.

Q. The traffic light was red?

A. The car was traveling down the street. It started to slow down, and then there was a lot of honking of horns. Blah, blah, blah.

Q. [Repetition #1] *I'm sorry. Maybe I wasn't clear. Let me try again.*
[pause] *I'm right that the traffic light was red?*

A. Yes. It was red.

If the witness persists, shift to a more confrontational tone. You can be more confrontational because juries don't like witnesses who won't answer simple questions. You might begin a second repetition stating the formal name of the character followed by a short pause. Or say "Sir" or "Ma'am," with a short pause. Then say: "My question is" and repeat the question, even more slowly. You might also force the witness's hand by adding, "was it or was it not."

Q. The traffic light was red?

A. The car was traveling down the street. It started to slow down, and then there was a lot of honking of horns. Blah, blah, blah.

Q. [Repetition #1] *I'm sorry. Maybe I was not clear. Let me try again.*
[pause] *I'm right that the traffic light was red?*

A. Well, the car started to slow down, and there was all this honking. Blah, blah, blah.

Q. [Repetition #2] *Mr. Bailey [pause]. My question is – The traffic light was red. Was it red or was it not red?*

A. It was red.

It will be rare that a witness persists beyond two repetitions. If it happens, repeat the question again and don't stop until you get the answer you want, or the judge intervenes. With the third and later repetitions, you can be more aggressive: "Mr. Bailey. My question called for a simple yes or no answer. I ask you again - the traffic light was red." Or even "Mr. Bailey. Is there some reason why you don't want to tell the jury that the traffic light was red?" It will be plain to everyone that the witness is unwilling to give a simple answer to a simple question. It embarrasses the witness. And the witness's behavior is likely at some point to prompt the judge to interrupt and instruct the witness to answer.

Additional Control Tactics.

The Hand. Ordinarily, you should not cut off a witness before he finishes an answer, except to object to inadmissible testimony. The interruption draws attention to

the answer. It also signals the jury that you are afraid of what the witness may say and don't want the jury to hear it. And it's impolite. If you feel the impulse to interrupt, use your hand. Simply hold up your hand like a traffic cop signaling stop. You might use both hands. In response, the witness is likely to look puzzled and stop. You then slide into the "repeat" routine. If you feel the hand is not enough and you must interrupt, begin with an apology. "I'm sorry. I apologize for the interruption. I must not have made myself clear." Then slip into the routine of repeating the question.

Was that a Yes Answer? This technique can be used when the cross-examiner hears what amounts to a "yes" in a witness's otherwise unresponsive answer. Use it when you don't want to get bogged down. Just get the "yes" and move on. Fix your eyes on the witness, smile, and say: "Was that a "yes" answer to my question" and repeat the question. You repeat the question because, after listening to the witness's blah, blah, blah, jurors may not remember the question. The tone can be adjusted to the circumstances.

Q. The traffic light was red?

A. The car was traveling down the street. It started to *slow down for the red light*, and then there was a lot of honking of horns. Blah, blah, blah.

Q. Excuse me. Did what we just hear a "yes" answer to the question - the traffic light was red?

A. Yes.

"Objection, Your Honor, Unresponsive Answer." The objection should be used as a last resort. The witness must have repeatedly failed to answer straight forward questions. Use it when it's clear the judge has lost patience and is ready to grant the motion and admonish the witness.

Q. "Mr. Bailey. My question called for a simple yes or no answer. I ask you again - the traffic light was red?"

A. [The witness once again refuses to say "yes."]

Counsel: Your Honor, I object. The witness has repeatedly volunteered testimony unresponsive to my questions. I ask the court to admonish the witness to answer the questions put to him and say no more.

Court: Objection Sustained. Mr. Bailey. I direct you to say no more than is necessary to answer the questions.

Part III - Using a Witness' Statement to Impeach the Witness

This part is divided into two subparts, one on impeachment with an inconsistent statement and one on impeachment by omission, preceded by a few observations about mock trial witness statements.

A. Witness Statements.

Mock trial witness statements are not Exhibits. They are not marked for identification and their authenticity is not stipulated. They are not intended to be offered into evidence or used as a substitute for testimony by a witness. When used to impeach, they need not be admitted into evidence.²

When a statement drawn from a witness statement is used to impeach, it is not hearsay because it is not offered to prove the truth of what it asserts, but only to prove a contradiction. If a party wants an impeaching statement admitted for the truth of what it asserts, the party must show that a hearsay exclusion or exception applies.³

Mock trial rules typically say a witness is bound by his statement. As a consequence, an examiner should always be able to force a witness to agree that the impeaching statement is the truth. The witness cannot take back what he said in the witness statement. He cannot say he has changed his mind. He cannot say that he now thinks he made a mistake. If an eyewitness stated in his pretrial statement that the thief had a black eye, he might resist when asked but must ultimately admit at trial that the thief had a black eye, however much the fact hurts his side's case.

B. Impeachment with Inconsistent Statement.

Think Before Jumping to Impeach

Impeachment has been described as an act of suicide. Think before you jump off the impeachment cliff. Don't impeach unless you are reasonably sure that you will win the battle. Too much is at stake. You are accusing the witness of being a liar, or at least mistaken. If jurors believe the witness, you look bad and lose credibility.

² Don't forget that a witness's pretrial statement may not be the only material that can be used to impeach. Most anything a witness said or wrote is potential impeaching material. That includes exhibits the witness wrote and oral statements the witness made to other witnesses.

³ The witness statement of a party-opponent, or by a party-opponent's agent, representative, or spokesperson, is not hearsay. Rule 801(4)(b). Likewise, a witness's inconsistent statement is not hearsay if it was given under oath, subject to the penalty of perjury, at a trial, hearing or other proceeding, or in a deposition. Rule 801(d)(1). Statements admissible under these rules are admissible for the truth of what they assert. If they apply, you should ask the judge to instruct the jury that the impeaching statement comes in as substantive evidence. The motion draws attention to the impeaching statement and makes clear that in closing argument you can use the impeaching statement as substantive proof of your case.

Don't impeach a witness with a prior statement that is not precisely contradictory. Close is not enough. The contradiction must be crystal clear to jurors. It should require no explanation. The witness should not be able to muddy the waters. When you've finished an impeachment, you don't want judges thinking "What was that all about?"

Don't impeach over minor inconsistencies. Juries understand that there will be minor variations in detail each time a witness tells a story. "Mock trial" judges understand that student witnesses can make minor mistakes. Impeaching over minor inconsistencies makes a lawyer look petty, and jurors end up sympathizing with the witness. Impeaching over minor inconsistencies is also tedious, boring, and irritatingly nitpicky. It annoys "mock trial" judges.

Don't impeach if you are not prepared. You can't hope to confront a witness with an inconsistent statement unless the witness's pretrial statement is digested and ready at hand. You must at least have a copy on which you have highlighted the language that is the basis for each of your questions, and a clean copy to show the witness.⁴ Too often, "mock trial" cross-examinations screech to a sudden halt. The cross-examiner begins a frantic search at counsel table for the witness statement and for the inconsistent words. Everyone waits. To be effective, an impeachment must be done efficiently. Impeaching a witness is a dramatic act. Delay sucks out the drama.

Goals

When impeaching a witness with an inconsistent statement, an attorney usually wants to accomplish two things. The first is to prove a contradiction, namely, the witness swore one thing before trial and another at trial. The idea is simple. People who contradict themselves either don't know what they are talking about or they are lying.

The second is to persuade the jury that the impeaching statement is true, not the witness's trial testimony. Unless an exclusion or exception applies, an impeaching statement drawn for a witness's pretrial statement is inadmissible hearsay. It cannot formally be put in evidence. However, the jury hears the impeaching statement, and an attorney can present facts suggesting that the impeaching statement is the more reliable source of truth.

Inconsistent Statements Made on Cross-Examination

A cross-examiner needs to learn a routine she can use when a "mock trial" witness on cross-examination testifies to something different than what he said before

⁴ Even better, have a sheet for each cross-examination subject, on which you have reproduced language from the pretrial statement, in the order of the questions you plan to ask, with page and line numbers. You can read the impeaching statement from the sheet instead of the witness statement.

trial in his witness statement. The primer's author recommends a procedure taught at the Advocacy Institute University of Virginia.⁵

In the following hypothetical, defense counsel is cross-examining an eyewitness to the murder of Cinna the Poet, whose story is immortalized in Shakespeare's play, *Julius Caesar*.⁶ The examiner needs to prove that the murderer stabbed Cinna with a pair of shears, a fact that identifies the killer as a Roman craftsman, not a soldier or member of the city's elite.

Q. My next questions are about what you saw at the time Cinna the poet was murdered. Okay?

A. Yes.

Q. You were there when Cinna was murdered?

A. Yes.

Q. It happened on the Via Nota?

A. Yes.

Q. Cinna was standing in the street?

A. Yes.

Q. He was surrounded by a crowd?

A. Yes.

Q. They were laughing?

A. Yes.

Q. Then Cinna said something to them?

A. Yes.

Q. The crowd became angry?

A. Yes.

Q. And one of them stabbed Cinna?

A. Yes.

Q. *Stabbed Cinna with a pair of shears?*

A. *No. It was a knife. I distinctly remember a knife.*

Step 1. Confront Immediately. The rules allow an examiner to immediately confront a witness with an inconsistent statement. The examiner does not have to postpone the confrontation until after the witness has been shown his witness statement.⁷

⁵ See Herbert J. Stern and Stephen A. Salzborg, *Trying Cases to Win, In One Volume* 294-296 (2013). Herbert J. Stern is a criminal defense lawyer, who was a U.S. District Judge in the District of New Jersey for thirteen years, and co-director of the Advocacy Institute at the University of Virginia School of Law for twenty years. Professor Stephen A. Salzborg teaches at the George Washington University School of Law and is the co-founder and director of the Advocacy Institute at the University of Virginia School of Law.

⁶ Act III, Scene 3. It was fashioned into a murder mystery by Tom Hold, "Julius Caesar, Cinna the Poet," in *Shakespearean Whodunits* 136-148 (1997).

⁷ Rule 613 of the Rules of Evidence says: "In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown, nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel."

Q. You just said the man stabbed Cinna with a knife, but in your pretrial statement, page 10, line 14, you said the man stabbed Cinna with a pair of shears. That's what you said, "with a pair of shears"? [Attorney displays the statement.]

A. I'm sorry. I misspoke when I said it was a knife.

Q. So we can agree. Cinna was stabbed with a pair of shears.

A. Yes.

The immediate confrontation has the advantage of engaging jurors. They don't have to wait to see the blow struck. They don't have to wait until you finish slogging through a boring litany of questions about the witness's pretrial statement. The immediate confrontation also denies the witness time to think about his answer. If the witness folds, as in the illustration, the cross-examiner wins a quick victory and can get her cross-examination back on track. If the witness does not fold, the cross-examiner simply moves ahead to the next steps.

Step 2. The Build. The build comprises questions showing that the witness understood the importance of the pretrial statement being complete and accurate. When the build follows an immediate confrontation, jurors stay attentive. They know exactly what's at stake. They are listening to see if the cross-examiner can wrestle the witness to the ground. Because a "mock trial" witness is bound by what his statement says, a lengthy build is rarely called for. And a lengthy build should be avoided because it can quickly become boring.

Q. You just said the man stabbed Cinna with a knife, but in your pretrial statement, line 14, you said the man stabbed Cinna with a pair of shears. That's what you said, "with a pair of shears"? [Attorney displays statement].

A. No. I've never said anything about shears. (Or, I don't remember saying anything about shears.)

Q. Well let's see. You do recall giving a statement before trial?

A. Yes.

Q. On March 17 of last year?

A. Yes.

Q. Two days after Cinna's murder?

A. Yes.

Q. When your recollection of what happened was fresh?

A. Yes.

Attorney: Your Honor, may I show the witness his statement?

Court: Yes.

Attorney: Hands the statement to the witness, steps back, and says to opposing counsel, "Counsel, I'll be referring to page 10, line 14."

This step is not required. It's a courtesy and prevents the opponent from interrupting the examination to ask what part of the statement is being used.

Q. [to witness] That is your witness statement?

A. Yes.

Q. You signed it at the end?

A. Yes.

Q. Just above your signature, you affirm under penalty of perjury that everything in the statement is true?

A. Yes.

Q. You also affirm that it includes everything you know that may be relevant to your testimony?

A. Yes.

Step 3. Re-confrontation. The attorney is ready to confront the witness with the impeaching statement. An examiner should ordinarily read the statement aloud to the court and witness. Given the chance, a "mock trial" witness will read badly, or try immediately to explain away what he said.

Q. Please look at page 10, line 14. I am correct that you say there: "The man stabbed Cinna with a pair of shears"?

A. Yes.

Q. A few moments ago, you swore to the jury that Cinna was stabbed with a knife. That statement was not the truth?

A. I'm sorry. I was mistaken.

Q. The truth is that Cinna was stabbed with a pair of shears?

A. Yes.

The attorney has been able to confront the witness twice with the inconsistent statement. She wins the fight and establishes herself to the jury as the more credible source of truth. She can now get the cross-examination back on track. Having been punished, the witness is less likely to jump the tracks again.

It's a common mistake to ask the witness to explain why there are inconsistent statements. It's one question too many. It gives control back to the witness and takes away from the drama of the impeachment.

Delaying the Confrontation?

Of the two impeachment goals, you often will be more interested in showing that the witness is a liar, or at least so mistaken that his testimony can't be trusted. You will be less interested in showing that the impeaching statement is the truth, not the witness' trial testimony. In that case, you don't want the witness to fold quickly. You want the witness to persist in his lie or misstatement. You want to enhance the impact of the confrontation by delaying it until after the build.

If you decide to delay the confrontation, you still need a way to grab the jury's attention. One is an accusation that makes clear to the jury, by your tone of voice, that you believe the impeaching statement is the truth, not the witness' testimony.

Q. On direct examination, you swore that the person who killed Cinna the Poet had red hair. That was your testimony?

A. Yes.

Q. Are you sure? [Your tone expresses disbelief.]⁸

A. Yes

Q. Mr. [Witness]. The truth is that Cinna's killer had black hair? [The attorney speaks the words slowly and with conviction.]

A. No. I saw him clearly. He had red hair.

You can then proceed to the build and finish confronting the witness with his own prior statement that the killer had black hair.

Inconsistent Statements Made During Direct Examination.

When the inconsistent statement was made during the witness' direct examination, you can't count on jurors remembering it. You must first get the witness to repeat it. The repetition blocks the witness from denying that he said it.

Q. On direct examination, you swore that the person who killed Cinna the Poet had red hair. That was your testimony?

A. Yes.

C. Impeachment by Omission.

Impeachment by omission is the tool you use to expose an opponent's unfair extrapolations and attack the credibility of a witness who says something important at trial that the witness never mentioned before.

Impeachment by omission depends on the cross-examiner persuading jurors that a truthful witness would not have waited to trial to divulge the information and would have included it in his witness statement. A problem is the inclination of jurors to believe that the earlier statement must be incomplete, an easier idea to swallow than the idea that a witness lied to them. To overcome the hurdle, a cross-examiner must do two things. Show jurors that the witness understood the importance of disclosing the piece of information at the time he gave his statement. And refute the notion that the piece of information was inadvertently left out of the witness statement.

⁸ You don't expressly accuse the witness of lying because many judges would sustain an objection that the question is argumentative.

Steps 1 & 2. Commit and Accuse.

Q. On direct examination, you testified that the person you saw kill Cinna the Poet was a slave named Quintus. That was your testimony?

A. Yes.

Q. Are you sure? [Your tone should be one of disbelief.]

A. Yes.

Q. Mr. [Witness] The truth is you did not see who killed Cinna? [The attorney speaks the words slowly and with conviction.]

A. No. I saw who did it. I saw Quintus kill Cinna.

Step 3. The Build

Q. Well, let's see. I think we can agree that the name of Cinna's killer is an important piece of information?

A. Yes.

Q. The police would want to know the killer's name?

A. Yes.

Q. By telling the police the killer's name, you'd be helping them catch a killer?

A. Yes.

Q. As a citizen, you know the importance of helping the police catch killers?

A. Yes.

Q. Now, you gave a witness statement three days after the murder?

A. Yes.

Q. When things were fresh in your mind?

A. Yes.

Q. When the police were still looking for Cinna's killer?

A. Yes.

Q. In the statement, you affirm that what you say there is "true and correct"?

A. Yes.

Q. You affirmed that it included everything you knew that may be relevant to your testimony?

A. Yes.

Q. Before you signed the statement, you had an opportunity to review it?

A. Yes.

Q. You reviewed it?

A. Yes.

Q. After reviewing it, you affirmed that you had nothing to add?

A. Yes.

Q. Just before trial, you reviewed your statement again?

A. Yes.

Q. And you affirmed that you had nothing to add?

A. Yes.

Step 3. The Challenge.

Attorney: Your Honor, may I show the witness his statement?

Court: Yes. [Attorney hands the statement to the witness and asks opponent if she needs a copy.]

Q. That is your witness statement?

A. Yes.

Q. Please tell me where in this statement you say that a slave named Quintus murdered Cinna the Poet?

A. [Witness looks at statement.] I cannot find it.

The challenge can be a problem in “mock trial” because of the time limits. The witness is likely to take his good old time looking at the document while the cross-examiner loses valuable seconds on the clock. A solution is to put the onus on the adversary to use redirect examination to rebut the claim that there is an omission.

Q. I would like to know where in this statement you say that the slave Quintus murdered Cinna the Poet. After I finish the cross-examination, you and your counsel will have the opportunity to do what’s called a redirect examination. Are you willing at that point to tell us where in your witness statement you name Cinna’s murderer?”

The witness can hardly say no. And whatever happens, you have re-cross examination to do clean up.

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