

FIVE EASY PIECES

New Theories, New Rules, New Techniques to Killer Cross Examinations

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INTRODUCTION

During the last 12 years a core group of criminal defense lawyers have proposed dramatic changes to the methods of cross-examination and, in particular, to the methods of preparing cross. The changes go beyond technique: the very concept and approach to cross is evolving.

Much like Renaissance astronomers challenging the prevailing earth-centered theories of the cosmos, trial attorneys have begun to reconsider the observed data and are preparing to challenge the closing-argument-centered approach to trial preparation.

In its place, lawyers are now adopting a *cross-centered* approach. This Section addresses the error-prone nature of our accepted methods of trial practice and outlines the benefits of using the cross examination as the engine to drive our trial preparation. The Section concludes with an overhaul of the methods of cross-examination. Using real transcripts of police testimony, the Section demonstrates the benefits of adopting a *scientific* (that is to say, a methodical and teachable, as opposed to an artful and inspired) approach to cross. The leading exponents of this method are attorneys Larry Pozner of Denver, Colorado, and Roger Dodd of Valdosta, Georgia. Much of the following material is adapted from their book, *Cross-Examination: Science and Technique* (Miche, 1993). The book has become the centerpiece treatise in a decade-long project to overhaul cross-examination, taking it from a single phase in trial technique to the fundamental tool for trial planning.

TIP 1. KNOW THE THEORY

The Closing Argument Method of Trial Preparation

What's wrong with planning your trial by starting with the closing argument? The closing has driven our trial preparation for generations and has served as the starting point for countless trials. Pozner and Dodd spare little in criticizing the method — it is slow and prone to error. Consider the following:

1. Time is short. Lack of time is the trial attorney's universal constant.
2. Planning the close and then developing the trial backwards poses the risk that the opponent's case may introduce facts inconsistent with your theory of case. There is no rigorous method to test your imagined closing against the facts. An experienced attorney may apply his or her instincts to uncover flaws, but the existence of a few "good" facts tends to cloud an honest evaluation of the "bad" facts.
3. If you later discover indisputable facts that are antagonistic or inconsistent with your chosen theory, then your closing must be modified, restructured, or abandoned. Often this discovery is made well into your trial preparation. What little time you had was spent hoeing the wrong row.
4. Trial preparation which has ignored an indisputable negative fact is valueless. (Ignoring indisputable positive facts is another unnecessary loss). The lawyer scrambles from one imagined closing to the next, adopting theory after theory until the indisputable facts contradict an essential premise. Trial preparation becomes a process of theory elimination.

Using the closing argument to drive the trial preparation wastes time. Worse, we are often lulled into hoping that a fact inconsistent with our close will be ignored, forgotten, or somehow neutralized before the jury retires. Or we are so short of time there is no possibility of reformulating our theory: we are forced to merely hope the indisputable fact won't matter. This, Pozner and Dodd point out, is prayer not preparation.

The Cross-Examination Method of Trial Preparation

What does cross-examination-centered preparation do for you? It reverses the tendency to guess and pray. A key to this phenomenon is in learning to recognize and deal with Facts Beyond Change (FBC).

Learning to Identify the Facts Beyond Change

1. The preparation of a major cross exposes those facts that are indisputable and

furthermore will suggest the theory of the case, themes, and theme lines.¹ Such indisputable facts are referred to as “Facts Beyond Change” (FBC). An FBC is a fact that will be accepted by the jury as truthful and accurate regardless of any party’s attempt to attack it. An FBC may be favorable, neutral or antagonistic toward your theory. The favorable and neutral FBCs we will want to weave into our case. The antagonistic FBC, the truly inconsistent fact that betrays our theory of the case, circumscribes for us the forbidden territory into which our theory must not stray.

2. Only a theory that can survive a thoroughly prepared cross, that is, a theory for which every FBC is either favorable or neutral, will have any value by the time the case is called for trial. FBCs are the walls that confine and channel the theory. If the theory is contradicted by an FBC one or the other must give way, for they cannot co-exist. Competing for the jury’s belief, the FBC will prevail, the theory will fail. To hope otherwise is false preparation.
3. Preparing for cross is the only means of determining which facts are still subject to argument and which facts are beyond change. This is also the means to learn whether there are inferences flowing from the facts that, like their predicates, are beyond change.
4. A theory that withstands thorough preparation for cross will be a ready instrument when you begin your preparation of the closing argument. Pozner and Dodd are explicit: *unless you have prepared your cross thoroughly, you cannot evaluate your theory or plan your close*. Cross, however, will provide you the facts, and from your grasp of general legal principles, you may draw upon the law in sufficient measure

¹ Pozner and Dodd give precise definitions to “theory of the case”, “theme”, “theme lines” and various techniques of cross itself. A thorough description of these terms would take pages. In its most general state, a theory of the case is a concise and cogent statement of the advocate’s position that justifies the verdict he or she seeks. Examples will appear in the second part of this article, reviewing Pozner and Dodd’s techniques for preparation and delivery of the cross.

to design the closing argument. Once the cross and close are outlined, the attorney may plan the opening statement and voir dire. This is also the time to polish the trial themes and theme lines.

5. Cross-driven planning allows you to consider an often-neglected species of fact: the “emotional feel” of the case. Pozner and Dodd emphasize the importance of this neglected “fact”. The jury must have some concept of your case’s dominant emotional theme. It will adopt one, whether invited to or not. The attorney who presents this emotional theme *as a fact* will have a far stronger basis for the jury to synthesize that party’s theory of the case by verdict time. A few emotional stances and their natural settings: fear (self-defense), anger or betrayal (malpractice plaintiff), fairness by authorities (entrapment or wrongful termination), justice, sorrow (wrongful death), righteousness (civil rights housing), skepticism (tort defendant), vindication (defamation), forbearance, outrage, etc.

The reason that cross-driven preparation is better than close-driven preparation is simple: throughout the entire process of planning cross-examination, the attorney is guided by *facts* — in particular those FBCs that must either support the theory of the case or be neutral towards the theory. The attorney is not wasting time with fantasy closings. The attorney is exploiting the natural structure of trial to hone those theories that have the best chance of succeeding.

Because the closing argument, by definition, may use logic, illogic, speculation and any other oratorical device, its preparation allows too wide a latitude. It is a poor vehicle in which to haul an untested theory of the case. The cross-examination, by definition, deals with facts, unadorned and subjected to withering scrutiny. Its preparation is the preeminent vehicle to test the theory of the case.

There are a few rules to consider in considering your case’s FBCs. The best source for FBCs are documents, photographs, tests, and the laws of nature. Remember, too, that even

an attractive theory will fail before a material FBC: a good fact cannot overcome an unfavorable FBC. Or, as Pozner and Dodd note, quoting Thomas Huxley: “The greatest tragedy of science -- the slaying of a beautiful hypothesis by an ugly fact.”

Thorough fact investigation is required in order to determine whether a fact is beyond change. Never forget that FCBs that favor your theory are the advocate’s dream. Anytime that an element of your theory is matched by an FCB, develop the point by exploiting the indisputable fact. The theory can only benefit from its association with a fact beyond change.

In practice, using a theme line in conjunction with a favorable FCB increases the acceptability of the line, and promotes a greater feeling of credibility for your overall theory. For instance, in an assault case, the lack of fingerprinting on the alleged weapon is a potentially favorable FCB. Your theory of the case is that the police did not thoroughly investigate but precipitously arrested your client because he was the only person nearby whose description matched the alleged assailant’s. One theme line you have chosen is that your client was the “convenient” suspect. A method of exploiting the indisputable lack of fingerprints on the recovered weapon would be to marry the theme line to the FCB. If in the same example, another FCB is your client’s arrest mere minutes after the 911 call, the theme lines about “hasty” decisions in the street, snap decisions, gut instincts, etc. will merge factual picture most readily acceptable to the fact finder. The acceptance of the FBC lends itself to the acceptance of your theme lines, and hence, to your theory and overall defense.

TIP 2: KNOW THE BEDROCK TECHNIQUE TO CROSS

The “Science” of Cross-Examination: A Learnable Method

The goal of trial planning is to create factual support for the theory of case. But a theory which has not taken into account incontrovertible facts antagonistic to our defense will fail. The best planning will come to nothing when the “well-trying” case ends in a disastrous verdict. There are some who suggest that the lawyer’s “art” will overcome these factual pitfalls. If the lawyer is sufficiently gifted or experienced enough, the factual holes can be smoothed over.

Perhaps.

But Pozner and Dodd chose the title of their book with a specific purpose: it is the “science” of cross-examination, a system of rules and ideas that can be taught and demonstrated, which ought to guide our preparation and trial of a criminal case. The artful wizards of trial may rely on their innate gifts: for the rest of us, a learnable methodology would do nicely.

THREE ESSENTIAL RULES & SOME ELEMENTARY RHETORIC (PLUS THE OCCASIONAL ACROBATICS)

The trial lawyer needs to have a method of cross where preparation reveals the fatal unfavorable FBCs (keeping the attorney from using a dead-end theory). The method must also effectively exploit any favorable FBCs while neutralizing the questionable ones. The task requires *control, clarity, and momentum*. The techniques for this method of cross follow:

RULE 1: ASK NO QUESTIONS, MAKE DECLARATIVE STATEMENTS

Tell the witness the answer, do not just suggest it.

| | |
|---|---------------------------------------|
| How do you feel about drinking? | (Open ended, great for voir dire) |
| How often do you drink? | (Direct; no leading) |
| You do like to drink, isn’t that correct? | (Traditional cross; somewhat leading) |

Compare these commonplace methods with the new science of cross:

You drink.

followed by, You drink after work.

followed by, You drink at lunch.

followed by, You drink to forget. (Declarative; pure lead)

Note that the declarative begins with a non-verb and never with the deadly leads: “how, why, when did, where did, explain to the jury, did [you, he, she or it], could [you, he, she, or it], have/has [you, he, she], etc.” Also note that the declarative method is a process of small questions building toward a goal. More on the *direction* of cross below.

The best declaratives get a single “yes”. When “no” is the answer you want, “no” is okay, but the best form requires a “yes” response.

As a matter of form, do not use the tired old tag–lines: “isn’t that true,” etc. On occasion, the tag may be needed to nudge a witness early in a cross examination when the witness does not yet understand that your declarative sentences require a response. Your voice inflection should generally do the trick, however. And beware when a tag may even add to the ambiguity that arises from *negative* questions.

For example:

Q: You did not take the time to look for fingerprints, correct?

Framed in the negative, you likely get...

A: No.

No what? No, I didn’t take fingerprints, or, No, you’re wrong, I did...

RULE 2:

ADD ONE NEW FACT PER STATEMENT

Learn from the primers: See Spot? See Spot run? See Spot run home? This sing–song method becomes:

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.

Notice that the good facts are *LOOPED* into the next questions. Looping essential points, when not overdone, can make an indelible mark on the jury. In the above example, seven questions were developed from what another examiner might have condensed to:

Q: You beat him up, didn't you?

Is the declarative method true cross? Will it provoke an objection? More importantly, will the objection be sustained?

The method can be so devastating to opposing counsel that an objection is likely. Nevertheless, cross properly employs the declarative method. For support, see, *Ohio v. Roberts*, 448 U.S. 56, 70-71, 100 S.Ct. 2531 (1980), which specifically noted that the declarative excerpts in that case “clearly partook of cross-examination as a matter of form...”

Besides, done with preparation, the court will *love* this method. Its lean and fast and eliminates the bickering.

**RULE 3:
BUILD FROM GENERAL TO SPECIFIC**

This rule governs the overall organization of the cross. For example, before questioning an officer on the items missing from her report, you begin by establishing the general principles of report writing. Establish that the officer was trained to make reports so that significant details would be recorded, so that superiors could review the case, so that further investigation would benefit from previous work, and overall as a means to assist in helping courts and juries find the truth. As general principles, these points are easily obtained. Now, focus the exam: bring up each point missing from the report. The witness is far less able to escape if the door was closed during the questioning on general points. Examples of

general-to-specific are found in section 5, below.

SPECIAL TECHNIQUES

Use TRANSITIONS to get the witness focussed, to get a quick “yes” and to cut down on exits. For example, to begin a cross on the expert’s qualifications, in which you do not want the witness running for cover into another topic begin with a transition question:

- Q: Doctor, I’d like to ask you some questions regarding your training at Podunk U, you understand?
A: All right. [now you can do your declaratives]
Q: You attended night classes.
Q: For three years. [learned from interviewing his teacher at Podunk U...]
Q: The program was a two-year program.
Q: The program required two labs.
Q: You transferred one lab credit from Fipple State Voc-School.
Q: You had to retake your Podunk U lab a second time.

The transition statement helps to narrow the discussion, secures the witnesses agreement, and gets a free “yes”. Without the transition, the witness has an easier time wiggling away. The tighter the topic used in the transition, the cleaner the declarative statements will flow. Note, however, that the declaratives must properly fit under the scope of the transition. So long as they do, you have a powerful means to control the witness’s attempts to run away.

Use TRILOGIES. Pozner & Dodd make use of a time-honored rhetorical device: the trilogy. In one example, Pozner & Dodd show how an examiner wove his cross into two trilogies and pounds home a new theme: *the facts have changed*.

- Q: Immediately after the collision, you told the investigating officer that the light was red for the plaintiff.
A: Yes.
Q: But now that fact has changed.
A: Yes.
Q: You told my investigator three months after your collision that the light was red for the plaintiff.
A: Yes.

Q: But now that fact has changed.

A: That's right.

Q: You told me three days before trial that the light was red for the plaintiff.

A: Yes.

Q: But now that fact has changed.

A: Yes.

Dealing with the *anticipated unfavorable answer*. Create a CONTEXT and a favorable CONTRAST. This next example, from Pozner & Dodd, this cross of the snitch, structured with parallel questions to undermine the anticipated unfavorable answer:

Q: You have been smuggling loads of marijuana for four years.

Q: You have gotten away with it dozens of times.

Q: In January, 1991, you smuggled a load of marijuana from El Paso to Denver.

Q: It was your load.

Q: You were the driver.

Q: In September of 1991, you smuggled a load from Los Angeles to Denver.

Q: It was your load.

Q: You were the driver.

Q: In January of 1992, you smuggled a load of marijuana from Salt Lake City to Denver.

Q: It was your load.

Q: You were the driver. [these declaratives all get "yes" answers]

[now, focusing on the key area where you know you're going to get an unfavorable "no"]

Q: In March, 1992, you were caught smuggling a load of marijuana from Tucson to Denver.

A: Yes.

Q: You were the driver.

A: *No*.

Q: It *was* your load. [time for a little emphasis, as in, you're not trying to deny *this* fact too?]

A: Yes.

The "no" answer is there (you couldn't get rid of it) but in the context you set up it is less credible. The contrast between the previous questions (deliberately put into trilogy form) creates a tension with the anticipated unfavorable answer.

In an example from an inventory search, the witness was given general declaratives about the purpose of inventory reports and the overriding need for accuracy. Then, the examiner focused on the specific report in her case:

Q: The form you complete has three sections.

Q: Section one asks for the time of the inventory.

Q: So that the report can be verified.

Q: But you left that section empty.

Q: Section two asks for your supervisor's signature.

Q: So that the report's accuracy can be verified.

Q: But you didn't get his signature...

Etc. (Note the developing trilogy... If you don't have three items to "trilogize" rethink the categories until you do. Trilogies are *powerful*: they focus attention, they are dramatic, they persuade. Especially when building a CONTEXT and CONTRAST scheme, as above, the TRILOGY works magic.)

Controlling the witness. The best feature of this method of cross is its power to put the witness under counsel's control. Used carefully, racking up "yes" after "yes" with simple short declaratives that build toward a goal, the witness is hardpressed to venture out on his or her own.

Pozner and Dodd offer a dozen techniques for handling witnesses who attempt to run from the corral: the favorite technique, the simplest and most direct, merely re-asks the question slowly and *verbatim*. If the question was proper when asked the first time, it is irresistible on the verbatim re-asking. You may add the witness's name to the question, if that seems appropriate. Otherwise, do not rephrase when you are trying to keep control. Rephrasing give the witness more permission, it invites more disobedience.

Most disobedience is the fault of the examiner. The fundamental technique of control is not to ask a question that invites disobedience. Frame the general topic with a transition question, build a series of declaratives, do not ask the witness to think but merely to respond, and most witnesses will be forced to comply. There are more control techniques,

but reference should be made to Pozner and Dodd's book for the complete series.

Summary. The new science of cross examination changes not only our delivery technique but changes how we prepare the trial. Cross-driven preparation asks us to construct a theory of the case that can co-exist with every FBC—especially the negative FBCs. Next, using three fundamental rules, and waging low-risk rhetorical skirmishes on the state's witnesses, the defense attorney can cross with control, clarity, and momentum. Using short, declarative sentences, and staying within the boundaries of tight transitional sections, the attorney maintains topic control. The addition of only one new fact per declarative sentence lends further control, and helps maintain clarity. Finally, structuring the cross from the general to the specific, and using the tightly crafted declarative sentence technique, the attorney can build momentum.

This methodology will not fit every witness or circumstance. There are times that the attorney benefits more by having the witness reveal too much of him or herself. There are cross examinations of neutral or favorable witnesses that do not require steely control. But the general situation facing most defense attorneys requires bedrock technique.

V. SAMPLE TRANSCRIPT No. 1 CROSS OF THE ARRESTING OFFICER

The following transcript is taken from a prosecution for possession of a soft-ball sized baggie of crack. The baggie was discovered during booking 20 minutes after the defendant had been patted down and stripped searched, without results, by a SWAT commander. The FBCs included 59 grams of crack, a baggie, the defendant's jacket with a sizeable hole in the pocket, and an booking officer who would testify to finding the crack in the lining. The favorable FBCs included the defendant's strip search and his jacket's proximity to an uncharged suspect following the clothing pat-down and strip search. The theory of the defense had to harmonize with or neutralize the unfavorable FBCs, exploit the favorable ones, and avoid direct conflict with any incontrovertible FBCs. In this excerpt, the SWAT officer is asked preliminary questions about his concerns during strip searches.

The FBCs include:

- pre-raid surveillance never noted client's presence at arrest scene;
- pat search of client at the arrest scene found no drugs;
- reports stated that 56gms of crack were found in client's jacket pocket at booking;
- baggie of crack had no fingerprint matches with client;
- transported alongside chief suspect;
- fingerprints comparisons were not ordered for major suspect or transporting officer

Goal of this cross was to establish that the SWAT search did not inadvertently miss the baggie of crack.

Theory: the major suspect attempted to hide the crack during his transport alongside client; cops found in backseat and "gave" it back to client by putting it into his pocket.

Themes: "staying one step ahead of the bad guys"
"thorough, accurate, honest reports"

Transition sentence.

Value judgment question but the search had been described on direct with this term.

Safety is the overriding point of this portion of the cross. A search for contraband does not convey the image the defendant needs to prove that the officer did not find the tennis-ball sized crack baggie because there was no tennis ball sized crack baggie...

So, we go *general* to *specific*. The general is projectile weaponry, starting with the big stuff...

to the smaller

smaller still

down to the tinnie-tiny

changing to edged weaponry, because the fact finder has to hear the horrors of safety control to understand that the officer would NEVER have performed these duties in a shoddy manner

big to little, just like before

the witness tries a short cut, but it just helps the defense, the witness's urge to assert control is forcing him **toward** the theory of the defense

[ignoring the short cut, but condensing somewhat...]

Q: Officer I want to ask you questions about how you conduct safety searches for the SWAT team, you understand?

A: Yes.

Q: Searches like the one done on April 30th are "high risk."

A: Yes.

Q: Not just because of the chance of finding crack but because you had past experiences with the homeowner, a guy once charged with murder plus the factors we just covered having to do with the safety of your team.

A: Yes, they are factors.

Q: Now, when you've done strip searches you have also come up with little sawed-off numbers, maybe 18 to 20 inches long?

A: Yes.

Q: And something smaller, a long-barreled pistol.

A: Yes.

Q: Something smaller, like a revolver.

A: Yes.

Q: You're familiar with little four-round derringers.

A: Yes.

Q: Looking for those, too.

A: Yes.

Q: Now, you're also worried about edged weapons, correct?

A: Yes.

Q: Knives — bowie knives — 18 inches long?

A: Yes, down to smaller ones.

Q: Down to a razor blade.

A: Yes.

Value-laden question... “well known” is not precise terminology. So, the questioner adds “is that fair.” When a witness is already cooperative, a value question may be ok, but use the “is that fair” tag for safety.

general

still general

Bingo! from the general to the specific...

Transition sentence merged with the question. Too wordy and too truncated. Better to get the commitment to the transition and build the questions paralleling the safety message from above.

Risky to use the word “clean” because it hadn’t come up before, it’s something of a value judgment question and we know Smith was later searched and found to be dirty. Probably better to have phrased it: “When YOU searched Mr. Smith, he was clean.”

The witness gave a weak answer, “I thought so” because the question was poorly phrased. But his fudging gave an opening to change the question and drive the point in again. The witness might have done better to have just said, “Yes” the first time...

Q: Stories of officers being cut by small objects, even a razor blade, are well-known to your team; is that fair?

A: Yes.

Q: Each one of you on that team relies on the other to make a thorough search for officers’ safety.

A: Yes.

Q: Because you can’t all search everybody.

A: Correct.

Q: You divide up the work.

A: Yes.

Q: Your guy was Mr. Smith.

A: Yes.

Q: Let’s discuss Mr. Smith, shall we? When you searched him, you weren’t thinking exactly “shotguns, razor blades”; you were thinking of any kind of weapon.

A: Yes, sir.

Q: Because you wanted to go home that night?

A: Correct.

Q: You don’t want to be in a hospital, correct?

A: Correct.

Q: And you don’t want anyone on your team in a hospital?

A: Correct.

Q: And you didn’t find any weapons on Mr. Smith.

A: That’s true.

Q: And you didn’t find any drugs on Mr. Smith.

A: Correct.

Q: Mr. Smith was -- [pause] -- “clean.”

A: I thought so.

Q: You thought so because when *you* were done searching him you found *no* weapons, *no* drugs, *nothing* whatsoever.

A: Correct.

VI. Know the Sequence of Impeachment: Take the Witness Fishing

Fishing Rule #1: No small fish

This means do not impeach small points. There is an exception.

1. If there are no large fish
2. If there are lots of small fish, and
3. If you are very very hungry

In other words, impeachment should focus on the points that matter. If you do not have any big points, however, and if the witness cannot be allowed to leave the stand unimpeached, you may go after the small stuff. There had better be lots of small stuff.

Fishing Rule #2: Hook the fish

Before you impeach you must solidify and target the witness's testimony that is subject to attack. Why? Because the jury will not appreciate the impeachment without its being counterposed against the suspect testimony.

In the case of a prior inconsistent statement, you will confirm that the witness gave certain testimony on direct. In the case of a bias impeachment, you can select any of the witness's direct testimony that you wish to place alongside the bias evidence; the stronger the bias, the more damage its revelation will do to the targeted testimony.

In any event, get the witness to confirm the target testimony. Don't waste time, just make sure the witness's escape route is cut off.

Exception? If the fish has outright swallowed the hook, you can skip this part. Some witnesses are called for one purpose only or the focus of their testimony is so singularly evident that you can dispense with the need to confirm it before impeachment.

Fishing Rule #3: Play the fish out

Now switch to the prior inconsistent statement. Enshrine the circumstances under which it was uttered. Extol, in general terms, the witness's effort to be accurate, thorough, or truthful when the first statement was given. This type of extolling is easy.

If you're preparing a bias impeachment, however, then extol *in general terms* the abstract relationship. Ex: if the witness is employed by the party that called her, ask the witness whether she has ever heard of employees letting their employer's interests get ahead of their own. Depending on the answer, you can next enquire into whether, in general terms, employees may feel it necessary, wise, or fair to help their employer out of a jam.

The purpose of this phase is to reduce the witness's options to discount the impeachment. Don't rush this.

Fishing Rule #4: Land the fish

Confront the witness with the impeaching fact, whether its a prior statement or bias. Ex:

from the same employee situation above, ask the witness who has just candidly admitted that employees might bend a rule to help an employer (or who incredibly denied that any employee would ever do such a thing) whether its a fact that she is the opposing party's employee. "You're on Mr. Owner's payroll, too, aren't you?" has a ring to it.

Fishing Rule #5: Kill the fish

If you have an admissible exhibit, move it into evidence and publish it to the jury. If not, dont.

Your're done. Don't play with the fish. Move on to the next impeachment or sit down.

IV. KNOW THE RULES

COLLATERAL? EXTRINSIC? or "Why Johnnie [Cochran] Can't Lead"

Few things are more confusing than what differences exist between questions used to impeach collateral or non-collateral events. The following chart clarifies some of the differences and gives guidance on some non-impeaching techniques that can do duty for impeachment purposes . . .

| | MUST BE A STATEMENT? | OF THIS WITNESS? | MUST IT BE INCONSISTENT? | MEMORY EXHAUSTED? | IS IT EVIDENCE? | MAY THE DOCUMENT BE INTRODUCED? |
|------------------------------|----------------------|------------------|--------------------------|-------------------|------------------|---------------------------------|
| PRIOR INCONSISTENT STATEMENT | Yes | Yes | Yes | No | Yes ¹ | Yes |
| RECORDED RECOLLECTION | Yes | Yes ² | No | Yes | Yes ³ | No |
| REFRESHING RECOLLECTION | No | No | No | Yes | No ⁴ | No ⁴ |

- 1 Yes, for impeachment purposes only. A prior inconsistent statement *can* be used as substantive evidence if it meets the definition under ER 801(d)(1)(a).
- 2 Must have been "made or adopted" by the witness. Rule 803(5).
- 3 May be read into the record in place of testimony. The document, however, is not published or introduced and does not go to the jury. Rule 803(5).
- 4 May not be read into the record and does not take the place of testimony. In fact, the witness should not have to refer to the document once "refreshed" and should be testifying from an independent recollection. On the other hand, the opponent *may* introduce portions relating to the testimony. Moral: use anything you want that refreshes, but make sure you're willing to have the jury see it if opposing counsel so wishes...

RULES ARE YOUR FRIENDS: An Example from ERs 612 & 613

If you have evidence of a prior bad act suggesting some defect in credibility, are you confined to the strictures in ER 612?

According to the collateral/extrinsic rule, you're stuck. You may confront the witness with your impeaching fact, but you must take the witness's answer. You can't prove up the

impeaching fact in the event the witness denies it.

But you may have a way around this obstacle.

Don't begin by asking the witness to admit the impeaching fact. The witness's denial ends the impeachment. Begin instead with the fishing rules. When you reach the point where the rules direct you to confront the witness, ask whether the witness *remembers* the impeaching fact. If the witness does, you don't need to prove it up with extrinsic evidence.

DON'T FORGET ER 806

Must the witness be present to be impeached? No. In fact, the witness need not even have been called. Evidence Rule 806 provides that whenever a hearsay statement — or a statement under Rule 801 — is otherwise admissible, the declarant may be impeach as if he or she was present.

In other words, if a statement comes in under one of the exceptions contained in ER 803 or 804, or if it wasn't technically defined as hearsay in the first place under the exemptions in ER 801, you may now impeach the absent declarant with proof of bias, prior inconsistent statements, etc.

Too often ignored, Rule 806 provides powerful ammunition. Mostly the trick is to see the admissibility and impeachment potential far enough in advance to adequately prepare.

V. KNOW WHAT YOU WANT

FORMS FOR PREPARING CROSS

The following forms are useful for preparing your cross examination.

Form 1 sets out the general topics for each section. Note that the purpose of the form is to allow you to take the podium with a listing of each prior statement regarding any single topic you may wish to impeach on. The space for direct testimony is small because you will only write down the direct if it is unexpected or the working is especially useful. The anticipated direct is not worth writing down. Keep your ears and hands ready for new and useful things.

Whatever system of abbreviation you use to identify the location of a prior statement, be consistent and have the document ready at hand. If at all possible, copies of the admissible prior statements should be prepared so that you can quickly provide opposing counsel and the witness with a copy, keeping one for yourself. If the judge has a role in this particular cross, have a copy for the court, too. The witness's copy is identified with an exhibit label, but your podium copy had better have the same labeling so you can keep track over an extended hearing.

Form 2 is an example taken from the same hearing as the example transcript above. The cross was prepared so that if the witness denied any portion of the scripted session, impeachment was ready at hand. In the example transcript, the officer never deviated a jot from his prior statements. If anything, the witness's efforts were directed in concert with the questioner's goals — a kind of cross-examination judo where the witness's own power carries the testimony in a favorable direction. But counsel was ready to handle any deviation; that confidence may be partly why the witness was so compliant.

Form 3 shows how the scripted cross might look for the same witness. It is detailed and some counsel may choose to use less detailed outlining for less important chapters or less important witnesses. Outlines, however, are thought traps. Just because you listed a topic sentence and 3 subordinate sub-topics does not mean you are fully prepared to properly cross on that topic.

At the minimum any section dealing with sensitive evidence or foundation issues, or which must open only certain doors and only so wide — these sections should be scripted fully and written out for use at the podium. You may find yourself not needing the script, but partly that will be because you took the effort to prepare one. The preparation is the activity that makes you wrap your mind around the problem and conquer the presentation; the preparation of a script makes using the script unnecessary. If unprepared, you will not be able to carry off the same cross.

[Forms can be viewed in separate downloads]