

IMPEACHMENT AND CROSS EXAMINATION

Although jury trials now seem to be the rare exception in litigation, these two critical skills are equally valuable in arbitrations, mediations, and settlements. This article will provide an outline of the basic skills needed to do both effectively and some practical examples about how you can put these techniques to work on the next case on your desk.

Introduction: Impeachment and cross-examination is only one small portion of the role that a trial lawyer plays in a case. Before discussing the specific techniques of impeachment and cross-examination, it is important to understand the role of the lawyer in those situations. The following excerpts from the terrific articles by Professor James McElhany are offered to put the entire trial into better perspective.

1. The Lawyer's Role in Trial :

The most dynamic trial lawyers are often characterized as the "stars" of the proceedings, ripping through witness and exhibits alike to reveal the "truth", and thereby winning the case. In reality, however, the effective trial lawyer is more of a director and producer than a star. The trial lawyer must be able to make an effective presentation with whatever evidence is introduced at trial. Mere dramatics, regardless of how powerful and moving, cannot hide the lack of proof of the facts needed to support a verdict for your client. No matter how much the jury likes you, the evidence has to support your client's case in a way that is both fair and compelling in order for your side to have any reasonable chance of prevailing.

The best trial lawyers are usually entertaining enough in their presentation methods to sustain interest in the proceedings, while informative enough to achieve an understanding of the client's position and needs, and perhaps even empathy for their client's position. Somehow, the best trial lawyers manage to do it all in an ethical and professional way. The goal of the trial lawyer should be to focus on substance rather than style. For the most part, it is the evidence that wins or loses the case, not the lawyer. This is not to say that lawyering does not make a difference. However, it is probably more accurate to say that a lawyer who does a poor job presenting the case is more likely to lose than a lawyer who does a good job presenting the same case. When both sides do an honest and credible job of presentation, justice

should prevail.

2. The Lawyer as a Witness:

James W. McElhaney, in "The Most Important Witness" (ABA Journal, August 1991, pp. 86-89) suggested that there are several messages which the lawyer communicates to the jury through his or her presence or actions. These affirmations are important to keep in mind for every time you have the opportunity to speak to the jury, as well as when you are communicating to the jury through direct or cross-examination. These messages include these express or implied promises or assurances:

"I have studied the facts and understand what this dispute is all about."

"You can trust me to steer you straight."

"I have carefully screened the witnesses."

"I will only call those who will tell you the truth."

"I know the law that governs this case. Justice is on our side."

"If I introduce evidence, it is because it is important."

"If I leave something out, it is because it is unimportant."

"If I attack a witness, it is because he is not telling the truth."

Professor McElhaney further suggests there are four times during trial when the lawyer really does act like a witness, talking directly to the judge and jury without having to go through anyone else. These four occasions are:

1. During Voir Dire: "To be sure, you are sizing them (the jury) up, and they know that. But they are also sizing you up--getting a sense of the kind of person you are, how you put your ideas, whether you get right to the point or dance around it . . . how much you believe in your case, and how you feel about your client, the judge, and the other lawyer."

2. During Opening Statement: "By now the jury has a little notion of what the case is all about, but this is their first opportunity to hear a coherent statement of what the case is all about. Whatever label you put on it, you are the first real witness for your cause Do you tell the story in simple words, or do you lard it with purple prose that is an obvious tug at their heartstrings?"

3. During Cross-Examination: Although the witness is the

one testifying, cross examination is your opportunity to tell your side of the witness' story. And you should do all the talking. When it is done well, all the witness can do is reluctantly agree that what you say is true."

4. During Final Argument: "Here, in a sense, is when the jurors are most critical. What kind of witness are you now that they know the case? Are you careful and reasonable? Or are you asking them to speculate on little bits and pieces and jump to unjustified conclusions? Do you unreasonably reject obvious points that you ought to give away? Worse, are there some points which you do not seem to understand?"

Id.

Professor McElhaney makes several other important points about the concept of what he calls the "witness theory," all of which can be summed up by saying that the jury is watching *what you do* as well as listening to *what you say*. Everything should point in the same direction. How you react to adverse testimony, how you treat the judge, the other lawyer, or the adverse witnesses, your tone and mannerisms all communicate something and should be considered no less carefully than your spoken words when directly addressing the jury in opening statement or closing argument.

3. The Lawyer as Professional Speaker:

In another excellent article on trial practice, Professor McElhaney described the unique position that a trial lawyer occupies as a professional speaker, and how that role requires the trial lawyer to accept certain responsibilities. In "Professionally Speaking," first published in the ABA Journal, September, 1991, pp. 74-77, Professor McElhaney suggested several rules for effective speaking:

A. "Bond with your audience: [P]leasing the audience is the key to persuading them."

B. "Accept responsibility for communication: [I]t is your job to make yourself understood--not your audience's job to understand you. . . . Focus your audience. Watch their faces for signs of understanding or confusion. Respond to the signals they give you. . . . Your job is to get ideas across, not to perform idle litany. . . . Respect your audience. Treat them as equals. Let them understand that getting your ideas across to them is the most important task you have."

C. "Create the perception of credibility: [S]ounding like a lawyer is usually a self-defeating effort. You should choose other ways to

look like you know what you are talking about . . . make sure it is true. Talk only about what you know. . . . Show that you have prepared for your presentation. . . . Use audible and visible organization."

D. "Have something to say: Never make a random . . . presentation. Even organization is not enough. You need a point of view, a story with an object, a theme."

E. "Show--don't tell: Good examples--apt analogies--are more precious than rubies. They have the power to persuade because they make the audience think your point through for themselves. So when they reach their conclusion, it is their idea, not yours."

F. "Keep it simple: The art of simplicity is not only knowing how everything fits together, but also in knowing what can be safely discarded. . . . Your function is not to cover everything, but to make a focused presentation."

G. "Make a memory: Vivid word pictures . . . that will argue your case for you."

H. "Stop: Afterthoughts, recapitulations, repetitive exhortation, and the dismal trailing off by the speaker who is not certain he has finished costs more than whatever they add. Better to leave them thinking they want more than knowing they have had too much."

All of these principles have the same goal: getting the jury's attention. You can only get the jury to really listen to you if you have established that you are a trustworthy guide, one who will guide the jury along the right path to reach a just conclusion. You can do this by putting important information first ("primacy") and close with something strong enough to be remembered ("recency"). The goal is to engage the jury in the process of learning the facts, making decisions, and sorting out what to believe and what to reject. If you can present your evidence in a bold and dynamic fashion, with the needs of the jury in mind, you have a better chance of getting and keeping their attention each step along the way from beginning to end. This can best be done by constructing clear and concise messages, minimizing technical jargon in order to help the jury understand the technical aspects of the case, and being seen as a trustworthy guide.

Note that all of these principles describe your responsibility as the trial lawyer.

They include both the implicit promises that you make to the jury as officer of the court and as an advocate for your client. They also include the explicit promises that you make during the case about what the evidence will prove. Almost everyone has heard an apocryphal story about the lawyer who asked one question too many. A very wise trial lawyer always told anyone who listened to him that if the fact is already in evidence there is very little need to repeat it, enhance it, polish it, or improve on it. If the conclusion is self-evident, the jury's conclusion will be much more persuasive to them than your summary of it.

A corollary to this rule, perhaps on the order of Murphy's law, is that if you decide not to bring up an issue during cross-examination because the damning statement is already in the record, the jury might wonder (and the opponent will certainly argue) that it was a minor matter that could have been cleared up if you had given the witness a chance to explain. Much like the game of chess, each tactical decision has intended and potentially unintended consequences. Just be sure that you think of them all.

4. The Lawyer as Professional:

An effective trial lawyer is a capable and honest person perceived by the jury to be trustworthy. It is not necessary to be "one of them" because they know nothing about the process and even less about the right thing to do. They need a trusted guide. They want someone to help them understand what they are supposed to do, and how they are to interpret and apply the jury instructions. An effective trial lawyer learns to recognize what issues will concern the jury, regardless of the facts presented at trial, and in spite of any instructions the court might give. The power and persuasiveness of your client's position must readily emerge from the evidence, not from the mere skills of dynamic public speaking.

The jury's perception of what is fair, and its common sense and experience in dealing with life's problems can overcome the nerves and occasional stumbles a new lawyer will experience when presenting a case to the jury for the first time. Honesty, integrity, and candor are trial skills that even the newest lawyer should have mastered before accepting representation of a client. For the experienced and capable trial lawyer, they are mandatory character traits.

Finally, although the courtroom is often referred to as a battleground, and the trial

frequently considered a war, there is no reason why two professional and ethical advocates cannot reach the highest levels of responsibility as officers of the court to help find the truth and do justice. Those lofty goals, established as founding principles of our civil system, are not incompatible with zealous advocacy. Justice involves the opportunity to present your case to the jury, and does not mean that you always win.

5. The Ethical Trial Lawyer:

A trial lawyer must never lose sight of the fact that the client expects that he (or she) will be a zealous advocate on behalf of the client. The jury's perception of that advocacy must be seen as an earnest search for truth, not just a yammering insistence that a certain outcome is supported by a mountain of facts or an acre of law. An ethical trial lawyer, however, never loses sight of the fact that however trite or naive the "search for truth" may sometimes seem in the hard everyday world of trial practice, it is a real concept for the jury, woven into the fabric of our society, fed by the drama of movies and television and reaching the very core human values which we share as a civilized society. Learning to tap into those values requires common sense, humility and an appreciation of human nature.

The Code of Professional Responsibility requires lawyers to maintain the dignity of the profession. Competent representation includes knowledge, skill, thoroughness, preparation, and diligence (ER 1.1, 1.3). The Rules of Professional Responsibility are excellent guidelines against which an ethical and effective trial presentation may be measured. An ethical trial lawyer must:

- A. Bring only meritorious claims & contentions (ER 3.1; Rule 11).
- B. Expedite litigation (ER 3.2).
- C. Be candid toward the tribunal (ER 3.3): including adverse facts and legal authorities.
- D. Be fair towards opposing party & counsel (ER 3.4).
- E. Be impartial and respect the decorum of the tribunal (ER 3.5): the case should be decided on the facts and law, not belligerence or theatrics.

These ethical principles are captured and applied in Professor McElhaney's monologues as effective trial techniques, not just archaic and unrealistic rules. We should all operate under a set of common values that guide our actions and influence our decisions. The famous novelist Ayn Rand put it this way: "*Ethics is a code of values which guide our choices and actions and determine the purpose and course of our lives.*" These values should include: trustworthiness, respect, caring, responsibility, justice and fairness and civic responsibility.

Trustworthiness includes integrity or moral courage and principled behavior. It incorporates notions of honesty that includes not only the avoidance of lying, but candor, sincerity, and truthfulness. Trustworthiness also includes principles like promise-keeping, confidentiality, and discretion. In the litigation setting, it may mean looking carefully at what passes for "zealous advocacy", both in the courtroom and in dealings with opposing counsel and parties. Even if you score some points that are permitted under the rules of evidence or ethics, you may lose credibility if it appears that the jury that you are using your authority as a trial lawyer to arrogantly bully or demean a witness just for the sport of it.

The ethical value of respect includes privacy, dignity, courtesy, tolerance, and acceptance of others. In the litigation setting, it may mean treating the process and the participants far better than they might deserve based upon their own merit or conduct. The opponent's lack of a moral compass is no excuse to abandon our own.

The principle of responsibility means that we are accountable and honest in accepting blame and sharing credit. In the litigation setting, it means that the secretary, process server, or co-worker is not to blame for my mistake, or my role in bringing about the problem. It may mean that we cannot get angry at the opponent who will not stipulate away the consequences of a mistake we have made, no matter how trivial. The refusal to waive a deadline may seem petty, but the real cause can be found no further than the end of your list of things that just didn't get done in time. The principle of responsibility also means that we should pursue excellence with diligence, effort, and dedication. In the litigation setting, this means careful attention to detail, no matter what the cost. It may be that your efforts seem unappreciated, but excellence can only be attained by personal commitment and effort.

The principles of justice and fairness are likely what attracted us to the law in the first

place. These values include impartiality, equity, equality, appropriate criteria for judging and interacting with people, due process, and consistency. In the litigation setting, this may include your decision to handle an unpopular case, or not to bill for a service because the person cannot afford it and an injustice would otherwise result. These values are displayed in the way we treat opposing counsel, parties, court staff, and co-counsel. Juries miss nothing in the courtroom because usually the pace of presentation is so slow that they have time to look around and see how everyone is acting, in and out of the courtroom. These values cannot be quantified, but they are always noticed. They are rarely profitable, but they are always appreciated. In a close case, with the equities evenly balanced, the outcome may very well be decided by these subtleties.

Caring is another ethical principle that seems directly contrary to zealous advocacy. Caring includes compassion, consideration, giving, sharing, kindness, and loving. It is usually reserved for close friends and family, and rarely exhibited in the firefights of litigation, but treating your opponent as a human being will pay surprising dividends. The bitterness and anger of litigation is probably unavoidable, but you are always able to choose how you will respond. One person described it this way: "Imagine what you would like people to say about you at your funeral, and then live backwards."

Civic virtue and citizenship also seem completely separate from the attributes of a hard-hitting litigator. Yet, the principles of being a law abiding citizen, serving one's community, participating in the democratic process, and doing your share in service or donations, are never wasted. They may never be recognized or noticed, but they are invaluable to the preservation of the system we serve. A lawyer who has personal values that can only be measured by the amount of billings and collections usually winds up a sad and lonely lawyer, with one or more tragedies or pathologies to deal with.

While a full discussion of professional and personal ethics is beyond the scope of these materials, every good trial lawyer should probably read the article by the Honorable Noel Fidel, entitled "Waltz Me Around Again, Willie . . . Reflections on Discovery Practice, Sharp Elbows, Junk Yard Dogs, and the Elusive Spirit of Cooperation," published in the Arizona Bar Journal, October/November, 1984, pp. 10-18. Judge Fidel's observations are as telling and accurate today as when he first made them more than 30 years ago.

No one should hesitate to be guided in everyday trial practice by these for fear of somehow showing "weakness." Moral courage to do the right thing is never easily found or maintained. It is, however, always worth the effort. As Justice Holmes once said, "*We often overestimate the cost of doing the right thing, and underestimate the cost of doing the wrong thing.*" In summary, being an excellent trial lawyer involves looking within yourself to make sure that you have not lost your enthusiasm for the process, your willingness to do the hard work of carefully evaluating the evidence, or your commitment to excellence.

A. Impeachment: The goal of impeachment is to have jury conclude that witness or the witness' testimony is not "credible". Credibility is obviously a subjective standard. You know the case better than the jurors, so your impression of the credibility of the witness may not always be the same as the impressions of eight jurors who are new to the facts and have no context to evaluate the credibility of the witness. Even if you point out an inconsistency, the jury may not recognize that the inconsistency affects the other testimony provided by the witness at all. Thousands of people have been gullible enough to accept implausible statements made by persuasive salesmen, talk show hosts, hucksters, lawyers, and others, despite the lack of any objective factual basis to support the statements.

People are frequently willing to set aside their common sense and believe something about a fact or about another person that is accepted as true simply because the speaker seems to genuinely believe the statement. Good liars are hard to detect and even harder to pin down. Jurors usually are willing to believe the best about a person that they just met and who just took a solemn oath to tell the truth the whole truth and nothing but the truth. Impeachment, therefore, becomes somewhat of an uphill battle, but if you set the proper foundation, the jury will be able to reach the conclusion that you want them to reach.

1. Jury Instructions: The jury is often given potentially conflicting messages in the instructions. Preliminary 1 of the Recommended Arizona Jury Instructions, tells the jury: "*It will be your duty to decide the facts. You must decide the facts only from the evidence presented in court. You must not speculate or guess about any fact. You must not be influenced by sympathy or prejudice.*" The instruction not to "speculate or guess" may lead the jury to expect

clear and objective evidence of an inconsistent statement. They may feel like they are “guessing” unless the impeachment evidence is tangible and admitted into evidence.

Likewise, RAJI Preliminary 3 explains the concept of evidence to the jury:

“You will decide what the facts are from the evidence presented here in court. That evidence will consist of testimony of witnesses, any documents or other things received in evidence as exhibits, . . . You will decide the credibility and weight to be given to any evidence presented in the case, whether it be direct evidence or circumstantial evidence. Direct evidence is a physical exhibit or the testimony of a witness who saw, heard, touched, smelled or otherwise actually perceived an event. Circumstantial evidence is the proof of a fact from which the existence of another fact may be inferred. You must determine the weight to be given to all the evidence without regard to whether it is direct or circumstantial.”

This instruction is a good guide for developing impeachment evidence. If you can demonstrate that the witness did not see, hear, touch, smell, or actually perceive an event at the critical time and place, then you are probably halfway home. In the movie “My Cousin Vinny”, Joe Pesci cross-examines an elderly woman with thick glasses by taking a tape measure, unrolling it until he reached the back of the courtroom, and then asked her to identify how many fingers he was holding up. The witness had previously identified the defendants without hesitation, but Pesci was able to show that she could not have seen what she testified about. She could not see the number of fingers he held up and her identification was impeached.

However effective the experiment turned out to be in the movie, it would be very risky in real life. Pesci guessed that simply because the witness had thick glasses, she would not be able to see how many fingers he held up. Had she been able to see them, his clients would have been sunk. An important rule of impeachment is just like the one for cross-examination: do not ask an impeachment question unless it is bullet-proof and you have the evidence to back it up.

Another great example of the rule is also from “My Cousin Vinny”. Marisa Tomei, Vinny’s girlfriend, is called by Vinny as an expert in automotive matters. The prosecutor asks for the right to “voir dire” the witness, which is a form of pre-emptive impeachment in which you seek to disqualify the witness from testifying at all. The prosecutor establishes that she is a hairdresser by trade. When he tries to demonstrate that she knows nothing about automotive matters by asking a question about an obscure timing setting on an older model engine, she admits that she cannot answer the question because it is a “bulls**t” question. When asked by

the judge why she cannot answer the question, her answer not only demonstrates that she is a highly experienced auto mechanic, but that the prosecutor was an idiot for ever asking the question.

Yet another example of impeachment also comes from “My Cousin Vinny”. Joe Pesci is cross-examining another witness who testified that he saw the defendants coming out of the convenience store where the robbery occurred while watching out of a window of his motor home. On cross-examination, Pesci was able to demonstrate that the witness had an obstructed line of vision, using pictures he took at the mobile home of the witness. Pesci meticulously goes through them one at a time, getting the witness to concede that his view was obscured by a dirty window screen, bushes, and leaves, all of which would have affected his ability to accurately identify the defendants. Despite these obstructions, the witness might still have been able to see the defendants, but Pesci establish that the quality of the observation was highly suspect.

In each of these examples, Pesci goes in for the “kill” question by pointedly asking the witness to finally concede that what the witness previously testified about was probably not true. The “kill” question was really unnecessary. If you watch the movie, in each of these cases the jury has already figured out that the testimony of the witness was not credible. In each case, Pesci had already given the jury a strong reason not to believe the testimony of the witnesses. The jury did not have to make the difficult judgment about whether or not they were telling the truth, but the jury could easily recognize that the witness’s testimony was just not reliable enough to convict the defendants.

The first sentence of RAJI Preliminary 5 provides additional guidance for the jury, but may also be somewhat confusing. *“In deciding the facts of this case, you should consider what testimony to accept, and what to reject, you may accept everything a witness says, or part of it, or none of it.”* In other words, to properly impeach a witness, you may need to give the jury enough evidence to reject all of the witness’s testimony. Otherwise, you may be able to impeach the witness on a collateral issue but that alone may not be sufficient (and usually is not) to convince the jury to reject all of the testimony. You should recognize that inconsistencies in the testimony are sometimes subtle. The first reaction of a jury may not be that the person is lying or completely mistaken. If the witness seems sincere, the jury may even go out of their way to try

to interpret the testimony in a way that is consistent with the other facts. Even worse, they may just disregard any inconsistent statement completely.

Impeachment can also be supported by a variety of other factors described in RAJI Preliminary 5:

In evaluating testimony, you should use the tests for accuracy and truthfulness that people use in determining matters of importance in everyday life, including such factors as the witnesses ability to see or hear or know the things to which he/she testified; the quality of his/her memory; the witness's manner while testifying; whether he/she has any motive, bias, or prejudice, whether the witness is contradicted by anything he/she said or wrote before trial, or by other evidence; and the reasonableness of the testimony when considered in the light of the other evidence. Consider all of the evidence in light of reason, common sense, and experience.

In RAJI Preliminary 1, the jury is told not to speculate or guess, and that they should make their decision only based on the evidence introduced in court, but in RAJI Preliminary 5, the jury is invited to evaluate the evidence in light of their own (out of court) reason, common sense, and experience. That sounds a lot like speculation, based on matters that took place outside of the courtroom. Whether you appeal to "...reason, common sense and experience" depends on the case and it can certainly cut both ways.

Since human beings are imperfect, it makes sense that during discovery you should be alert to identifying impeachment possibilities in the facts and records that you review, the depositions that you attend, and any other opportunity you have to develop the ability to impeach a witness. During any of these activities you may have a "moment of clarity", or just your inner voice that reminds you that what the witness just said is not consistent with some other fact in the case. Try to make a habit of keeping track of these moments so that you can have them available for you when you start your final trial preparation. Except in the most obvious cases, which is relatively rare, impeachment evidence is usually subtle and easily missed or forgotten in the mass of material we usually generate during discovery.

Trying to apply these instructions to the facts may be further complicated by what the jury is told in RAJI Preliminary 7 (1) that the statements or arguments of the lawyers

are not evidence, but rather may be considered to help the jury understand the evidence and the law. Preliminary 7 (2) states that the question, by itself, is not evidence but can be used to give meaning to a witness's answer. These provisions suggest that when you are trying to craft an impeachment line of questioning, the traditional cross-examination tagline such as "... isn't that true?" is probably not enough to signal the jury that there is anything wrong with the testimony. It will be necessary to be more deliberate in laying the necessary foundation so that the impeachment is patently obvious to the jury, and crafting the question so that the witness has no alternative but to admit the validity of the impeachment and has nowhere else to hide.

In order to do this effectively, after you have identified a potential impeachment statement during a deposition, you may need to either repeat or rephrase question or the answer, or circle around and come back to it again, so that all means of escape, explanation, or denial are cut off. It may be necessary to break the statement down into component parts so that each part becomes a separate basis for the jury to reject the testimony of the witness. Since the goal is to try to convince the jury to reject all of the testimony of the witness, there really is no room for half measures because the jury may find its own way to reconcile the statements with the rest of the evidence.

If you are faced with impeachment evidence, you need to go back to these instructions and find a way to equip the jury with the means to ignore or diminish the importance of the impeachment. The strongest impeachment evidence probably comes from the words of the witness made at a time before litigation which unequivocally states something that conflicts with the witness' current statements or with other undisputed facts. In one medical negligence case, the treating physician testified that he had referred the patient to a nationally recognized expert in the particular syndrome being reported by the patient. The treating physician testified at trial that he relied upon this third-party expert to support his diagnosis, and further testified that this third-party expert supported the treating physician's own opinion regarding causation. Unfortunately for the physician, the referral physician had written a letter to the treating physician that specifically expressed his opinion that the patient did not have the syndrome. The

treating physician had apparently been so convinced that the expert would support him that he never looked at the letter until asked to do so during the trial, with the letter plainly displayed on the eight-foot overhead screen. The impeachment was complete and the case was won.

Sometimes impeachment can come in an indirect form. In the same case described above, the plaintiff claimed to be completely disabled, wheelchair bound, and completely unable to walk or move her arms normally because of the syndrome. It was discovered that she had applied for employment after the alleged onset of the syndrome and filled out employment applications, including for a flight attendant position that stated that she had no disabilities. When confronted, she claimed that she had filled it out during one of her “good days” when the syndrome was not as active. A less damning impeachment, but no less effective, was found in the fact that she had listed her height on 4-5 different applications as ranging from 5’3” to 6’. As luck would have it, because the case had dragged on from trial through appeal and a subsequent retrial, she was captured on surveillance video walking without shoes, on concrete cool deck, in a two-piece bathing suit, and holding hands with her daughter. Most impeachment is not nearly as complete or effective as this case, but it demonstrates that impeachment evidence may be found almost anywhere.

Beware of relying of statements attributed to the party that are contained in police reports, medical records or similar documents prepared by third-party recorders. Patients frequently deny the medical history taken by the physician or the physician staff that attributes a particular statement to them. The statement may have been written by the physician, but more frequently was probably written by a physician assistant, even though the physician actually signed the note. Laying an accurate evidentiary foundation for an impeachment statement is critical to the effectiveness of the impeachment evidence. For instance, in a slip and fall case, with undisputed video evidence of the fall, the plaintiff claimed to have low back problems from the fall that later resulted in expensive back surgery. Plaintiff worked as a cable TV installer, and his subsequent work records showed time off for a low back injury suffered in a fall off a ladder. His

treating physician's records for several years before the slip and fall accident indicated frequent visits for low back pain, along with prescriptions for heavy duty pain-killers. He went back so frequently that the primary care physician discharged him from the practice for lack of compliance and possible substance abuse. Armed with this information, the defense lawyer chose to go through these entries calmly, factually, and one by one, during the plaintiff's deposition. At the conclusion of the deposition, the plaintiff was honest enough to concede that his low back problems had been in existence for years. Because of the video, the premises liability issue was clear, but the concessions by the Plaintiff were enough to result in serious questions about the nature, extent, and duration of the injuries suffered in the slip and fall.

All of these examples demonstrate the rule that you must know the obvious facts of the case, as well as the less obvious secondary sources of information from which helpful facts can be derived. Not every case will justify the time, effort, and expense, but paying attention to the facts may reveal sources of potential impeachment information.

2. Evidence Rules: The Federal Rules of Evidence and its Arizona counterparts include multiple grounds that may be used to impeach a witness.

- Rule 404 limits the admission of character evidence to prove that the person acted in conformity with that character or trait of character under specific circumstances.
- Rule 405 allows testimony about the person's reputation but on cross-examination of the character witness, specific instances of the person's conduct may be admitted.
- Rule 406 permits evidence of the habit or routine practice of a person or an organization to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. This evidence may be admitted "... Regardless of whether it is corroborated or whether there was an eyewitness."
- Rule 407 prohibits evidence of subsequent remedial measures to prove negligence, culpable conduct, a defect in a product or its design, or a need for warning or instruction unless the evidence is offered for "another purpose such as impeachment..."

- Rule 408 prohibits evidence of compromise offers and negotiations except if offered for another purpose, such as proving a witnesses bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.”
- Rule 410 prohibits the admission of pleas, plea discussions and related statements, with limited exception.
- Rule 411 prohibits evidence about whether a person was or was not insured against liability unless it is offered for another purpose, such as proving a witnesses bias or prejudice or proving agency, ownership, or control.
- Rule 602 requires that “sufficient” evidence must be introduced that the witness has “personal knowledge” of the facts, although the witness is permitted to establish the foundation for that “personal knowledge”.
- Rule 607 allows any party, including the party who called the witness to attack the witness’s credibility.
- Rule 608(a) allows the credibility of the witness to be attacked or supported “...by testimony about the witness’s reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character.”
- Rule 608(b) limits the admissibility of specific instances of a witness’s conduct in order to attack or support the witnesses character for truthfulness, although they may be admitted if they are “... probative of the character for truthfulness or untruthfulness of the witness, or another witness who is being cross-examined about the truthfulness or untruthfulness of the witness.”
- Rule 609 allows impeachment by evidence of a criminal conviction under certain specific circumstances. Although there is a presumptive limit of 10 years in using such evidence, it may be admissible if its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect (the Rule 403 balancing test), and the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.”
- Rule 610 prohibits evidence of the religious beliefs of a witness to attack or support the witness’s credibility.”

- Rule 613(a) allows a witness to be examined about a prior statement without being shown the statement, although it must be disclosed to the adverse party's attorney.

- Rule 613(b) allows extrinsic evidence of a witnesses prior inconsistent statement only if the witness is given an opportunity to explain or deny the statement, and the adverse party is given an opportunity to examine the witness about it.

- Rule 702 allows expert testimony if the experts specialized knowledge will “(a)...help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.”

- Rule 801(d)(1) allows impeachment by use of a prior statement of a witness if the statement is “(A)...inconsistent with the declarant’s testimony and given under penalty of perjury; (B) is consistent with the declarant’s testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive...”

- Rule 801(d)(2) allows statements by an opposing party to it be admitted if “(A) was made by the party in an individual or representative capacity; (B) is one the party manifested that it adopted or believed to be true; (C) was made by a person whom the party authorized to make the statement on the subject; (D) was made by the parties agent or employee on a matter within the scope of that relationship and while it existed; or (E) was made by the parties co-conspirator during and in furtherance of the conspiracy.

- Rule 803 carves out a number of prior statements by a witness that are not excluded by the hearsay rule, regardless of whether the declarant is available as a witness. These include, present sense impression, excited utterance, then-existing mental, emotional or physical condition, statement made for medical diagnosis or treatment, recorded recollection, records of a regularly conducted activity, public records, records of religious organizations concerning personal or family history, certificates of marriage, baptism and similar ceremonies, family records, records of documents that affect an interest in property, statements and documents that affect an interest in property, statements in ancient documents (at least 20 years old whose authenticity is established, market reports, statements in learned treatises, periodicals or pamphlets, reputation concerning personal or family history, reputation concerning boundaries or general history, reputation concerning character, judgment of a previous conviction, judgments involving

personal, family or general history or a boundary, former testimony in noncriminal action or proceedings.

- Rule 804(b) list a number of prior statements of the witness that are not precluded by the rule against hearsay if the declarant is unavailable as a witness: former testimony in a criminal case, statement under the belief of imminent death, statement against interest ¶(b)(3), statement of personal or family history, statement offered against a party that wrongfully cause the declarant's unavailability.

- Rule 806 provides that if a hearsay statement has been admitted into evidence, the declarant's credibility may be attacked or supported, by any evidence that would be admissible for those purposes if the declarant has testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it.

Each of these rules provides different grounds for possible impeachment of a witness. Obviously, only a few may apply to a particular case. The point is that impeachment may be available on a variety of legal grounds and for a variety of factual reasons. Without a strong working knowledge of the Rules of Evidence, and all of the details of your claim or defense, you may miss some important opportunities to impeach a witness.

Prior inconsistent statements can be fertile ground for impeachment or cross-examination. Here are some guidelines:

- a. Rule 613(a): When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness, but on request must show it to the adverse party's attorney. *Lynn v. Helitec Corp.* 144 Ariz. 564, 698 P.2d 1283 (Div 1, 1984).

- b. Rule 613(b): extrinsic evidence of prior inconsistent statement is admissible only if the witness is given the opportunity to explain or deny the statement, and the adverse party has the opportunity to examine the witness about it. This does not apply to prior admissions of a party. *Lynn*, supra. Extrinsic evidence can be used if the witness denies making the statement. If the witness admits the statement, the court can still allow the admission of the statement into evidence if the jury must decide which version is true.

c. The statement can be used for substantive and impeachment purposes. *Reed v. Hinderland*, 135 Ariz. 213, 660 P.2d 464 (1983).

d. The statement does not have to be directly contrary to the testimony, but to be relevant the inconsistent statement may not merely be on a collateral issue. *Trickel v. Rainbo Baking Co. of Phoenix*, 100 Ariz. 222, 412 P.2d 852 (1966)

e. However damning the inconsistency may be the jury is still entitled to give it whatever weight it deems appropriate. RAJI Preliminary 3, *supra*; *Ohio Farmers Ins. Co. v. Norman*, 122 Ariz. 330, 594 P.2d 1026 (App, Div. 2, 1979).

f. Note that Rule 26.1(a)(3) requires disclosure of witnesses and a fair description of the substance of the expected testimony. Rule 26.1(a)(4) requires disclosure of persons who may have knowledge, and the nature of the knowledge or information each person is believed to possess. Rule 26.1(5) requires disclosure of persons who have given statements, written or recorded, signed or unsigned, and the custodian of such statements. Rule 26.1(8) requires disclosure of evidence, relevant documents or electronically stored information that the disclosing party intends to use at trial. These rules suggest that Arizona's disclosure rules, if broadly construed, may require disclosure.

g. The protection otherwise provided by Rule 26(b)(3) regarding trial preparation materials states that "substantial need" is not a prerequisite to obtaining a statement concerning the action or its subject matter previously made by that party. The rule defines "statement" as a (A) written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical or other recording, or a transcription which is a substantially verbatim recital of an oral statement made by the person and contemporaneously recorded.

h. For guidance regarding production of impeachment materials, See *Zimmerman v. Superior Court*, 98 Ariz. 85, 402 P.2d 212 (1965) and *State Farm Insurance Company v. Roberts*, 97 Ariz. 169, 398 P.2d 671 (1965) .

i. Types and sources: unsigned statement: accident report, recorded statements, voice messages, social media, diaries, journals, a summary of a statement given by the witness to a third party: medical history, employment application, disability application, criminal appearances, probation reports

j. Note that Rule 801(a) defines a "statement" as a person's oral assertion, written assertion, or non-verbal conduct if the person intended it as an assertion.

k. Rule 801(d)(1) covers prior inconsistent statements. Note that Rule 801(d)(1)(B) has changes effective January 1, 2015 that allow admission of *consistent* prior statements to rebut an express or implied charge of recent fabrication, improper influence or motive while testifying, or to rehabilitate the witnesses credibility as a witness “...when attacked on another ground”. (?)

l. Review all of the elements of Rule 801 for the necessary foundation needed to admit statements of the witness or party.

Potential Methods for Impeachment:

1. Prior Inconsistent Statement(logical, backward to the source statement): start from the statement during trial but then go backwards to the first consistent statement . As an example:

a. Refresh the jury’s recollection about the witness’ testimony on direct: “You just testified, under oath, that the light was red when the defendants entered the intersection, true?”

i. May need to set foundational facts if impeachment based on inability or interference with ability to make the observation that is claimed.

ii. Consider having the reporter read back the witness’ answer; in electronic courtroom, that would not be available at the earliest until the next day.

iii. Check with the clerk about when to have a clip of the testimony available.

b. Lay a strong foundation for inconsistent statement to eliminate waffling or misunderstanding:

i. Testified in deposition a few weeks ago that you weren’t sure if the light was red or green.

ii. Interviewed by investigator for my office, and said the light was green.

iii. Later filled out a witness statement (show the document), said the light was green. Signature on witness statement was your promise that your statement was true.

iv. Interviewed at the scene by the police officer? Told officer light was green for defendant?

c. Avoid the temptation to ask follow-up questions that start with “So...”. This is usual predicate to the Perry Mason moment when the questioner gets the complete concession or confession. The jury will have already recognized that the statements are inconsistent and unreliable. Avoid asking “Which statement is a lie?” or questions like that—they almost always give the witness an escape.

2. Prior inconsistent statement (logical, from the first statement to the current one): in this technique the questioner ignores the recent inconsistent statement, and instead lays the foundation for the first prior statement at the beginning of the cross-examination and then moves forward to the current statement.

a. “ At the scene, you gave a statement to the police officer?” It took place while you were still at the scene? It took place at the scene while everything was still fresh in your mind? Agree that this is your statement?”

b. About a week later, you were interviewed by a police investigator who asked you about the facts of the accident. Facts were still fresh in your mind? Exciting event, so not likely you would have forgotten? Didn’t know anyone in the accident, no you were not choosing sides, right? No reason to favor one driver over the other?

c. About two weeks later, you gave a recorded statement to an investigator? Facts were still fresh in your mind? We’ve had it typed up and I’ll ask you to read it to yourself. Is that true and accurate? (Move the admission of the prior statements.)

d. Is it true that the first time that you provided your eyewitness statement that the light was red was after you were interviewed by an investigator for the Plaintiff, some 2 years after the events, right?

e. At the time of the accident, your mind was clear? You told the truth to officer what you saw? You told the truth when you filled out a witness statement about what you saw. You told the truth to the police investigator about what you saw.

3. Impeachment by impossibility: In this example, the witness has consistently told the same story, but could not have seen what the witness testified about (see, e.g. examples from “My Cousin Vinny”, above), or was accurate in the observation but completely inaccurate about timing or sequence.

a. Paint the rest of the picture to help put the jury in the spot; use maps, diagrams, etc. so the jury is right there with you.

- i. On the day of the accident, you were waiting at the bus stop near the intersection, right?
- ii. Map shows location of bus stop...appears correct?
- iii. Bus stop faces south, so the back of the bus stop shelter is behind you (picture?)
- iv. Defendants car came from behind you as it approached the intersection
- v. Didn't see it before the crash?
- vi. You were drinking a Starbucks frozen latte?
- vii. It was hot out?
- viii. You looked down the street a couple of times to see if the bus was in sight yet?
- ix. The first thing you heard was the crash?
- x. Looked over/up and the light was red?

b. Avoid the temptation to go for the kill question unless you are sure that the witness is ready to give it up.

4. Impeachment by prior deposition testimony: this is a potentially dangerous area for examination because at least 50% of the time, the deposition question to which the inconsistent answer is given is itself vague, ambiguous, or confusing. When you read it back in the transcript, you would be surprised that the way you constructed the question gave the witness any room to escape.

a. Establish the foundation for the deposition. Frequently, you can ask the judge to tell the jury what a deposition is; or ask permission to explain what it is.

- i. You testified under oath at my office on (date), do you remember that?
- ii. You promised to tell the whole truth? Just like in court today?

- iii. Court reporter was present taking everything down, word for word.
- iv. I asked you to tell me if you did not understand a question?
- v. You answered every question I asked?
- vi. Never asked me to repeat or clarify any question.
- vii. After the reporter typed up her notes, you had the right to read the deposition and to correct any errors the court reporter might have accidentally made.
- viii. You didn't do that either, did you?
- ix. Let me read you your testimony under oath on (date), I've handed you a copy, so please read along as I read it. (or, "It is up on the screen so we can read it together.")
- x. Was this testimony was the truth at the time you gave it?

b. Where you go next depends on the situation, but the jury usually "gets it" the first time.

5. Be careful not to unravel your case by impeachment that is too clever so that you impeach the witness but damage your own case. Do not give the witness a chance to reinforce or repeat the prior testimony.

a. Remember the prior inconsistent statement is admissible for all purposes including substantive proof of a fact. Rule 801.

b. The intended consequence of examination is to impeach, but if it backfires, the witness may get the chance to elaborate to re-confirm the direct testimony.

c. A good guide is that if the statement is already in evidence, there might not be a need to ask any other questions, other than to establish the accuracy and the foundational facts.

i. Plaintiff in a med mal case is shown an informed consent form she signed

ii. She agrees that it accurate and includes her signature

iii. You sit down and the other side shows a medical record that demonstrates she had a powerful pain drug administered 15 minutes before the nurses/physician asked her to sign the consent. Oops.

6. Special/Problem Witnesses: Elderly, child, victim: The jury may likely believe that the testimony is suspect anyway, based on the demeanor of the witness or manner while testifying. If you have to impeach, try to do it indirectly, through information that is already in evidence. Don't ask the witness to recant, just show it makes no sense. Options include:

a. Pass the witness?-no questions

b. Be careful with sympathetic witness, gently and kindly

c. Establish one or two points then quit

d. Make sure that the witness was not coached through prior prep sessions.

Kids especially can be remarkably candid even when they have been coached.

(i.e. "Did your Mom tell you not to tell something that you know?")

7. Non-Expert Witnesses and Categories (Party, Employee of Party, and Non-Party Witness): Just because the credibility of a witness might be challenged, it does not mean that the jury will find them unbelievable. The jury will usually give them the benefit of the doubt that they are telling the truth as they know it or believe it to be. Impeachment of these witnesses should be efficiently done, if at all. The question to ask yourself is: Did the testimony establish an element of the opponent's case or damage an element of my defense?" If the answer is no, then move on. Even unmistakable impeachment is worthless unless it helps your case.

8. Evasive or Non-Responsive Witness: This is a problem area because witnesses, especially experts, are adept at sidestepping cross-examination or impeachment, and can sometimes even reinforce their direct testimony. If you have asked a good question and the witness keeps ducking it, the jury usually gets the idea that the witness is not being fair with you. Usually, that is a good thing. Possible techniques and basic principles include:

a. Short, clear questions.

b. Use low risk (the answer is very clear), high benefit questions (the information helps your case).

c. Listen (really listen) to both direct and the answers given. It may not be the answer you wanted but may give you just as much to work with.

d. Look for tells: mannerisms that show the witness is not being candid (nervousness, twitching, squirming, pulling at clothes, hair, etc.)

e. Repeat question 2 or 3 times (avoid rolling eyes or changing tone or becoming impatient...just let the jury get the idea that you are asking a clear question and the witness won't give it to you.

f. Be polite (perhaps I didn't make it clear; perhaps you didn't understand).

g. Break the question down for witness into smaller concessions. (BUT do not be condescending!)

i. Do you understand the question?

ii. Are you able to give me a yes or no before any further explanation?

iii. Let's break it down (and then go through each element of the question to identify the specific area of disagreement.

h. Witness repeating himself: be patient and lead the witness back; use of visuals is very helpful.

i. Avoid cutting off the witness if possible, and then politely.

ii. Withdraw the question and start again

iii. Avoid arguing with or being upset or belligerent with witness (no matter how well deserved).

iv. If witness continues to refuse to respond, jury will let you know and more often than you think a judge will voluntarily intervene and require the witness to answer without explanation. BUT

v. Avoid asking the judge to intervene and require the witness to answer without explanation. Jury will not understand the interruption, may think you are hiding the truth, and it sounds a lot like whining.

9. Witness who wants to explain everything: this witness is completely incapable of giving a simple answer, no matter how good the question. If the babbling is not hurting you, wait, and then ask the question again, even simpler if possible.

10. Expert Witnesses

- a. Same techniques and principles above apply.
- b. Emphasize fees for bias only when fees are disproportionate.
- c. Ask witness to repeat what he tells others what he does for a living when asked. If self-description is consultant, expert or the like that establishes that witness does not work day to day at a productive job in the particular field in which expert testimony is being offered.
- d. Avoid a head on attack. The expert has been challenged before and will use some term or testimony to try to show you up.
- e. For depositions get expert to tell you:
 - a. All previous instances in which he has testified;
 - b. What treatises are considered authorities in the area;
 - c. What the witness did not do; and
 - d. Whether the witness has ever been wrong in the past.
 - e. Limiting expert witnesses to yes or no, by reminding expert of the following:
 - i. Witness has trial experience before.
 - ii. Direct cross and redirect is part of the process
 - iii. Willing to be fair, answer the questions, and let the jury decide.

B. Cross Examination: The purpose of cross-examination is to establish or permit jury to infer points or facts that are important or favorable to your case. The direct examination should have established the necessary elements of proving the opponent's prima facie case on one or more issues or elements of proof. In cross-examination, you are telling the jury the "rest of the story" that the direct examination left out, or demonstrating that the quality of the proof offered on a particular element of the case is inadequate in some way. In the movies, cross-examination is frequently portrayed as the penultimate point where the cross-examining lawyer obtains the fatal admission that destroys the opponent's case (See, e.g. Tom Cruise's final (screaming) cross-examination of Jack Nicholson in "A Few Good Men" to get Nicholson's

admission against interest: “You’re damned right I ordered the Code Red!”). In real life, such a dramatic conclusion is a complete fiction.

1. The Basics: Rule 39 (b) Arizona Rules of Civil Procedure specifies the order of proof at civil trials. Rule 611(a) provides that the trial court *should* exercise “reasonable control over the mode and order of examining witnesses and presenting evidence so as to open: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment.” This language suggests that the trial judge is expected to be active in the control of the presentation of evidence. These three components of Rule 611(a) are an excellent list of the factors that good trial lawyers use trying to convince the trial judge that a particular line of questioning or cross-examination should be allowed. Most trial judges are very attuned to the need to avoid wasting time. The best way to assure the judge that you should be given some leeway is to tell the judge that the lines of questioning will (a) help the jury understand the evidence, and (b) move the case along. This assurance almost always works as long as the judge believes that you can be trusted to keep your word.

The trial court, has discretion to impose reasonable limitations on the presentation of evidence that take into account the importance of cross-examination in the fact-finding process. *Dunn v. Carruth*, 162 Ariz. 478, 784 P.2d 684 (1989); Rule 39(b) and Rule 16(h), Arizona Rules of Civil Procedure. The limits imposed by the court must be reasonable under the circumstances. Rigid limits are disfavored, and any time limits imposed should be sufficiently flexible to allow for adjustments during trial. *Gamboia v. Metzler*, 223 Ariz. 399, 224 P.3d 215, (Ct. App Div. 1, 2010, rev. denied, 2010).

Rule 611(b) of the Federal Rules of Evidence limits cross-examination to matters covered in the direct testimony of the witness and matters relating to credibility. In Arizona, Rule 611(b) of the Arizona Rules of Evidence provides that “a witness may be cross-examined on any relevant matter”. In general, the court will allow a cross-examining lawyer “wide latitude” in the conduct of the examination. *Watts v. Golden Age Nursing Home*, 127 Ariz. 255, 619 P.2d 1032 (1980). The right to cross-examination is considered fundamental to the judicial process and may involve due process issues. *Town of El Mirage v. Industrial Commission*, 127 Ariz. 377, 621 P.2d 286 (Div. 1, 1980); Arizona Constitution Article 2, §24.

The latitude given to a cross-examining lawyer is not without limits. The court can preclude the use of argumentative questions, which have been held to be an improper motive examination. *State v. Bible*, 175 Ariz. 549, 858 P.2d 1152 (1993). It is also improper to ask questions during cross-examination that insinuate the existence of facts that will not be the subject of proof. *Taylor v. Cate*, 117 Ariz. 367, 573 P.2d 58 (1977). Cross-examination may not be used as a pretext for directly or indirectly presenting evidence that the court has previously excluded. *Sharman v. Skaggs Companies, Inc.*, 124 Ariz. 165, 602 P.2d 833 (Ct. App. Div. 2, 1979). This is particularly true for rulings by the court on *motions in limine*.

For impeachment, the goal of the examination is to undermine the credibility of witness and the reliability of the testimony being given. In cross-examination, the goal is to attack the competency of the witness and the relevance or admissibility of the testimony. Rule 601, Arizona Rules of Evidence provides that a witness is allowed to testify “...*only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter...*”. A good direct examination for an important eyewitness will establish not only that the witness was present, but will also provide enough detail to satisfy the jury that the witness is testifying about matter that they actually saw, heard, or participated in. The testimony must be based on the personal observation of the witness or participation in the events at issue. *Selby v. Savard*, 134 Ariz. 222, 655 P.2d 342 (1982). The lack of first-hand knowledge usually makes the testimony incompetent, and thus inadmissible. Sometimes the absence of a particular event becomes relevant, such as when the witness testifies that something did not happen (for instance in the case of whether lights and siren were audible, or the flashing lights of the railroad crossing could be seen. In *Mast v. Standard Oil Co. of California*, 680 P.2d 137, 140 Ariz. 1 (Ariz., 1984) there was a gas explosion and a survivor provided an affidavit that he did not smell the telltale odorant in the air. The court found that the testimony was admissible. “*Negative evidence can rise to the level of probative value only when coupled with a sufficient predicate, consisting of additional testimony or circumstances to show that the witness' position and attitude of attention were such that he probably would have heard or seen the occurrence of the event had it happened*”, citing *Byars v. Arizona Public Service Co.*, 24 Ariz.App. 420, 424, 539 P.2d 534, 538 (1975).

An additional limitation on the scope of cross-examination is that it is limited to any *relevant* matter. This necessarily brings into play all of the 400 series relevancy rules, including Rule 403, which allows the court to exclude relevant evidence “...if its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” In *Gasiorowski v. Hose*, 182 Ariz. 376, 897 P.2d 678 (Ct. App. Div. 1, 1994), the court discussed the “balancing” test that the trial court should use in determining whether to admit or deny certain evidence. The Court held that when considering those factors, the trial court should take into account the right to cross-examine before excluding evidence that might only have marginal relevance. *See*, Ariz. R. Evid. 403; *Yauch v. S. Pac. Transp. Co.*, 198 Ariz. 394, 399, ¶ 10, 10 P.3d 1181, 1186 (App.2000). 198 Ariz. at 403, ¶ 26, 10 P.3d at 1190 (stating that the balancing of factors under Rule 403 is peculiarly a function of the trial court, not appellate courts); *Shotwell v. Donahoe*, 207 Ariz. 287, 295–96, ¶ 33, 85 P.3d 1045, 1053–54 (2004) (“For the benefit of the appellate court, a trial court conducting its Rule 403 analysis should explain on the record its Rule 403 weighing process.”).

2. Preparing for Cross-Examination: In order to be done effectively, cross-examination requires much more advance preparation than almost any other aspect of the trial. It cannot be left until the evening before the witness will testify, the week before the trial is set to begin, or even a month before the trial. It should never be done, even in outline, by a paralegal or new associate. Impeachment and cross examination is part of a case-long process, even when the apparent value of a particular piece of evidence may not be recognized at the time it is received. Pleadings, interrogatories, medical records, disclosure statements, and depositions are all potential sources of valuable information that could be used for cross-examination or impeachment. Depositions, especially of single-issue fact witnesses, are a valuable place to learn how to craft cross-examination questions which pin the witness down to a specific fact that you need to establish, and leave no room to squirm, explain, or even deny.

A highly regarded Arizona trial lawyer made it a routine practice for each case carry a bound notebook that he carried to every proceeding in the case, whether it was a deposition or a court appearance. In that “moment of clarity” that trial lawyers can sometimes have when they

have focused and prepared for a particular issue, he found that keeping track of potential cross-examination points was extremely valuable. As a result, his cross-examination was widely considered to be among the best in the state. In a busy practice, it is not unusual to delegate most organizational tasks to a support person or to an associate. As the trial lawyer, you have a unique perspective of the importance of each bit of evidence as a key aspect of the trial. A particular point may seem insignificant at the time, and will be easy to overlook in the larger tasks of getting ready for trial. A side benefit of this preparation is that you will have a clearer focus on how to prepare your own witnesses for their cross-examination and what is needed to present your own exhibits that will illustrate the points of your cross-examination or the weaknesses in the witness's testimony.

3. Organization: After potential information for cross-examination or impeachment has been collected, it needs to be carefully evaluated. One case management database program on the market allows the entry of all of the facts into the database and then provides a separate field in the database to evaluate each fact. Whether the specific fact is disputed or undisputed, the facts are divided into five major categories: strongly in our favor, in our favor, neutral, against us, strongly against us. The program allows you to assign and link the supporting documentation, whether it is an exhibit, a deposition transcript, a medical record, or other source. How you complete this process is not as important as evaluating each piece of information for potential cross-examination in terms of its own strength or weakness. You can assemble these facts according to the elements of the claim or defense, but if you put a particular piece of evidence into a particular cubbyhole too early, you may miss some of the connections with other aspects of the case or with a particular witness.

The next step is to associate each fact with a specific claim, defense, or essential element of your proof. A fact may be relevant to more than one category of your proof. Once you have identified what is needed for your case, it will be helpful to identify those bits of evidence that are necessary for the opponent's burden of proof on any claim, defense, or element of the case. By comparing the two lists, you will be able to identify the strongest areas of your case and the weakest areas of your opponent's case. By identifying more than one supporting basis for the elements of the case, including supporting or contrary evidence produced by the other side, the

general organizational structure of your cross-examination should become clearer. The point is that cross-examination and impeachment do not exist in a vacuum. They are part of an integrated puzzle which the jurors must be able to see before they can determine what to believe and what to reject.

Next, identify the points for cross examination, including short statement of each fact or conclusion you want to establish. The strongest cross-examination or impeachment is usually supported by a document or photograph that illustrates the point you are trying to make. In the cross-examination of the eyewitness in “My Cousin Vinny”, described above, Vinny makes good use of objective facts and builds on those facts to get to his final point that the witness did not actually see what they believed that they saw. Note that it was not necessary to be disrespectful to the witness, or to accuse the witness of lying. It also is not necessary to get the witness to concede that they could not have seen what they testified about.

The cross-examination was effective because the testimony could not possibly be reliable once the foundational facts were established. Whether it is cross-examination or a courtroom demonstration, however, remember the rule that should not try something unless you are positive that it will work correctly the first time. Murphy’s Rule for trial lawyers is that something that can go wrong will go wrong at the worst possible time. A great example of this is also from “My Cousin Vinny” is the cross-examination of a witness by co-defense counsel. He approaches the witness and notices that the witness has glasses in his coat pocket. He obtains the admission that the witness must wear the glasses to see clearly and was not wearing glasses at the time of the robbery. When he goes for the kill question to impeach the witness, the witness merely said “Them’s reading glasses”. The only thing worse than this backfired examination was the lawyer’s bumbling attempt to salvage something, which also failed miserably. Or, as the famed trial lawyer Louis Nizer put it: *“In cross-examination, as in fishing, nothing is more ungainly than a fisherman pulled into the water by his catch.”*

The concept of circumstantial evidence is usually harder for the jury to understand. This may be because the jury instructions, as noted above, tell them not to guess or speculate and to only rely on “evidence”. The jury instruction says that *“Circumstantial evidence is the proof of a fact from which the existence of another fact may be inferred.”* This is a convoluted explanation

of a fairly simple concept. If I am a parent and I come downstairs to investigate a noise in the kitchen, and my child is holding cookies and his chubby cheeks are bulging, there is no question about what happened. If I come down a minute later, however, and the only evidence is some small crumbs on my child's cheeks, I was not there to see the child eat the cookie but there is still no question about whether or not he ate the cookies. If you are going to ask the jury to reach an inference, you probably will have to work twice as hard to establish the connections between the foundational fact and the inference to be drawn.

Sonja Hamlin should be required reading for any trial lawyer seeking to improve their skills. In her original book "What Makes Juries Listen Today" and her later books,¹ she makes critical points about the importance of communication skills. She includes these basic points about cross examination techniques.

1. Cross should be skillful and invisible dissection. The main goal is not to cream the witness, but to uncover and disclose new evidence and insights in order to inform the jury.

2. Getting the jurors involved. Cross is not a verbal argument between the lawyer and the witness. You are not just reciting facts that you know. You are telling a story to the jury and you have to get them interested as quickly as possible so that you can motivate them as you set the clues in front of them, one step at a time, which gives them a job to do. If you have done it correctly, the jury will get to the conclusion long before you or the witness do.

3. Jurors are not robots. They have feelings. They usually want to think the best of people, even defendants. If you start off as the grand inquisitor, you are just as likely to have the jury react just like the witness is reacting, with fear, confusion, or defensiveness. The jury may be inclined to take sides with the witness and therefore will not hear any controverting testimony.

4. Establish yourself as a seeker of truth: you need to show the jury why your point makes a difference and what impact it has on the case.

5. Jurors have seen enough TV and movies to expect cross-examination to be a loud hostile confrontation. If you can catch their interest, they may be more willing to

¹ "What Makes Juries Really Listen Today" and "Now What Makes Juries Listen", Legal Works, 2008, available through West Publishing or Amazon; see bibliography at the end of these materials.

stay with you as you circle your prey. One trial lawyer described it as setting a picket fence, one pole of the time, each one building on the other to extend the circle around the witness, until the witness has nowhere to go, no place to escape. Avoid a frontal, confrontational tone because more often than not, the jury will have no idea why you are being confrontational. If you are conversational, you can help the jury focus on the fact and the answers.

6. Since the jury is told that what the lawyers say is not evidence, posturing and showboating is rarely, if ever, effective. If you can capture the jury's interest in seeing what is uncovered by each question, the cross will be much more effective.

7. This is not to say that you need to be a robot either. Cross-examination is sometimes like what Shakespeare called "all sound and fury, signifying nothing." What you are trying for is giving the jury a sense of your integrity and your search for the truth that will help the jury do their job.

8. Accept the fact that your view of the witness on cross-examination is like a bull's-eye and you have worked hard to take dead aim at the kill shot. It is easy to forget that the jury is inundated with facts, conflicting testimony, unfamiliar surroundings, and sometimes just losing focus.

9. Cross-examination should start with a clear idea of what you want to accomplish with the cross-examination. This is harder than it sounds. Your cross-examination of each witness will have a different objective, and a different means of getting to that objective. The objective is not to make you look good or skilled or eloquent. The objective is to help the jury see a critical point of evidence that helps your case or a critical point of evidence that the other side left out of their case. Jurors may not have a great opinion about lawyers in the courtroom, but they certainly expect them to play fair, act professionally, and help them in seeking the truth.

10. A subset of deciding what you want to accomplish is evaluating the points in terms of the importance of the fact to the case or whether or not the fact will get lost. Try to identify what the jury needs to know or has to learn in order to accomplish the goal that you set. You are a teacher, not a lecturer.

11. There are different types of cross-examination: a constructive cross adds the rest of the story, areas of agreement, additional and useful facts, points of contact which will make your version of the facts or your arguments in your client's favor more persuasive. A destructive cross challenges the witness's credibility or competence, much like impeachment. The constructive cross is a bit like buying government bonds: slow and steady but not spectacular progress and returns. If the jury looks to you as being a

guide, a constructive cross helps them understand the rest of the story. On the other hand, a destructive cross is more difficult to do and may confuse the jury about whether or not you are personally attacking the witness or undermining their credibility. Not every inconsistency or credibility lapse automatically disqualifies a witness.

12. Consider using demonstrative exhibits to contrast between what was said on direct and what is being said by the witness on the stand. For instance, you could create an exhibit that has the statements of the witness at the scene, in the insurer recorded statement, in deposition, in interrogatories, and in trial, to highlight those differences. By doing that, you will see what are clear contrasts (traffic light red versus green) and fairly minor inconsistencies.

13. Cross-examination is not just a single uninterrupted flow of information. Understand that the jury needs time to process. This does not mean dead time, it means that you have to establish clear connections between one point and another. Just like a railroad train is built one car coupled to another, each line of questioning needs to be connected to what was just presented, so the jury sees how the new information connects.

14. Given the enormous pressure of being a juror, it is unreasonable to expect the jury to get to the right destination on its own. More often than not, if you do not leave them, someone else on the jury will. This will require that you establish bridges, transitions, connections, and reminders, signposts along the way so that later in the trial, with another witness or in closing argument, you can show them the path that they were on and they will recall what you taught them.

15. When an exhibit is used in the courtroom, it is marked as a demonstrative exhibit. The clerk assigns a number to the exhibit and the record should clearly show when a witness or the lawyer are talking about what is on the exhibit. As a demonstrative, it is intended to illustrate a point. It is not admitted into evidence in the jury is not permitted to take it back into the jury room during deliberations. A demonstrative exhibit, properly done, can stay with the jury and will be a good visual cue that will help refresh their recollection about what happened when that demonstrative exhibit was used.

16. The fact that the demonstrative exhibit is used in the courtroom means that the cross examiner is free to use it as well. In the classic traffic accident case, a diagram used on direct examination can be just as effective, perhaps more so, if used during cross-examination to undermine the witness' testimony or credibility.

4. Classic Cross-Examination Techniques: There are dozens if not hundreds of excellent books on the subject of cross-examination. Thousands of lectures have been given on

the topic. Most judges, however, will usually concede that it is a skill that is rarely performed well, let alone effectively. Sometimes, skillful cross-examination can help educate the jury so well that they become convinced that the other side should win. Although you are the “teacher” in many respects, and your integrity is always on display, never forget that your role as an advocate should never be blurred or lost in a noble search for the truth. Usually, the roles of teacher and advocate can co-exist quite well, but sometimes a more experienced lawyer can get carried away with one role at the expense of the other, especially when the opponent is doing badly and stumbling about. Here are some classic reminders:

- a. Leading questions and content: keep the witness on a short leash; make questions to the point and clearly delivered.
- b. Try to construct the cross-examination so that the jury sees where you are going.
- c. Establish one fact or point at a time to the jury’s understanding can be built one brick at a time.
- d. Make the question as clear as possible; avoid misunderstanding or ambiguity.
- e. Avoid trite or mechanical techniques: do not always begin or end a question with: "Isn't it true?"
- f. Always be polite and respectful, no matter how hard you have been hit and no matter how disrespectful the witness has been. Keep your cool professional demeanor at all times. Jurors don’t like bullies any more than you do.
- g. Despite the broad scope of cross-examination provided in Rule 611(b), there must be a reasonable good faith basis for every question. If there is not, you must challenge the cross examiner if necessary, at the bench, and ask to have it struck and then seek jury instruction if no proof or good faith basis exists.
- h. Make fact you want to impeach, simple, specific, and convert it to a form that is directly parallel and consistent with the impeaching fact.
- i. Use the actual words of the prior inconsistent statement. Do not paraphrase or take out of context.

Pursuant to Arizona case law and Evidence Rule 801, the prior statement is also substantive evidence, and may be relevant to the issues in the case beyond whatever impeachment value it may have. In Arizona, Rule 26.1 requires disclosure of all documents including those for impeachment. In federal court, Rule 26 does not require disclosure of impeachment documents. There is probably no tactical reason not to disclose prior inconsistent statements. Although there is always the concern that the witness should not be given a chance to dilute the impeaching effect of the prior statement, the fact is that additional efforts to “cure” the inconsistency, will just as likely lead to more inconsistencies. Disclosure may also undermine the opponent’s case sufficiently to lead to a better settlement. In any event, the interests of justice are best served by full disclosure.

Conclusion: The strategic use of impeachment and cross-examination requires an enormous amount of preparation and practice. The object of both of these tools is to communicate, clearly and effectively with the jury to help them see the evidence in a new light or to disregard certain evidence. Unfortunately, in this modern age the time in which you have to score points is very limited. A recent study called “Attention Span Statistics”, by the National Center for Biotechnology Information, U.S. Library of Medicine, announced that in 2013 the average attention span for adults was only eight seconds. That was down from a whopping twelve seconds measured in 2010, and less than the attention span of a goldfish (9 seconds). The trial process is long and most jurors find it repetitive and tedious. Cross-examination and impeachment, if done correctly, can grab the jury’s attention, increase their understanding, and improve their retention of what information is important to help them decide the case. With short attention spans, long winded or complex cross-examination will not likely be effective.

As so eloquently stated by Oliver Wendell Holmes Sr.: “*Speak clearly, if you speak at all; carve every word before you let it fall.*” It is a great rule in life, in relationships, and especially in trial.

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Don has had advanced mediation training, including two intensive annual programs presented by the Strauss Institute for Dispute Resolution, located at Pepperdine University, Malibu California. Don also completed advanced training in Christian mediation and reconciliation from Peacemaker Ministries, as well as other advanced mediation training from the American Bar Association. Don has successfully mediated a wide variety of matters from automobile and other vehicle accidents to construction defect litigation, civil rights, employment discrimination, insurance coverage and bad faith and complex partnership dissolutions. Don is also available for arbitrations, special master appointments and other forms of alternative dispute resolution.