

Ten Tips for Direct Examination and Cross-Examination

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Introduction

There are textbooks and treatises devoted to the intricacies of direct and cross-examination. Even so, every detail necessary for effective examination of witnesses cannot be found in a single source.¹ Such unfound details are practical skills and require years of learning, practice, and experience. This Article outlines ten tips for both direct and cross-examination, which certainly is not an exhaustive list. Other than preparation, these tips are not listed in order of importance.

Ten Tips for Direct Examination

1. Prepare

There is absolutely no substitute for hard work. You must master both the facts and subject matter of your case. You must know the judge, the

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¹ See FRANCIS WELLMAN, THE ART OF CROSS-EXAMINATION 122 (1919) http://www.trialtheater.com/documents/The_Art_of_Cross_Examination.pdf (“I am of the opinion that it is impossible to embody in any set of rules the art of examination of witnesses. . . .”), originally in FRANCIS WELLMAN, THE ART OF CROSS-EXAMINATION 135 (1903).

witness, and the jury. Your job on direct examination is to have the witness tell the story, which cannot be done effectively unless you know every nuance of the case. Direct examination requires you to ask every question with a purpose. If you represent the plaintiff, ask yourself how the witness helps you satisfy your burden of proof. Practitioners should use Pattern Jury Instructions as a roadmap.²

You must prepare every witness. Meet with your witnesses and cover their expected testimony and practice with each witness so they know what to expect. Witnesses obviously cannot memorize every answer, but they should never be surprised on direct examination. Tell your witnesses when they appear ambiguous or uncertain. Because every question on direct should be “a home run pitch” for the witness, every answer should be powerful, truthful, concise, and confident.

Witnesses should be familiar with the “magic” words or legal terms that may arise upon questioning. If a witness is going to discuss a treatise or piece of literature on a subject, the witness needs to know how to establish the treatise as a reliable authority. If a witness is going to testify to causation, that witness needs to know the legal difference between “probable” and “possible.”

Familiarize your witnesses with the courtroom. Tell each witness where to sit and where the judge and jury are located. If you can, take your witnesses to the courthouse and show them the courtroom. Let your witness sit on the witness stand so she can understand the jury’s vantage point. Such courtroom familiarity helps the witness and relieves anxiety in what will certainly be an uncomfortable situation.

For every witness you intend on calling, have the following ready for trial:

- Copies of witness statements;
- Copies of deposition testimony;
- Copies of deposition summaries;
- Confirmation of service of subpoenas;
- Documents to be used in support of testimony. These documents should be included with other exhibits, and your outline should reference the document by name and description in your trial notebook;

² See, e.g., Ala. Pattern Jury Instr. Civ. 8.00 (3d ed. 2014) (stating a plaintiff must prove to a “reasonable satisfaction” that her contentions are true).

- Direct examination outlines;³ and
- Evidentiary rules or case law to combat anticipated objections.

2. Keep it Simple

“Learn to talk like a regular person wherever you are. In the office or at home. In court or out. And write like a regular person for both personal and professional matters unless you have a very good reason for using a precise legal term of art”⁴ Avoid using legalese in court—it “is a poisonous set of verbal habits that we unconsciously turn on or off.”⁵ With witnesses, “[a]sk a stiff question and you’ll get a stiff answer. Ask a long, rambling question and you’ll get a long, rambling answer. Ask an incomprehensible question and you’ll get an incomprehensible answer—or no answer at all.”⁶ Brevity can be key. “Short questions command instant comprehension from both the witness and the jury. The longer the question, the more you are likely to inject serious confusion.”⁷

For direct examination, try to begin each “question with who, what, when, where, how or why.”⁸ Think about this for every topic you plan to cover with the witness, because part of your job is to make sure the jury hears the whole story from the witness. Lawyers easily forget that the jury does not know the case as well as the lawyers. As a lawyer, you know the depths of your witness’s testimony and how your witness knows the substance of her testimony, but the jury does not. A lawyer’s failure to qualify the witness is a missed opportunity to develop credibility with the jury.

³ See E-mail and Attachments from Terry Gatewood, Judicial Event Specialist, to Billy Bates (May 17, 2010, 10:17 CST) (on file with author).

⁴ James McElhaney, *Persuasive Direct*, A.B.A. J. (Jan. 1, 2009, 6:19 AM), http://www.abajournal.com/magazine/article/persuasive_direct.

⁵ *Id.*

⁶ *Id.*

⁷ James McElhaney, *Direct Answers: Examining a Witness Is Telling a Story—So Make it a Good One*, A.B.A. J. (May 1, 2012, 7:49 AM), http://www.abajournal.com/magazine/article/direct_answers_examining_a_witness_is_telling_a_storyso_make_it_a_good_one.

⁸ *Id.*

3. Use Topic Sentences or Headers

“Direct examination is not the same as having a conversation. It should sound like one, but it [is not]. Do it right, and you guide the witness every step of the way, without ever sounding like you’re putting words in the witness’s mouth.”⁹ Guide the witness by using “the headline method of direct.” Under the headline method of direct, “[b]efore each new series of questions, announce the topic: the headline that tells the witness—and everyone else—what the subject is going to be.”¹⁰ The headline method of direct is also referred to as the “paragraph method.”¹¹ For example, Dr. Smith, I am going to ask you about Mr. Jones’s medical history. How long were you his primary care physician?¹² The headline method can be used “to get wandering witnesses back on track.”¹³ For example:

Dr. Smith, I am going to ask you about everything you did during surgery, but first I want you to tell the jury what you and Mr. Jones discussed before the surgery.

Although topic sentences and headers are helpful, avoid using superfluous introductory phrases. Statements like “Let me ask you this . . .” and “Dr. Smith, isn’t it true that . . .” annoy the jury and distract from the witness’s testimony.

4. Personalize the Witness

It is important during direct examination to give the jury a chance to get to know the witness personally. Establish your witness’s credibility

⁹ *Id.*

¹⁰ *Id.*

¹¹ See James W. McElhaney, *The Case Is Falling Apart . . . And Continuity Is the Glue that Keeps Things Together*, A.B.A. J. 74, 74 (1998) (“[S]tart using the paragraph method of direct examination. Break down everything you need from the witness into a series of simple paragraphs, and think of a short simple title for every subject.”).

¹² Use “a simple declarative statement designed to orient everyone—judge, jury and witness—and give meaning to the questions that [follow].” James McElhaney, *Keep it Simple*, A.B.A. J. (July 1, 2010, 8:00 AM), http://www.abajournal.com/magazine/article/keep_it_simple.

¹³ McElhaney, *supra* note 7.

and ask your witness questions that demonstrate her relationship with the case. It is crucial to help the jury understand why they should like your witness, and the jury should be able to identify with your witness. However, if a witness is only there to address a few evidentiary issues, such as a records custodian to authenticate records, it is best to do a basic introduction so you can move quickly to the important reason the witness is there.

Humanizing witnesses helps the witnesses feel comfortable in front of the jury:

If [witnesses] are alarmed or diffident, and their thoughts are evidently scattered, commence your examination with matters of a familiar character, remotely connected with the subject of their alarm, or the matter in issue; as, for instance, —Where do you live? Do you know the parties? How long have you known them? etc. And when you have restored them to their composure, and the mind has regained its equilibrium, proceed to the more essential features of the case, being careful to be mild and distinct in your approaches, lest you may again trouble the fountain from which you are to drink.¹⁴

The following topics can be covered to help the jury identify with the witness:

- Where the witness was born and raised;
- Her parents' occupations;
- Any information on siblings;
- Any information on spouse and children;
- The witness's educational background;
- Whether the witness served in the military;
- Whether the witness has been involved charitable or mission work;
- Honors or awards the witness has received;
- Any civic involvement; and
- Whether the witness holds any leadership positions.

Even the weakest witness possesses strengths. Sometimes you have to dig deep, but your job is to find those facts or personal traits that warm the jurors to your witness. Remember, in most cases you cannot present

¹⁴ WELLMAN, *supra* note 1, at 122.

character evidence.¹⁵ Although it is important to personalize each witness, do not “open the door” to attacks on a witness’s character on cross-examination.¹⁶ For example, if your witness is a doctor, it is appropriate to show that the doctor is a member of a prominent medical organization to help establish credibility. It is probably inappropriate to show that the doctor received an award for her fundraising efforts with a charitable organization. A judge may view this as character evidence and, if so, will likely allow opposing counsel to impeach the doctor with unfavorable character evidence.¹⁷

5. Direct the Focus to the Witness

Unlike every other aspect of the case, direct examination is not about your personality or style. The jury should be focused on the witness, not the lawyer. On direct examination, the lawyer serves as a teacher by “teaching the judge and jury the facts of [the] case through the witnesses’ stories.”¹⁸ If the lawyer does well in her role as a teacher, “[she] will seem to disappear during direct examination as the jury becomes locked in on what [the] witnesses are saying.”¹⁹ This does not mean the lawyer remains passive during direct examination. As stated by Cheatwood and Walters: “Consider the lawyer as the director of the examination. He has a great amount of control and discretion over what is covered in the examination,” as well as “[t]he tone, pace, and organization of the story.”²⁰

The witness needs to shine when he is on the stand, and the witness can only shine if the lawyer gives some control to the witness. A credible, well-prepared witness adds strength to your case. Lawyers are reluctant

¹⁵ See FED. R. EVID. 404(a) (providing that evidence of bad character is inadmissible to show conformity therewith).

¹⁶ See, e.g., FED. R. EVID. 404(a)(2)(A) (This is commonly referred to as the “mercy” rule: “a defendant may offer evidence of the defendant’s pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it.”).

¹⁷ See FED. R. EVID. 607 (“Any party, including the party that called the witness, may attack the witness’s credibility.”).

¹⁸ McElhaney, *supra* note 4.

¹⁹ *Id.*

²⁰ ROY C. CHEATWOOD & EDWARD J. WALTERS, JR., *DIRECT EXAMINATION* 1-2 (2015).

to give up control, but leading questions are not appropriate for direct examination.²¹ Asking leading questions shifts the focus away from the witness. When you lead on direct, the jury stereotypes the witness as unprepared, thinks you have something to hide, or thinks you lack faith in the witness. These are a few examples of questions you should ask on direct:

- Please explain that to the jury.
- Why is that the case?
- Tell us how you came to that conclusion.

Ultimate success resides in convincing the jury of the validity of your case. Make sure the witness knows the jurors and the judge are the most important people in the room. When giving answers, and when appropriate, witnesses should address the jury directly. Good posture, demeanor, and eye contact increase the effectiveness of a witness's testimony.

6. Help the Witness Show, Not Tell, the Jury

“Because people believe what they see, you want the jury to ‘see’ what your witnesses say. The words you use in your questions help produce that effect. Use simple words like see, show and picture.”²² It also helps to use props and to get the witness out of the witness chair and in front of the jury where appropriate—to have the witness interact with the jury. Showing, not telling, puts two factors to work.

The first factor is known as “the rush to judgment.”²³ Jurors, in a new environment and unsure what to do, “subconsciously search through the thousands of layers of stories in their minds to see if it's like something they've encountered before. And if they find one that seems to fit, it helps protect them from feeling the inadequacy—of not knowing what to do or say.”²⁴ The second factor is known as “the sense of injustice.”²⁵

²¹ See FED. R. EVID. 611(c) (“Leading questions should not be used on direct examination except as necessary to develop the witness's testimony.”).

²² McElhaney, *supra* note 7.

²³ James W. McElhaney, *People Like Their Own Ideas*, A.B.A. J. (Oct. 1, 2007, 6:12 PM), http://www.abajournal.com/magazine/article/people_like_their_own_ideas.

²⁴ *Id.*

²⁵ *Id.*

The sense of injustice is a powerful influence in the courtroom because justice is “an indefinable ideal”—“no one really knows what it is.”²⁶ On the other hand, “injustice—unfairness—is real. Everybody recognizes it when they see it.”²⁷ As stated by legal philosopher Edmond Nathaniel Cahn, “Injustice has the power to stir people’s blood.”²⁸

Use visual language to put these two factors in play. Visual language “works partly because [seventy] percent of the neurons in the normally sighted human brain are devoted to interpreting visual images. [S]cientific studies show you can actually access this part of the brain with spoken and written words.”²⁹ Visual language works by “ask[ing] the question in the present tense, as if the event is happening right now.”³⁰ Visual language “puts the jury at the scene, seeing it as it happens in their mind’s eye.”³¹ Ideally, the witness will answer the question in the present tense:

- Q: [Mr. Jones,] your boss sends you to the top of the reactor. You’re [ninety] feet up there looking at the valves, what do you see up there?
A: I’m freezing. I [see] this steam coming out from around the valve. It shouldn’t be leaking. I’m hearing this loud hissing sound from the same valve. It’s raining like hell. I grab my radio and call for a maintenance guy. Just as I turn to run, . . . I hear this noise like a jet engine and it knocks me down.³²

By using visual language and keeping the story in the present tense, you can control the courtroom even when the jury’s focus is on the witness.

7. Start Strong, End Strong, and Address Your Weaknesses

“Never begin before you are ready, and always finish when you have done. In other words, do not question for question’s sake, but for an

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ CHEATWOOD & WALTERS, *supra* note 20, at 20.

³¹ *Id.*

³² *Id.*

answer.”³³ It is most effective to start your direct examination with exactly what the jury wants to hear. The jury wants to know why the witness is on the stand and what makes the witness important. For example:

- Attorney: Dr. Smith, do you understand what Ms. Jones is accusing you of in this case?
- Doctor: She claims I failed to treat her husband with antibiotics and caused her husband to pass away.
- Attorney: Did you fail to treat Mr. Jones with antibiotics on September 15, 2013?
- Doctor: No. My main concern for Mr. Jones was his complaint of chest pain. I knew if I did not address that first, he could have a heart attack and die.
- Attorney: Would antibiotics have saved Mr. Jones’s life?
- Doctor: No. Unfortunately, Mr. Jones did have a heart attack. The heart attack caused him to die. Antibiotics would not have prevented the heart attack.
- Attorney: Dr. Smith, we are going to cover everything you did for Mr. Jones, but first I want you to tell the jury a little about who you are.

In less than a minute, Dr. Smith told the jury three important things: (1) He denies doing anything wrong; (2) he disagrees with the plaintiff’s causation theory; and (3) he has a different causation theory. The jury will remember these points and will want to hear Dr. Smith explain them. “The jury is most alert at the beginning and at the end of your examination, and likewise, you should be prepared to illustrate your most important points at these times.”³⁴

Just as the weakest witness has strengths, the strongest witness has weaknesses. Do not wait for opposing counsel to expose your witness’s weaknesses on cross-examination. Expose any weakness on direct, in the most favorable light possible. Although you want to address a witness’s weaknesses, do not end there. It is just as important to end

³³ WELLMAN, *supra* note 1, at 122.

³⁴ CHEATWOOD & WALTERS, *supra* note 20, at 6 (“The technique of ‘book-ending’ involves introducing the most important information at the beginning, repeating it at the end, and sandwiching the less important material in the middle.”).

strong as it is to start strong. If possible, end with a point the other side cannot attack. Do not allow opposing counsel to start his cross-examination by discrediting the last thing your witness said on direct. This may be the only thing the jury remembers.³⁵

One way to end strong on direct examination is to have a “safety valve question” for every witness. If your examination goes as planned, you will not need this question. However, if the answer to your last question is weak, or if the judge sustains an objection to your last question, do not end your examination there. Go to your safety valve question and finish on a positive note. The question needs to be simple. It should be something you know the other side will not object to. The question can be a simple summary of the witness’s testimony: Dr. Smith, am I fairly summarizing your testimony when I say you did not do anything wrong in your treatment of Mr. Jones and that you met the standard of care?³⁶

8. Highlight Strong Answers

Before you start your direct, you must know the points you want to prove. As you make your points, highlight them for the jury. A simple way to do this is to use a flip chart to write down the most important portions of your witness’s testimony. Be selective in what you write—do not overdo it. The jury will see you writing and will know the information is important. When you get to your closing argument, refer back to the flip chart to reinforce the important points for the jury.

If you plan on using exhibits with a witness, make sure you discuss the exhibits with the witness beforehand. Discuss what you will use the exhibits for, what is important about each exhibit, and what the witness will need to be able to explain. Sometimes it can be especially powerful to have your witness leave the witness stand to explain key exhibits or explain what occurred during the relevant time at issue. By nature, jurors are inquisitive and want to learn. Giving your witness this chance to

³⁵ See JAMES W. MCELHANEY, MCELHANEY’S TRIAL NOTEBOOK 420 (A.B.A., 4th ed. 2005) (“Don’t hide your warts. Nobody is perfect. Be forthright about admitting your weaknesses and mistakes. Concealing your misdeeds magnifies them tenfold. On the other hand, you should usually start and end with strong points. Put the concessions and the less exciting stuff in the middle.”).

³⁶ This technique also applies to cross-examination. You should have a safety valve question for every witness you intended to cross.

teach the jury is an opportunity to let the witness shine. If the jury believes the witness is confident and has expertise in the area at issue, the witness's credibility will rise. If you are considering a demonstration, drawing, or teaching moment, practice it prior to trial. Trial is not the place to perform your dress rehearsal; it is the place where you want to hit all your cues and marks.

Many cases are document intensive and require you to use programs like Trial Director.³⁷ The ability to blow-up and highlight various pages from the relevant documents helps crystallize their importance in the jurors' minds. However, do not overuse this technology as it can be overbearing. When you are done using the document with your witness, take it down so the jury is not distracted. Similarly, if you publish an exhibit to the jury while your witness is on the stand, give the jurors time to examine it before you return to questioning the witness. Otherwise, the jury will not hear the witness's testimony.

9. Avoid Sustainable Objections

Although it is nearly impossible to conduct a direct examination without an objection from opposing counsel, do not invite objections. Do not ask questions you know are improper or questions the witness cannot answer. An effective direct examination is uninterrupted—focus on the witness is never lost. As noted by trial specialist and author, James McElhaney, “fragmented testimony is a lot harder to follow than a simple, coherent story that has a minimum of interruptions.”³⁸

Every question should have a legitimate purpose.³⁹ If opposing counsel wants to lodge improper objections to proper questions, let it happen. The jury will notice the lawyer is trying to be disruptive, and the jury will dislike him for it.⁴⁰ At the same time, nothing makes a lawyer look better than having the judge sustain every objection made.

³⁷ See Trial Director, IN DATA, <http://www.indatacorp.com/TrialDirector.html> (last visited Mar. 16, 2016).

³⁸ McElhaney, *supra* note 7.

³⁹ WELLMAN, *supra* note 1, at 122 (“Never ask a question without an object, nor without being able to connect that object with the case, if objected to as irrelevant.”).

⁴⁰ *Id.* (“Nothing is so monstrous as to be constantly making and withdrawing objections; it either indicates a want of correct perception in making them, or a deficiency of real or of moral courage in *not making them good.*”).

“Frequent failures in the discussions of points of evidence enfeeble your strength in the estimation of the jury, and greatly impair your hopes in the final result.”⁴¹

10. Listen and Apologize

God gave you two ears and one mouth for a reason, so listen. This may sound like common sense, but every lawyer has fallen victim to thinking of the next question instead of listening to the witness’s answer. “Paying close attention to how the witness answers your questions will help you develop a capacity that every good trial lawyer needs”⁴² You want “to hear the witness’s answers like the jury does—with fresh ears, as if for the first time. Fresh ears tell you when to fill in the blanks and when to let them pass, how far to go down an interesting side path or when to jump ahead.”⁴³ Fresh ears also “tell you when to ask clarification questions to make sure everybody gets an essential point.”⁴⁴

Below are real examples of questions asked in the courtroom:

Attorney: She had three children, right?

Witness: Yes.

Attorney: How many were boys?

Witness: None.

Attorney: Were there any girls?

Witness: Your Honor, I think I need a different attorney. Can I get a new attorney?

. . . .

Attorney: How was your first marriage terminated?

Witness: By death.

Attorney: And by whose death was it terminated?

Witness: Take a guess!⁴⁵

When this happens to you, or “when the witness gets tangled and doesn’t know what you want, don’t say, ‘You didn’t understand my question.’”

⁴¹ *Id.*

⁴² McElhaney, *supra* note 12.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Browsing the Bar with Barbara*, MONTHLY BULL. (Mobile Bar Ass’n, Mobile, Ala.), June 2012, at 2 (quoting MARCELLE BOREN, *DISORDER IN THE AMERICAN COURTS* (Iwahu Publishing 2014)).

Instead say, ‘I’m sorry, [Ms. Jones]. I made a mess out of that last question. Let me put it another way.’ Then take your time and do it right.”⁴⁶

Ten Tips for Cross-Examination

1. Prepare

“Cross-examination is generally considered . . . the most difficult branch of the multifarious duties of the advocate.”⁴⁷ “There is no short cut, no royal road to proficiency, in the art of advocacy.”⁴⁸ “[P]ersonal experience and the emulation of others trained in the art, are the surest means of obtaining proficiency in this all-important prerequisite of a competent trial lawyer.”⁴⁹

[Cross-examination] requires the greatest ingenuity; a habit of logical thought; clearness of perception in general; infinite patience and self-control; power to read men’s minds intuitively, to judge of their characters by their faces, to appreciate their motives; ability to act with force and precision; a masterful knowledge of the subject-matter itself; an extreme caution; and, above all, the instinct to discover the weak point in the witness under examination.⁵⁰

Approaching cross-examination, you should know ninety-five percent of the questions you are going to ask and ninety-five percent of the answers you should receive. In your outline, you should note the bates-numbers of the relevant portions of records or deposition pages along with the line numbers that provide the answer to the question. These references are important because you may need them to refresh the

⁴⁶ McElhane, *supra* note 12.

⁴⁷ WELLMAN, *supra* note 1, at 8.

⁴⁸ *Id.* at 7; *see also id.* at 17 (“What can be conceived more difficult in advocacy than the task of proving a witness, whom you may neither have seen nor heard of before he gives his testimony against you, to be a willful perjurer, as it were out of his own mouth?”).

⁴⁹ *Id.* at 8.

⁵⁰ *Id.*

witness's recollection or for impeachment.⁵¹ However, do not become a slave to your outline. Listen closely to what the witness says. The testimony may give rise to impeachment or to another question not on your outline.

Conducting thorough discovery is key for cross-examination. The identification of witnesses and the substance of their potential testimony can be gathered through interrogatories. However, there is no substitute for a good deposition. You should ask opposing counsel for the opportunity to depose all witnesses they may call at trial. This request should be made early in the case to allow sufficient time to take these depositions.

Taking a thorough deposition will make cross-examination much easier. While it is important to learn the who, what, where, when, why, and how from a witness, every witness you depose possesses some positive piece of information you can obtain. It may be as simple as a factual scenario that is different than that of the opposing party. Whatever those positive points may be, obtaining them should be part of your plan of action.

You should also perform a proper workup of the witness's background prior to trial. The following are some of the resources you can use:

- AlaCourt (for Alabama practitioners);
- PACER;
- Searches through social media;
- Internet searches for chat rooms or web sites; and
- Searches for prior deposition or other sworn testimony.

For every witness you intend to cross-examine, have the following ready for trial:

- Copies of witness statements;
- Copies of deposition testimony;
- Copies of deposition summaries;

⁵¹ See FED. R. EVID. 612 (outlining when a writing may be used to refresh a witness's recollection); FED. R. EVID. 803(5) (delineating when a recorded recollection is excepted from the rule against hearsay); FED. R. EVID. 607 (discussing who may impeach a witness).

- Documents you plan to be used for impeachment. These documents should be included with other exhibits. Your outline should reference the document by name and designation in your trial notebook;
- Cross-examination outlines;⁵² and
- Evidentiary rules or case law to combat anticipated objections.

2. Know the Rules of Evidence

The Rules of Evidence tell you (a) what you are allowed to cover on cross-examination, and (b) the procedures you must follow. For example, challenging the credibility of a witness is one of the most common areas of cross-examination. Under both the Alabama and Federal Rules of Evidence, “[t]he credibility of a witness may be attacked by any party, including the party calling the witness.”⁵³ Prior inconsistent statements and bias are two ways to challenge the credibility of a witness.⁵⁴

a. Prior Inconsistent Statements

Under Rule 613 of the Alabama and Federal Rules of Evidence, a witness may be impeached with prior inconsistent statements.⁵⁵ “Rule 613 answers two basic questions: (1) When can you examine a witness about a prior inconsistent statement? and (2) When can you use extrinsic evidence to prove the prior inconsistent statement?”⁵⁶ With respect to the first question, “a party can ask a witness about a prior inconsistent statement without first showing it to the witness or informing the witness of its contents.”⁵⁷ Rule 613(a) does require that you show or disclose the

⁵² See E-mail and Attachments from Terry Gatewood, Judicial Event Specialist, to Billy Bates (May 17, 2010, 10:17 CST) (on file with author).

⁵³ ALA. R. EVID. 607; *see also* FED. R. EVID. 607 (providing substantially the same rule).

⁵⁴ *See* FED. R. EVID. 613; ALA. R. EVID. 613; ALA. R. EVID. 616 advisory committee’s notes.

⁵⁵ ALA. R. EVID. 613; FED. R. EVID. 613 (providing substantially the same rule).

⁵⁶ Terry McCarthy, *A Guide to Impeachment in Federal and Alabama State Courts*, 70 ALA. LAW. 45, 46 (2009).

⁵⁷ *Id.*

prior inconsistent statement to opposing counsel if opposing counsel requests it.⁵⁸

Addressing the second question, “Alabama and federal rules differ considerably on when a party may use extrinsic evidence to prove a prior inconsistent statement.”⁵⁹ Pursuant to Alabama Rule 613(b), “extrinsic evidence of a prior inconsistent statement may not be used until the witness is confronted with the particular circumstances of the prior statement (i.e., time, place, content and to whom it was made) and given the opportunity to admit or deny having made it.”⁶⁰ For example, the following scenario is permissible pursuant to Alabama Rule of Evidence 613(b):

- Q: You just testified on direct that A ran the red light, correct?
A: Yes.
Q: Immediately after the accident you were interviewed by the police?
[Time]
A: Yes.
Q: And that was on January 1, 2007? [Time]
A: Yes.
Q: At that time the accident was fresh on your mind? [Time]
A: Yes.
Q: And he interviewed you right there at the accident scene, right? [Place]
A: Yes.
Q: At the corner of Fifth Avenue and Twentieth Street? [Place]
A: Yes.
Q: The police officer asked you who ran the red light, correct? [Content
and to whom the statement was made]
A: I’m sure he did.
Q: And you told him that B ran the red light, didn’t you? [Giving the
opportunity to admit or deny it]
A: No.⁶¹

The Federal Rules of Evidence do not require you to confront the witness with the prior inconsistent statement before using extrinsic evidence.⁶² “[Federal] Rule 613 makes it clear that an attorney examining a witness in federal court as to prior inconsistent statements need not first

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 47.

show the statement to the witness as was required at common law.”⁶³ “[T]he impeached witness must be given an opportunity at some point in the trial to explain away the inconsistency.”⁶⁴

b. Bias

The Federal Rules of Evidence do not specifically address bias.⁶⁵ Under Rule 616 of the Alabama Rules of Evidence, a witness may be impeached “with evidence of acts, statements, or relationships indicating bias.”⁶⁶ Bias is considered “[o]ne of the broadest forms of impeachment.’ The types of bias that can be brought out on cross-examination are limited only to the creativity of counsel. Extrinsic evidence is allowed if the witness denies the matter brought out to show bias.”⁶⁷

These two examples highlight the importance of knowing the Rules of Evidence. As you prepare your case, make a list of the evidentiary issues you expect to face at trial. This list and a copy of the Rules of Evidence should be readily available during trial.

3. Pay Attention on Direct Examination

“Nothing could be more absurd or a greater waste of time than to cross-examine a witness who has testified to no material fact against you.”⁶⁸ Many lawyers are so concerned with their cross-examination outline that they fail to pay attention on direct examination. Doing so not only prevents you from hearing what the witness says, but negates your opportunity to analyze the witness’s demeanor, the strengths and weaknesses of the testimony, and the overall impact the witness’s testimony has on the case. Noted early twentieth century attorney and trial techniques author, Francis Wellman, stated:

⁶³ *Id.* (quoting WILLIAM A. SCHROEDER & JEROME A. HOFFMAN, ALABAMA EVIDENCE § 6:64 (3d ed. 2008)).

⁶⁴ McCarthy, *supra* note 56, at 47.

⁶⁵ *Id.* at 49.

⁶⁶ ALA. R. EVID. 616 advisory committee’s notes.

⁶⁷ McCarthy, *supra* note 56, at 49 (quoting CHARLES W. GAMBLE, GAMBLE’S ALABAMA RULES OF EVIDENCE § 616 (2d ed. 2002)).

⁶⁸ WELLMAN, *supra* note 1, at 39.

A skillful cross-examiner seldom takes his eye from an important witness while he is being examined by his adversary. Every expression of his face, especially his mouth, even every movement of his hands, his manner of expressing himself, his whole bearing all help the examiner to arrive at an accurate estimate of his integrity.⁶⁹

Lawyers prepare as if witnesses will exaggerate their testimony or, even better, will change their testimony altogether. However, if witnesses testify consistent with their depositions, are not effective on the stand, and do not hurt your case, the best cross may be no cross at all. Under this scenario, if you choose to cross-examine, the jury may view your cross-examination as an attempt to bully or embarrass the witness. Before you stood up, the witness had little impact on the case. By the time you sit down, you have done much more damage than the witness.⁷⁰ “Avoid the mistake, so common among the inexperienced, of making much of trifling discrepancies. It has been aptly said that juries have no respect for small triumphs over a witness’s self-possession or memory.”⁷¹ On cross-examination, a question that does not advance your case harms it, and “[i]f you have not a definite object to attain, dismiss the witness without a word.”⁷²

4. Maintain Control of the Witness

“Like any trial technique, the purpose of cross-examination is what you can use it for.”⁷³ “The point of cross is not to get information from the witness. The point of cross is not to get the witness to change his story. And most of the time, the point of cross is not to destroy the witness with contradictions and clever impeachment.”⁷⁴ Instead, cross-

⁶⁹ *Id.* at 8.

⁷⁰ *See id.* at 39 (“It not infrequently happens that such unnecessary examinations result in the development of new theories of the case for the other side; and a witness who might have been disposed of as harmless by mere silence, develops into a formidable obstacle in the case.”).

⁷¹ *Id.* at 13.

⁷² *Id.* at 123; *see also id.* at 39 (“It cannot be too often repeated, therefore, that saying nothing will frequently accomplish more than hours of questioning.”).

⁷³ Jim McElhaney, *Persuasive Cross-Examination*, A.B.A. J. (Apr. 2, 2009, 1:10 AM), http://www.abajournal.com/magazine/article/persuasive_cross-examination.

⁷⁴ Jim McElhaney, *It’s a Gift: Evasive Witnesses Are Doing You a Favor if You Know to Take Advantage*, A.B.A. J. (Aug. 1, 2011, 7:00 AM), <http://www.abajournal.com>.

examination allows you to “tell your side of the case so the witness has to agree that what you say is true.”⁷⁵ “[S]ince you are the real witness, your credibility is the key.”⁷⁶ Losing control of the witness hurts your credibility.

Evasive witnesses pose the biggest threat to your control. Most often, control is lost because the lawyer fails to maintain composure when the witness does not “cooperate.” According to McElhaney,

[w]hen you take evasion personally, you lose an opportunity to show the judge and jury that you are a better source of information. You lose your cool. Your self-control gets frayed. You argue with the witness. . . . [You make] everything the witness says seem justified. Your testimony is forgotten in your quest to destroy the witness, and no one takes your side.⁷⁷

When handled correctly, a difficult witness is a gift.⁷⁸ After you learn how to handle a nonresponsive witness, “almost every evasive, argumentative witness the other side throws at you is an opportunity to make your case stronger than it was before.”⁷⁹ One way to control an evasive witness is to politely interrupt the witness with an apology. For example:

What if you ask the witness a yes or no question, but he gives you a why or why-not answer? Last week I asked Dr. [Smith] whether he gave the plaintiff . . . a stress test. It was a simple yes or no question. But he went on for nearly [fifteen] minutes explaining why he felt it would have been inappropriate. I couldn’t shut him up! . . . [I]f you ask the judge to instruct the witness to answer the question, the ruling is likely to be, “The witness may explain his answer.” . . . But you can literally stop the witness cold by interrupting him with an apology. . . . “I’m sorry, doctor, but I meant to ask if you had done a stress test on [the plaintiff]. Would you tell us whether you did that, please?” . . . [If the doctor continues,] [k]eep your cool and politely interrupt him again. . . . “Pardon me, doctor, but did you do a stress test on [the plaintiff]?”⁸⁰

com/magazine/article/its_a_gift_evasive_witnesses_are_doing_you_a_favor_if_you_know_to_take_adva.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ McElhaney, *supra* note 73.

Generally, witnesses are “nonresponsive because [they do not] like your question. That’s because [they do not] like the answer it calls for. So [they answer] another question instead—one with an answer [they like].”⁸¹ The remedy for this “is to show the judge and jury just how argumentative the witness has been without joining in the argument.”⁸² Juries dislike witnesses who decline to answer basic questions.⁸³

5. Keep Your Questions and Your Examination Short

Cross-examination involves “a set of verbal habits” you must develop. Effective cross-examination requires “very short, fair, leading questions that call for yes or no answers. It’s counterintuitive for most lawyers, who seem to think that long questions are powerful. . . . Long questions are weak. They invite long answers.”⁸⁴ Short questions “make it difficult for the witness to throw in extraneous material.”⁸⁵ Make “your points so clearly that men of the most ordinary intelligence can understand them. Keep your audience—the jury—always interested and on the alert. Remember it is the minds of the jury you are addressing, even though your question is put to the witness.”⁸⁶

Try to lead the witness with one fact per question and refrain from asking open-ended questions. Depending on the witness, it may be “wise to confine yourself to one or two salient points on which you feel confident you can get the witness to contradict himself out of his own mouth.”⁸⁷ This requires that you “avoid asking questions recklessly, without any definite purpose. Unskillful questions are worse than none at all, and only tend to uphold rather than to destroy the witness.”⁸⁸ Make

⁸¹ McElhaney, *supra* note 74.

⁸² *Id.*

⁸³ McElhaney, *supra* note 73.

⁸⁴ *Id.*

⁸⁵ James McElhaney, *Cross-Exam Surprises*, A.B.A. J. (Oct. 24, 2006, 10:46 AM), http://www.abajournal.com/magazine/article/cross_exam_surprises.

⁸⁶ WELLMAN, *supra* note 1, at 10.

⁸⁷ *Id.* at 18.

⁸⁸ *Id.* at 12.

your important points and move on. Belaboring the minutia confuses the jury, bores the jury, and weakens the effective portions of your cross.

6. Start Strong, End Strong, and Do Not Act Surprised

Like direct, you must start your cross on a high note. Let the jury know immediately that what you say is true and, if possible and appropriate, that the witness cannot be trusted. There are two important reasons you should start your cross with your most important points:

First, the jury have been listening to [the witness's] direct testimony and have been forming their own impressions of him, and when you rise to cross-examine, they are keen for your first questions. If you "land one" in the first bout, it makes far more impression on the jury than if it came later on when their attention has begun to lag, and when it might only appear as a chance shot. The second, and perhaps more important, effect of scoring on the witness with the first group of questions is that it makes him afraid of you and less hostile in his subsequent answers, not knowing when you will trip him again and give him another fall. This will often enable you to obtain from him truthful answers on subjects about which you are not prepared to contradict him.⁸⁹

Cross-examination never goes exactly as planned. Sometimes the witness has a good explanation or additional information to counter the point you are trying to make. Know this happens and do not be surprised when it does. Because the jury is focused on you, your reaction may have more of an impact than the witness's answer. As Wellman noted:

A good advocate should be a good actor. The most cautious cross-examiner will often elicit a damaging answer. Now is the time for the greatest self-control. If you show by your face how the answer hurt, you may lose your case by that one point alone. . . . With the really experienced trial lawyer, such answers, instead of appearing to surprise or disconcert him, will seem to come as a matter of course, and will fall perfectly flat. He will proceed with the next question as if nothing had happened, or even perhaps give the witness an incredulous smile, as if to say, "Who do you suppose would believe that for a minute?"⁹⁰

⁸⁹ *Id.* at 37.

⁹⁰ *Id.* at 9.

7. Let the Jury Make it Their Idea

Because people form their own ideas, facts, not opinions, are what persuade people.⁹¹ Putting “the facts together without any editorial comments—verbal pushing, shoving or arm-twisting—[allows] the story [to] engage[] the minds of the listeners. It impels them to reach their own evaluation of the facts.”⁹² Most jurors are “wiser than many suppose. Questions can be put to a witness under cross-examination, in argumentative form, often with far greater effect upon the minds of the jury than if the same line of reasoning were reserved for the summing up.”⁹³

This is important because “[n]o matter who you are, . . . no matter how carefully you choose your words, no matter how well you present your thoughts, people like their own ideas better than someone else’s.”⁹⁴ Your job “is to show, not tell. Calling a witness a liar is pitting your credibility against his. Worse, it [is] telling the listeners—the judge and the jury—how to think.”⁹⁵ To challenge a witness’s credibility, present “the key facts that show what the witness is doing so the jurors put the story together for themselves. . . . That way it [is] their idea—not yours.”⁹⁶ When “[t]he juror sees the point for himself, as if it were his own discovery, [he] clings to it all the more tenaciously.”⁹⁷

8. Quit While You Are Ahead

“When you get what you need, stop.”⁹⁸ Do not ask one question too many. “[M]ost cross-examiners browbeat and bullyrag witnesses with sneering, sarcastic questions that beat everything to death. That [is] the

⁹¹ McElhaney, *supra* note 23.

⁹² *Id.*

⁹³ WELLMAN, *supra* note 1, at 13.

⁹⁴ James McElhaney, *Speaking of Liars*, A.B.A. J. (Mar. 21, 2006, 11:06 AM), http://www.abajournal.com/magazine/article/speaking_of_liars.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ WELLMAN, *supra* note 1, at 13.

⁹⁸ James McElhaney, *Blind Spots*, A.B.A. J. (Oct. 10, 2004, 7:21 AM), http://www.abajournal.com/magazine/article/blind_spots.

kind of cross that can lose a case by making the jury hate the lawyer and actually take the side of a lying witness.”⁹⁹ Wellman put it this way:

If, perchance, you obtain a really favorable answer, leave it and pass quietly to some other inquiry. The inexperienced examiner in all probability will repeat the question with the idea of impressing the admission upon his hearers, instead of reserving it for the summing up, and will attribute it to bad luck that his witness corrects his answer or modifies it in some way, so that the point is lost. He is indeed a poor judge of human nature who supposes that if he exults over his success during the cross-examination, he will not quickly put the witness on his guard to avoid all future favorable disclosures.¹⁰⁰

Do not ask your question twice to emphasize its importance. Instead, face the jury as you ask the question. Make sure the jury is focused on you and what you are saying. After the witness answers your question, pause. Let the moment impact the jury before you move on to the next question.

9. You Catch More Flies with Honey than Vinegar

“Be respectful to the court and to the jury; kind to your colleague; civil to your antagonist; but never sacrifice the slightest principle of duty to an overweening deference toward either.”¹⁰¹ Every witness is “just as necessary for the administration of justice as judges or jurymen, and [is] entitled to be treated with the same consideration, and [the witness’s] affairs and private [life] ought to be held as sacred from the gaze of the public as those of the judges or the jurymen.”¹⁰²

There are two good reasons why you should refrain from attacking a witness on cross-examination. “First, if the jury really likes the witness, you have just committed judicial [suicide].”¹⁰³ Both “[j]udges and juries want the good guys to win. And the understandable human reaction to a nasty, vituperative, vicious cross-examiner is that he must have been

⁹⁹ *Id.*

¹⁰⁰ WELLMAN, *supra* note 1, at 13.

¹⁰¹ *Id.* at 123.

¹⁰² *Id.* at 53.

¹⁰³ James McElhaney, *The Point of Cross*, A.B.A. J. (July 1, 2008, 1:01 PM), http://www.abajournal.com/magazine/article/the_point_of_cross.

hired by a nasty, vituperative, vicious client.”¹⁰⁴ “Second, even if the jurors do [not] like the witness, they no longer need to use their verdict to punish the party that brought him to court. You’ve already done it with your cross.”¹⁰⁵ You can be firm, insistent, and tough when necessary but you must always be “fair, polite and respectful.”¹⁰⁶

10. Do Not Ask the Question Unless You Know the Answer

Never ask a witness a question without knowing the answer.¹⁰⁷

The best example comes from the famous nose-biting case. The prosecution’s witness says the defendant bit off the victim’s nose in a fight, committing the crime of maiming. On cross-examination, defense counsel develops a series of questions and answers showing the witness could not have seen it happen—there were too many things blocking his view. But then the defense lawyer cannot resist capping the series with the question: “Well, if all that’s true, how can you say that the defendant bit off the victim’s nose?” You already know the answer: “Because I saw him spit it out.”¹⁰⁸

Asking a question you do not know the answer to gives control back to the witness. Asking a hostile witness a question you do not know the answer to will likely turn out to be like wrestling a pig in the mud: Both of you are going to get dirty, but only one of you will like it.

Conclusion

As was said at the outset, acquiring these skills takes years of practice. Keeping in mind that the foregoing is not an exhaustive list, every

¹⁰⁴ McElhaney, *supra* note 73; *see also* WELLMAN, *supra* note 1, at 9 (“The sympathies of the jury are invariably on the side of the witness, and they are quick to resent any discourtesy toward him.”).

¹⁰⁵ McElhaney, *supra* note 103.

¹⁰⁶ McElhaney, *supra* note 73.

¹⁰⁷ McElhaney, *supra* note 85; *see also* McElhaney, *supra* note 98 (“Only ask questions when you know what the answers should be, based on logic, context and common sense.”).

¹⁰⁸ McElhaney, *supra* note 85.

practitioner should continuously refine the tools used for examining witnesses. One tool never changes, however—you must be willing to outwork your opponent.

